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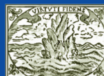
Prospettive di diritto comparato

a cura di
Maria Donata Panforti e Cinzia Valente

Protecting Unaccompanied Children. Towards European Convergence



Mucchi Editore

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collana diretta da Maria Donata Panforti e da Cinzia Valente

PROTECTING UNACCOMPANIED CHILDREN.
TOWARD EUROPEAN CONVERGENCE

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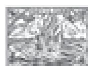

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Di cosa parliamo quando parliamo di minori stranieri?[*]

MARIA DONATA PANFORTI[**]

Le difficoltà di una ricerca

Di minori stranieri non accompagnati l'ordinamento italiano si occupa nelle due prospettive, assai diverse, del diritto amministrativo e del diritto civile. I due approcci risultano così divergenti che risulta difficile ricomporre un quadro unitario della disciplina relativa i bambini e le bambine, gli adolescenti e le adolescenti che entrano in Italia provenendo da altri paesi. Più in generale, peraltro, è l'intera area delle misure giuridiche per i minori stranieri che presenta una criticità di ricostruzione. La problematicità della materia è dovuta alle intersezioni di cui è al centro: fra il diritto civile e il diritto amministrativo, come si è detto, ma anche con il diritto penale, e anche con il diritto internazionale privato e diritto internazionale pubblico.

Ricondurre ad unità un discorso sui minori stranieri è inoltre molto complesso in considerazione dell'eterogeneità della "categoria", nella quale rientrano molti sottoinsiemi. Un tentativo di elencazione enumera minori migranti che fanno ingresso nel paese accompagnati da un loro familiare, minori stranieri nati in Italia da genitori non aventi la cittadinanza, i minori stranieri non accompagnati o accompagnati da figure non immediatamente riconducibili a quella di rappresentanti legali come ad esempio il kafil, minori che entrano nel paese a ragione di un adozione internazionale completata o in corso di perfezionamento, minori nomadi che si trovano nel nostro paese per periodi di tempo più o meno lunghi, minori in soggiorni solidaristici, minori richiedenti asilo o aventi lo status di rifugiato.

Ma non basta, perché credo si debbano aggiungere minori che definisco *cross borders* in assenza di una migliore definizione. Mi riferisco a tutti

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quei minori che appartengono a famiglie con elementi di internazionalità, la cui famiglia – formata talvolta da genitori che non hanno la medesima nazionalità – vive più o meno a lungo nel nostro paese per ragioni di lavoro, studio, scelte di vita provenendo da paesi dell'area europea comunitaria e non. In questi casi è il collocamento sociale che fa la differenza, poiché gli spostamenti sono in questi casi riconducibili alla mobilità caratteristica delle società economicamente mature.

Le famiglie *cross borders* sono toccate da temi specifici, radicalmente diversi da quelli che interessano le famiglie e i minori migranti. Infatti, rilevano nei loro confronti la separazione/divorzio dei genitori o lo scioglimento della loro convivenza, la sottrazione internazionale e il recupero dei crediti alimentari, anche in considerazione dell'avvenuta emanazione del nuovo regolamento UE del 20 dicembre 2010, n. 1259/2010, che mira a regolare in modo più uniforme, nei diversi Stati dell'Unione, separazioni, divorzi e scioglimenti che presentino aspetti transnazionali. È significativa anche, in particolare per questa tipologia di famiglie, l'adozione del regolamento UE 25 giugno 2919 n. 2019/1111 relativo "alla competenza, al riconoscimento e all'esecuzione delle decisioni in materia matrimoniale e in materia di responsabilità genitoriale, e alla sottrazione internazionale di minori", che è destinato a sostituire, a partire dal 1° agosto 2022, l'importante regolamento 2201/2003, il c.d. Bruxelles II-bis. Il nuovo testo troverà applicazione alle medesime materie del precedente, ma disciplinerà in modo più accurato la sottrazione internazionale in coordinamento con le regole poste dalla Convenzione dell'Aja del 1980.

Acquisire la cittadinanza non è lo stesso che divenire cittadini

Rispetto ad altri temi di ricerca, chi lavora su temi connessi ai minori stranieri ha spesso la sensazione di essersi imbattuto in una materia comunque un po' sfuggente, nella quale si è ancora lontani da una sistemazione anche ricostruttiva pienamente soddisfacente e assodata. D'altra parte, se in astratto e in via teorica il diritto dei minori è ormai del tutto emerso in moltissimi ordinamenti nazionali come un settore pienamente autonomo nell'ambito del tradizionale diritto di famiglia e differenziato rispetto al "diritto della coppia", si deve ammettere che il riconoscimento e l'effettiva attuazione dei diritti dei bambini sono processi ancora in corso sia nel diritto interno dei singoli Stati che nel diritto internaziona-

le. Anche quando è cittadino italiano, la condizione del minore, infatti, è spesso di scarso rilievo: la sua partecipazione nei procedimenti amministrativi e giudiziari e, in generale, nei processi decisionali che lo coinvolgono non è sempre assicurata o non è assicurata in modo pieno, come invece sarebbe richiesto dalla *Convention on the Rights of the Child* 1989 (art. 12) e dallo stesso codice civile italiano (ad esempio dall'art. 336 bis).

Un altro punto decisamente problematico è costituito dal contatto tra minori nativi di altri Paesi e le autorità amministrative del nostro Paese, in primo luogo perché il primo interlocutore dello straniero, minore o adulto, è proprio la pubblica amministrazione nelle sue varie articolazioni, anche di Polizia. La comprensione, il più consapevole e informata possibile, dei processi riguardanti il rilascio del permesso di soggiorno, l'estradizione, il ricongiungimento, dovrebbe essere assicurata da meccanismi che tengano conto dell'origine culturale, dell'età e delle esperienze dei minori, soprattutto se non accompagnati. Una maggiore valorizzazione dei diritti dei minori migranti richiede una proficua integrazione delle attività amministrative con iniziative di mediazione culturale e psicologica e tocca temi disparati: il rilascio di certificati, il diritto a un nome, l'accesso alle informazioni sulla propria origine biologica, l'acquisizione della cittadinanza, il ricongiungimento familiare, l'applicazione di misure punitive, la capacità di contrarre e compiere atti legali, il diritto di partecipare ed essere ascoltati nei procedimenti giudiziari, la rappresentanza legale, il ruolo dei servizi sociali, il mediatore familiare, la responsabilità dei genitori o dei tutori.

Inoltre, da un punto di vista giuridico e politico appare ancora apertissima la questione delle "seconde generazioni", che si concentra su alcune problematiche specifiche e di complessità notevole. Fra esse, in ordine di importanza, una delle prime è quella dell'acquisto della cittadinanza. È ben noto, infatti, che a differenza di quanto avviene in altri ordinamenti giudici, nel nostro paese tale acquisto non è conseguenza automatica della nascita sul territorio ma discende da una pluralità di condizioni, cosicché le "seconde generazioni" non sono necessariamente formate da cittadini e cittadine italiane.

La complicata normativa sulla cittadinanza fa velo, peraltro, a reali questioni legate all'integrazione e all'appartenenza, al legame con la terra d'origine e con le proprie tradizioni. L'identità delle persone che per caso, per scelta personale o per mancanza di alternative si trovano a vivere all'estero è composta anche dalla consapevolezza della loro "origine etnica o sociale",

per citare le parole della Convenzione di New York (art. 2). La sensazione di avere un legame con un altrove lontano, ricordato, immaginato, sperato è un elemento che spesso accomuna fra loro gli immigrati e dà loro strumenti per restare sé stessi in un ambiente talvolta molto diverso da quello di origine. Al tempo stesso, proprio la nostalgia – tema indagato così bene in letteratura – può trasformare la difficoltà di ambientamento in una condizione esistenziale e permanente di rifiuto di integrazione, posto che inserirsi in un gruppo sociale nuovo implica una rinuncia a qualcosa di proprio per adottare, in poco o in tanto, modi, gusti, abiti mentali del nucleo in cui ci si vuole inserire.

Sono convinta che questi sentimenti debbano essere rispettati dalla normativa sull'acquisto della cittadinanza e che perciò qualsiasi automatismo vada escluso, anche se è innegabile che una normativa più inclusiva e aperta dell'attuale sia necessaria *in primis* in relazione ai minori nati nel nostro paese. Milioni di persone nel mondo sono in fuga dalla loro terra o l'hanno abbandonata per le più varie ragioni, e lo sradicamento, per chi non riesce a ritrovarsi nel luogo di arrivo, è un rischio concreto. Perché "chi se ne va non sarà mai più a casa, anche se ritorna"[1], dato che il ricordo e il sogno di un luogo non evolvono come invece i luoghi reali fanno.

L'interazione fra desiderio personale di integrazione, nostalgia, elementi identitari, necessità e volontà di appartenenza rappresenta, mi pare, uno dei risvolti più affascinanti della tematica sui minori stranieri, che si riverbera sul tema apparentemente così ostico della normativa italiana sull'acquisto della cittadinanza. Ogni anno trovo conferma dell'interesse per questo argomento dal dialogo con le studentesse e gli studenti del corso di Diritto comparato di minori.

Essere cittadini in definitiva è uno scopo molto più complesso del semplice acquisto dei diritti politici[2]. Approfondire il contributo che le norme ordinamentali possono offrire al fine di una integrazione sociale rispettosa delle identità e delle aspirazioni individuali rappresenta a mio giudizio un obiettivo che, pur se concretamente difficile da raggiungere, è comunque un fine che giustifica eticamente l'impegno della ricerca in campo giuridico.

[1] "El que se va no vuelve aunque regrese": così il poeta José Emilio Pacheco, in *Aquel Otro*.

[2] A.C. Moro, *Manuale di diritto minorile*, sesta edizione, Bologna, Zanichelli, 2019, p. 345.

Unaccompanied Children: National and European Protection. Jean Monnet Project[*]

Cinzia Valente[**]

Summary: 1. Introduction; 2. The essence of the Jean Monnet Project; 3. Teaching activities; 4. Research activities; 5. Book roadmap; 6. Some anticipatory conclusions.

1. *Introduction*

Over the last few years, national legislators have been forced to deal with social changes that have had important repercussions in family law.

After a long period of inaction, there has been a sudden acceleration in reforms concerning family law and, in particular, children's law.

This growing focus on minors has provoked important reforms, specifically on issues relating to the welfare and protection of children, including equal rights for children regardless of their nationality.

The recent social changes highlighted important areas of concern with a more international scope.

We refer to the 'children on the move', or unaccompanied children, separate children or any other term defining migrant minors who cross national borders seeking protection or better opportunities.

In particular, our attention has focused on the hypotheses in which a foreign minor has crossed the national borders of the host country without an adult figure responsible for them. The minority age entails a condition of vulnerability that combines with the foreigner status (and its as-

[*] The paper is the result of the study conducted within the project granted by European Commission, Grant decision n. 2017-1903/001-001 – concerning the Jean Monnet module "Unaccompained Children: National and European Protection", cod. 587039-EPP-1-2017-1-IT-EPPJMO-MODULE, University of Modena and Reggio Emilia, scientific responsible prof. Maria Donata Panforti and related to the research "La protezione dei minori stranieri non accompagnati. Prospettive europee", Department of Education and Human Science.

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sociated difficulties, such as language barriers, identification of the applicable law, integration needs, etc.) and the need of a legal representative.

The migration flows towards EU countries and Italy in particular recorded in recent decades, have imposed intense pressure to modernize institutions, services and specific legal frameworks, with the aim of responding adequately to the needs of foreign individuals, as well as ensuring a good level of living standards and facilitating integration, especially for migrant children without an adult who takes care of them.

The issue of migrant children's rights has attracted widespread attention. There is a common assumption that migrants are running away from conflicts, poverty and human rights abuse and they emigrate to a foreign country hoping for a better life; unaccompanied children encounter additional difficulties in their integration in the host country.

In this context, the vulnerability of minors demands the introduction of efficient remedies removing any obstacles to effective protection. Clearly, prevention and care can lessen the risk of discrimination that without doubt affects marginalized individuals; however, societies are forced to intervene heavily from an economic and social point of view.

2. *The Essence of the Jean Monnet Project*

With these considerations in mind, Professor Maria Donata Panforti submitted a research project as part of the Jean Monnet Activities scheme for European funding. In July 2017, the project was accepted and, as a result, a teaching module in Integration Law has been made available at the University of Modena and Reggio Emilia, and related research has been conducted by the research Unit to which I belong.

The subject matter covers the legal issues relevant to the status of unaccompanied foreign minors, including the need for integration in the host country.

What caught our attention was the sheer number of unaccompanied children recorded as entering the European Union, and Italy in particular, which according to the Save Children 2017data set is about 18,000[1].

[1] www.savethechildren.it and the data on https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Pagine/Dati-MSNA-2017.aspx.

In 2018[2], this number reduces to 14,000; in 2019[3] to 6,054 and in 2020[4] we recorded almost 7,080 unaccompanied children in the national territory. Although there has been a substantial reduction, the number remains (obviously) significant.

Our work was encouraged by the absence of a coherent and relevant legal framework, which hinders a full understanding of the minor's issues and possible solutions to the problem. The lack of systematic discipline and the absence of uniform standards in case law characterises national and European practices.

While the UN Convention on the Rights of the Child represents a valid instrument for the promotion of children's rights, there are issues specific to migrant minors for which special regulation is required. Following the Guidelines published by the United Nations in 1997 on the policies and procedures in dealing with unaccompanied children and the most 'recent' European Act (i.e. European Directive on the Refugees 2003/9/CE), a lot of progress has been made on the subject of foreign unaccompanied minors but these are not sufficient, yet.

The different treatment of the 'child on the move' remains an issue. We need uniform law for the identification of the child, and procedures to acquire data on their identity, age, asylum seeker status, etc.; we need procedures to locate parents or relatives and for the appointment of a guardian; standards for health and treatment facilities; access to education; guidelines for possible repatriation or the long-term placement, and for other important issues.

The starting point of our research has been on the one hand the lack of a systematic European or international discipline (as per my previous comment) and on the other the differences between national laws and practices; in particular, the lack of a systematic discipline also at national level has brought to our attention the issue of the effective protection of the minor. Another criticality is given by the overlapping of rules of different nature (migrant law, juvenile law, administrative law) whose bal-

[2] https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Pagine/Dati-MSNA-2018.aspx.

[3] https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Pagine/Dati-MSNA-2019.aspx.

[4] https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Pagine/Dati-minori-stranieri-non-accompagnati.aspx.

ancing is difficult to implement. This is because the aforementioned areas of law guarantee specific fundamental rights with the risk of points of conflict.

The project aimed at analyzing the existing regulation and proposing hypotheses of "optimal" solutions for minors.

3. *Teaching Activities*

The project involves both teaching and research activities.

As for the teaching activities, the project includes the launch of a course entitled: 'Cultural Integration Law'.

This title was chosen to highlight migrant children's needs at reception, but also to point out the work needed to find instruments towards the harmonisation of minors' legal status, whether foreign or nationals.

The module on unaccompanied children is intended for students of the Faculty of Education, Department of Education and Human Sciences of the University of Modena and Reggio Emilia[5], and is designed to educate/train social educators.

The main functions of a professional educator are the development of processes and practices focused on individual autonomy and social responsibility, integration of cultures, mediation and negotiation of conflicts, networking with other services / agencies / parental and professional actors. It is evident that the knowledge of the complex topic of migrant children is useful for students.

Social educators will be asked to deal with various issues concerning unaccompanied minors. Let us consider real-life instances, such as the need for medical assistance; special treatment in cases regarding ethical or religious implications such as abortion for young female rape victims; the need to trace back to their origins and the likelihood of finding their parents; access to school; their learning skills; possible naturalisation etc.

[5] The Faculty offers, among other competence, theoretical content and historical issues related to education and training and an analysis of the contexts of education with particular reference to schools, childcare centers and adolescence, to communities for children, intercultural centres and services conflict mediation, international cooperation, etc.

For all the above-mentioned characteristics, the educational path was suitable to include a specific course on migrants' issues.

Students who successfully complete the course are expected to become multi-skilled educators, able to operate in diverse and specialised educational and social contexts assisting children and youths.

The ability to interact effectively with local authorities, community associations and various organisations is essential; all professionals working in the above settings may need to interact with unaccompanied minors.

Knowledge of the relevant legal framework is therefore paramount for the students' training and will be essential for the effective managing of the children in their care.

The module is intended to provide all the legal knowledge needed by the educator as an integration to their technical skills.

The course was developed with the input of experts (including in the social work field), who also lead some of the seminars. The aim was to present theoretical and practical aspects and equip the students with specialised skills and knowledge, including access to legislative sources; interpretation of national and European acts; instruments to fill the gap between local and international regulations; studies on other countries' practices; learning mechanisms for ensuring children's welfare.

The course aims at providing an in-depth analysis of the national landscape and an outline of the relevant legal instruments with a critical approach, not ignoring the need to promote the harmonisation of different national frameworks at the European level. National approaches to repatriation, education and healthcare services vary from country to country and international regulations are lacking on these issues.

The course has been distributed in two modules: 1) the main part included the analysis of national and international regulations and the remedies offered by different countries; 2) the detailed study on specific topics was the object of the second section.

Core to the first part of the course was the description of the essential elements of the legal issue and the introduction to general principles in the area of family law and child law, including the concept of filiation, parental responsibility and guardianship. As the target students of this course did not have a legal background, it was deemed necessary to provide them with a broad introduction to the fundamentals of children law.

The analysis begins with the historical and juridical switch that occurred at international level (and in Italy in the sixties) from the child as 'object of law' to empowered subject whose full participation in community life is conditioned by his/her vulnerabilities.

The analysis of the specific questions concerning foreign children without a responsible adult who takes care of them was the core of the lecture.

A detailed study about national solutions together with the practice existing in the Italian system including the investigation of the Constitution and other acts and special laws has been carried out. We analysed the 2017 reform and its difficult interactions with the disjointed existing law in the subject of immigration, highlighting strengths and weaknesses of the current system. Abstract notions were followed by a hands-on approach, where the issues were presented with the help of case law and input from subject experts.

In order to describe the main features of minors' protection, we analysed international conventions such as the United Nations Convention on the Rights of the Child 1989, European legislations (such as the Nice Charter of Fundamental Rights 2000, as amended in 2007, European Directives, European Resolutions, the Geneva Refugee Convention, etc.), including some acts of soft law, such as guidelines on specific matters (i.e. procedures on the minors' identification, best practices to facilitate reception, etc.) and the activities of the Council of Europe.

The course developed over the three years and was enriched with progress from the research activities. In its second year, it explored international regulations with the aim to test (in the third year) the efficacy of the domestic law in comparison with the remedies developed by other European legal systems looking for the existence of common practices.

The second part of the course was dedicated to the study of particular issues with a more technical and practical approach. We analyzed specific disciplines in specialist fields. The module included: the Involvement of the Juvenile Court in the Choice of Voluntary Guardians for Children; Access to Education and the Issue of Language Comprehension; Healthcare and the Consent for Therapy; the Exercise of Religious Rights; Residency Permit and the Age of Majority; Criminal Relevance of Minors' Conduct; the Facility Accomodation.

In connection with this part of the course some seminars held by experts have been activated.

During the first academic year, we analyzed the relationship between the children and the national institutions and to face also bureaucratic problems. The seminars focused on the following topics: Disabled Migrant Children and their Inclusion in the School Environment; Criminal Aspects of the Migratory Flow and Attention to the Phenomenon of Bullying; the Role of Social Services in the Choice of Juvenile Centers for Unaccompanied Children.

In the second year, a representative of the directorate-general for communication in the European Parliament in Milan illustrated the issues on the subject of migration encountered in Europe. The Police Commissioner of Sassuolo (MO - Italy) spoke on the relevant aspects of criminal law, while the Director of the Office of the Public Guardian of Bologna Council provided interesting insights on regional statistics and the relationship between local institutions and minors.

The last two experts were also invited in the third year to provide updates on the conditions of unaccompanied minors in their respective areas of competence. A lawyer expert in child law held a seminar addressing relevant issues bringing concrete examples sustained by the analysis of case law.

Every year, the final lesson was dedicated to a round table where students were invited to intervene on the critical areas of the protection of juvenile law through questions and discussion of concrete cases. The closing lesson was highly appreciated by the students, who had the opportunity to reflect on the more complex issues and ask any clarifications, while exchanging views with their peers.

In general, judging from the growing level of student participation and interest shown, the outcomes were positive. Student enrolment increased from 25 in the first year to 120 in the second year and 241 in the third year (despite COVID restrictions), when the course was offered in blended modality.

Students were asked to complete a questionnaire before the start of the course and another one at the end to gauge their expectations, which were met. The aim of the survey was to evaluate the students' knowledge in the legal subjects compared to the beginning of the course.

This procedure improved the efficacy of the lessons and consented to satisfy the students' requests. In the years following the questionnaire, we adapted the course according to the students' feedback.

The initial questionnaire presented a series of open questions in which students were asked to describe their knowledge on some legal issues of general nature and to present their expectations on the course. The invitation to express an opinion on the functions of the institutions involved in the management of foreign minors was inserted with the aim to evaluate their knowledge and the need to explore those issues.

In the final questionnaire, some questions were included to assess the progress of legal knowledge, while other questions were devoted to considerations on the course in relation to its value in career prospects.

All the students were satisfied with the modules.

Finally, we devised a strategy of quality control on the teaching which consisted of intermediate exams and final exams for attending students and an oral exam for non-attending students.

Some students presented the dissertation on unaccompanied children and we received requests for internship at the Juvenile Court.

We can conclude that the teaching activities obtained positive results, having received the appreciation of the students to whom they were offered for training. The initial objectives were achieved, as shown by the growing interest of students registered on the platform where the course has been made available.

Undoubtedly, the interdisciplinary approach and the organization of seminars dedicated to specific aspects of the migratory phenomenon, together with the presence of experts, contributed to the success of the course: they represented added value to teaching.

4. *Research Activities*

The research was complementary to the teaching. In this paragraph, we will discuss only the directives of the study whose results are contained in this book.

The research activities are organized in three steps that span the length of the project (three years).

The first phase of the project is devoted to the study of law and practices in Italy, with a preliminary analysis of the international context aimed at verifying compliance with the trans-national standards. The analysis starts with the study of existing rules on the subject of unaccompanied foreign minors, which before 2017 were very inconsistent. Rules of different nature (civil, administrative, criminal, international) overlapped, and this did not offer effective protection due to the lack of continuity and consistency (i.e. there was no single definition of a foreign minor).

In 2017, Zampa's Law introduced a new discipline creating an organic regulation dedicated to foreign minors. In referring to what will be said in the chapter dedicated to this topic, we can anticipate that although some practical aspects of the reform need to be improved, it represents a step forward toward the enhanced protection of minors.

In the second part, we deepen the analysis of individual European systems, with a focus on judicial and doctrinal work. For this purpose, we prepared the questionnaire enclosed in this book, which has been distributed to legal experts and academics in foreign countries to gather more specific information and data. The elaboration of the questionnaire followed the study of domestic and international law on the basis of the emerged critical issues. The questions were deliberately "open" to leave the respondent the opportunity to illustrate the existing discipline without limits given by categories imposed by our national mindset. The main aim of the questionnaire is to provide the elements identifying the discipline applicable to the minor and to reveal whether there is ad hoc regulation in regard. Our goal was also to test possible solutions already devised by other legal systems for their efficacy, in order to consider a possible legal transplant.

The request for in-depth analysis of the regulatory aspects essentially concerned four macro-areas: minors seeking international protection; fundamental rights and age assessment procedures; reception systems; legal guardianship.

With regard to minors seeking international protection, because of their increased/greater vulnerability, it was necessary to identify any enhanced protection that refugee children receive, and to analyse if and how this specific condition waived the "general" rules.

Although we were convinced that essential rights were guaranteed in each legal system, we wanted to focus on their relevance in relation to the

identification and age assessment procedures. The last often requires invasive clinical examinations, against which it is necessary to verify compliance with the minor's right to information, to listen to them and obtain their consent. Let's not forget that these procedures are generally carried out at the arrival of the minor in the host country, when their knowledge of the language is still limited and not they are not yet aware of their rights.

The reception system was also investigated, as profound differences (in dedicated or mixed structures) related to the "political" characteristics of each legal systems were expected to be found. The availability of economic funds (of state or local origin) and the consistency of migratory flows could be characterizing elements. Foster care or adoption were further investigated options.

The appointment of a guardian and their functions represented an additional dividing line between different legal systems in the absence of European "guidance".

In the third phase, we evaluated possible common and effective solutions and proposed draft guidelines on the basis of the responses received in the questionnaires. This is a critical part of our analysis, as it produced the most interesting results, in terms of international relevance. The development of guidelines is an ambitious project, which will hopefully lead to good outcomes.

The interim and final results of the research were disseminated through the publication of articles written by the members of the research unit, while thanks to the conferences held, important information on the subject was gathered and research progress was publicized.

Annual conferences were organized with the presence of experts and authorities as a moment of reflection on the most current issues.

In the first year, the meeting "Cross border children: rules and solutions. Is this the birth of new family law?" had an interdisciplinary approach. The speakers were experts in the area of unaccompanied children matter, including: criminal relevance of the migrant children conduct; inclusion strategies in the scholar context; domestic practices in the management of children having regards to the procedures in Bologna; the experience of the reunification of foreign minors with mothers. The interim results of the research were reported in that occasion.

The second conference was of international relevance due to the 30th anniversary of the 1989 ONU convention "Cross border children: rules and solutions. Is this the birth of new family law?". This topic has been the subject of analysis in relation to unaccompanied foreign minors. Family law professors belonging to the International Society of Family Law (ISFL) have given their contribution, in Reggio Children, an active association in the sector.

In the last year, due to the health emergency, the national online conference "Migrant Minors. Legal rules and political perspectives" has been organized to present the final results of the research (also subsequently presented at the ICCFL 2020, International Conference on Comparative Family Law) and to verify the practical impact of the Italian reform and its efficacy. The introduction to juvenile law and the critical elaboration of the best interest principle on the issue of migrant minors has been followed by the updated analysis of criminal aspects of the protection of migrant minors. The operating procedures were instead illustrated by the participation of social services and voluntary associations operating in the field.

5. *Book Roadmap*

This book aims to collect a significant part of the results of the research carried out. It is divided into three parts with an annex which includes the most relevant national legal texts.

The first part collects all the national reports received by academics or experts in the field of children law. In two cases (France and the Netherlands), we had two reports. In both cases, they have with high level expertise. As for France, they are professors in prestigious universities, which allowed us to have a more detailed view of the French legal system. The different geographical locations of the two research's unit involved made it possible to compare two different points of view on the issue, which were determined by the local procedures in place (for example, at the reception facilities). As for The Netherlands, we collaborated with the academic world and national associations. The national section of the Defence for Children International (DCI) joined the specialization of the professor at the University of Amsterdam in separated reports.

The second part of the book contains some extracts of the papers presented at the final research conference. Attention was focused on three essential aspects: the criminal area relating to foreign minors with reference to the evolution of the Italian legal system following the recent reforms; the report on the organization of the municipality of Reggio Emilia, with particular reference to the reception measures that this city has adopted at local level; the summary of the results of the funded research. This part also includes a short essay on the problem linked to the ascertainment of the minor age and the solutions in place on the national territory, as well as an interesting insight on Spanish regulations on some critical issues.

The third part contains a proposal for guidelines developed by the research group based on the convergences that emerged from the analysis of the national reports or a comparative analysis of national solutions, in respect of the primary interest of the minor.

It is a simplified proposal that must be evaluated in its (particular) context. The issue of unaccompanied foreign minors involves diverse sectors of rights in which the balance of the different sources of law is also largely influenced by social policies within each country.

The developed recommendations are of general nature considering the current situation in which the matter remains of national competence. The need for coordination between national migration policy and local management of the phenomenon remains a common feature of many legal systems. This leads to many differences in the implementation of national and supranational legislation, which are justified by the individual state organization. Guiding criteria could be established to add to the fundamental principle of protecting the well-being of the child.

6. *Some Anticipatory Conclusions*

The issues around unaccompanied minors are very topical and extremely urgent.

The key problem in this area of law, and in family law more broadly, is linked to its practical application.

Indeed, often the abstractness of legal theory clashes with practical needs, and in the case of unaccompanied children, this creates problems not very easily overcome.

The success of regulatory law depends on continuous monitoring of social conditions to evaluate its efficacy and consider possible action. Collaboration between key players (minors; guardians; courts; administrative authorities) is paramount and should be inspired by the common desire to find the best possible solution that guarantees the welfare and protection of the child over any other competing interest.

This approach is in contrast with the one taken so far in family law (more broadly). In fact, if family law is currently steering towards privatisation of relationships, in this context it is not possible to exclude state intervention if we want to guarantee the child's wellbeing.

A crucial point that needs emphasizing is the improvement of guardianship and its function aimed at creating a strong bond of trust between the guardian and their ward, with the guardian trained to effectively meet the child's needs.

This should then lead us towards a solution of the phenomenon of unaccompanied foreign minors who flee from care because they clearly feel they cannot rely on their guardian or the authorities to ensure their wellbeing.

Moreover, promoting foster care placement would enable the creation of real personal bond and affection. It is a solution that would also safeguard the relationship with the family of origin, wherever possible.

Effective protection of migrant minors requires both social and emotional inclusion. Therefore, it must be strengthened/supported by those institutions (guardianship and foster care) that guarantee the development of their personality in a loving family context.

We believe that these conditions can create the prerequisites for effective and lasting integration.

Part I – National Reports

Czech Republic

Martin Kornel*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

The national legal system does not devote specific discipline to unaccompanied foreign minors (UaM or UaMs). One of the main reasons would probably be that the number of UaMs within Czech Republic territory is relatively small and decreasing over time[1]. Nevertheless, some of the national laws provide legal definitions of UaM, as explained below.

Namely, Act No. 359/1999 Coll. on the Social and Legal Protection of Children (AoSLPCh)[2] defines UaM as a foreigner under 18 years of age separated from his/her parents and/or other persons responsible for his/her upbringing (sec. 2(1) AoSLPCh and sec. 6(h) AoSLPCh).

Also Act No 325/1999 Coll., on Asylum (AoA) in sec. 2(1)(h)[3] stipulates that "Unaccompanied Minors shall be a child under 18 years of age who enters the Territory unaccompanied by an adult responsible for the minor for the period for which he/she is actually not in the care of such a person; an unaccompanied minor also means a child under 18 years of age who has been left unaccompanied after entering the Territory".

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[1] See Šimáková, Adéla. Unaccompanied minors in the Czech Republic Social inclusion and the best practices of integration. Organization for Aid to Refuges, Prague. Available at https://www.re-future.eu/Data/Sites/13/GalleryImages/Toolkit/OPU%20-%20Unanccompained%20minors%20in%20the%20Czech%20Republic.pdf [19.02.2021].

[2] Zákon č. 359/1999 Sb. o sociálně-právní ochraně dětí. The actual text of the law in Czech available at https://www.zakonyprolidi.cz/cs/1999-359 [19.02.2021].

[3] Zákon č. 325/1999 Sb, o azylu. In English available https://www.mvcr.cz/mvcren/file/asylum-act.aspx (translation from 2016). The actual text of the law in Czech available https://www.zakonyprolidi.cz/cs/1999-325 [19.02.2021].

A specific definition of UaM provides Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Czech Republic (AoRFN)[4] according to which "Unaccompanied minor is a foreigner from 15 to 18 years of age who arrives in the Czech Republic without person responsible for her or is left in the Czech Republic without such a person." (sec. 180c AoRFN). Narrower definition (from 15 to 18 years of age) corresponds specific nature of the regulation (detention of the UaM that is not possible if the UaM is under 15, therefore rights of UaM from 15 to 18 are specifically addressed in the Act).

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

On the constitutional level, unaccompanied minor children fall within the scope of protection provided to children by the Charter of Fundamental Rights and Freedoms[5]. Its art. 32(1) stipulates that special protection of children and adolescents is guaranteed.

Specific aspects related to the Unaccompanied minors are covered by several Czech laws that were indicated above (question 1), namely AoSLPCh (specifying Social and Legal Child Protection Authority procedures and powers), AoRFN (specifying legal grounds upon which foreigners may reside in the Czech Republic and providing some procedural rules) and AoA (providing a legal framework on international protection).

Moreover, Act. No. 89/2012 Sb., Civil Code (CC)[6] provides substantive family law rules, especially on parental rights and obligation, substitute family care (foster care, care of other persons), tutorship (custodianship), guardianship, institutional care and adoption.

[4] Zákon č. 326/1999 Sb., o pobytu cizinců na území ČR. The actual text of the law in Czech available https://www.zakonyprolidi.cz/cs/1999-326 [19.02.2021].

[5] Usnesení předsednictva České národní rady o vyhlášení Listiny základních práv a svobod č. 2/1993 Sb. In English available at https://www.psp.cz/en/docs/laws/listina.html [19.02.2021].

[6] Zákon č. 89/2012 Sb., občanský zákoník. In English available at http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf (translation from 2014). Actual text of the law in Czech available at https://www.zakonyprolidi.cz/cs/2012-89 [19.02.2021].

Civil judicial proceedings rules are stipulated especially by Act No. 292/2013 Coll, on special judicial proceedings (AoSJP)[7] and Act No. 99/1963 Coll., civil procedure code (CPC)[8].

Relevant procedural and private international law issues (adoption) are governed mainly by the Act. No. 90/2012 Sb. Act Governing Private International Law (AGPIL)[9].

There are also several EU regulations and directives relevant, implemented or applied in the Czech Republic. Namely, Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office; 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; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; 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); and 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.

[7] Zákon č. 292/2013 Sb., zákon o zvláštních řízeních soudních. Actual text of the law in Czech available at https://www.zakonyprolidi.cz/cs/2013-292 [19.02.2021].

[8] Zákon č. 99/1963 Sb., občanský soudní řád. Actual text of the law in Czech available at https://www.zakonyprolidi.cz/cs/1963-99 [19.02.2021].

[9] Zákon č. 90/2012 Sb., zákon o mezinárodním právu soukromém a procesním. In English available at http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf (translation from 2014). Actual text of the law in Czech available at https://www.zakonyprolidi.cz/cs/2012-91 [19.02.2021].

Governmental Policy for Protection and Care of Unaccompanied Minors including Applicants for International Protection[10] from 2012 established a system of care for unaccompanied minors which is based on individual assessment and analysis of the needs of each child, to choose the most appropriate type of care (care by relatives, close persons, substitute family care or placement in an accommodation facility such as facilities for children requiring immediate assistance, or else institutional care and preventive educational care facilities operating in the Czech Republic)[11]. The policy states that the entirely determining factor in the placement of a child in a specific facility is the child's best interests.

The Czech Ministry of Labour and Social Affairs 2016 Methodical guideline on the socio-legal protection of Unaccompanied Minor provides a framework for Social and Legal Child Protection Authorities when handling UaM situations[12].

Ministry of Education, Youth and Sports Information concerning Unaccompanied Minors in Facilities for Administering Institutional Care and Preventive Educational Care approved in 2019 should stabilize the new system of care for UAMs as care centres were set up[13].

[10] Usnesení Vlády České republiky ze dne 6 září 2012 c 646 o Koncepci ochrany a péče o nezletilé cizince bez doprovodu včetně žadatelů o mezinárodní ochranu.

[11] See Member States's Approaches to Unaccompanied Minors Following Status Determination. Czech Republic. EMN Study 2017, p. 32. Avaliable https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf [19.02.2021].

[12] Ministerstvo práce a sociálních věcí. Metodické doporučení MPSV Č. 1/2016 k postupu obecních úřadů obcí s rozšířenou působností při poskytování sociálně-právní ochrany nezletilým cizincům bez doprovodu, Available https://www.mpsv.cz/documents/20142/225508/Metodicke_doporuceni__MPSV_c.1_2016_k_postupu_obecnich_uradu_obci_s_rozsirenou_pusobnosti_pri_po.pdf/b701a25d-7e2c-20fa-75f4-15db40a9ec95 [19.02.2021].

[13] Ministerstvo školství, mládeže a tělovýchovy. Informace MŠMT týkající se nezletilých cizinců bez doprovodu v zařízeních pro výkon ústavní nebo ochranné výchovy a preventivně výchovné péče), Ref. No.: MSMT-31 467/2019-1 Available at https://www.msmt.cz/file/54269_1_1/ [19.02.2021].

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

In case that the child has refugee status or has applied for international protection, he/she should have full social and legal protection according to the AoSLPCh by the Social and Legal Child Protection Authority.

Compared to such a child in case of unaccompanied minors who have not refugee status or have not applied for international protection, Social and Legal Child Protection shall take only actions stipulated in section 37 and 42 of the AoSLPCh. Specifically:

- to take measures to protect the life and health and provide for the satisfaction of fundamental needs within the crucial scope, including healthcare services;
- inform specified authorities and, if practicable, also the diplomatic mission of the country where the child is a national;
- place a child into a facility for children requiring immediate assistance.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

In case that unaccompanied foreign minor wishes to enter the Czech Republic to apply for international protection (sec. 3 and sec. 10a (1)(g) AoA), he/she shall not be refused at the external border under any circumstances.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

Forced returns (expulsion) of UAMs do not take place in practice. Still, the Czech law does not exclude them if the minor would be on the territory illegally (does not apply for international protection or international protection would not be granted). However, if UaM is still minor, the Social and Legal Child Protection Authority would take steps to legalize the minor's stay on the territory (interim order – see answers to questions 7 and 11) for the time until he/she reaches the majority.

The legal rule provides that the police shall perform the expulsion of an unaccompanied minor only after the state to which the unaccompa-

nied minor is to be deported, states that the unaccompanied minor will be provided with a reception appropriate to his/her age (sec. 128(3) AoRFN). However, it remains only a safeguard that does not need to be applied in practice.

After UaM reaches the majority and does not have any residence permit (or did not apply for international protection, his application was definitively rejected etc.), he/she might be expelled.

In practice, UaMs returns to the state of their origin happens when he/she requests that (and has sufficient capacity to make such requests) or in the event of family reunification. Even such returns are exceedingly rare[14].

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The police will usually be the first body involved in the management of UaM's case. The police may detain UaM for the necessary time (up to 24 hours) if there is a reason to believe that the minor is a foreigner who entered or stays within state territory unlawfully (sec. 27(1)(d) of Act No. 273/2008 Coll. on Police).

Ministry of Interior, Department for Asylum and Migration Policy of the Czech Republic conducts proceeding concerning the UaM's international protection application.

Social and Legal Child Protection Authority (run by Municipal councils of municipalities with extended powers or districts of Prague – more than 200 offices in the Czech Republic):

- represents child as a guardian in various proceedings (see the answer to question 15);
- is required to perform a regular situation assessment (sec. 10(3)(c) AoSLPCh) and to create an individual protection plan for each child (sec. 10(3)(d) AoSLPCh).

[14] See Member States's Approaches to Unaccompanied Minors Following Status Determination. Czech Republic. EMN Study 2017, p. 51 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf [19.02.2021].

Civil courts are competent to appoint guardians, issue interim orders and final decisions (on substitute care or institutional care of the minor, adoption etc.).

Administrative courts are competent to rule on UaM's appeals against detention, international protection and expulsion decisions.

Facilities for Children Requiring Immediate Assistance are crisis accommodation centres for children providing accommodation, meals, clothing, care. The child's stay should not extend for six months. Regional offices, municipalities or private persons operate the facilities. The Ministry of Labour and Social Affairs is responsible for those facilities.

Facility for Children of Foreign Nationals (Zařízení pro děti – cizince)[15] is a custodial facility providing accommodation, meals, clothing, care, therapeutic, supportive services, education, integration services, run by the Ministry of Education, Youth and Sports specialized in providing custody to foreign children lacking knowledge of Czech language.

Office for International Legal Protection of Children (ÚMPOD). If appropriate, according to the court, the office might be appointed to UaM as a guardian for court proceedings. The office also helps with family reunifications – search for UaM's relatives.

Detention / reception centres. The UaM who is older than 15 years of age staying at the territory illegally (or if when there are doubts about the age of a person claiming to be a minor) might be placed for a limited time to the centre[16].

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

Upon detection, the police might detain UaM (sec. 27(1)(d) Act on Police) for a maximum of 24 hours. Social and Legal Child Protection Authority is notified immediately after the detention of the UaM. In case that UaM is under 15 years of age, the police would release him/her from

[15] Facility for Children of Foreign Nationals. https://zdcpraha.cz/ [19.02.2021].

[16] Refugee Facilities Administration of the Ministry of the Interior. http://www.suz.cz/en/ [19.02.2021].

the detention within this time limit. He/she then may apply for international protection anytime during his/her stay on the Czech Republic territory.

The Czech Republic has no special reception centres for UaMs. Thus, UaM should be placed into the reception centres only under exceptional circumstances (e.g. when the fact that he/she is UaM is found out only after placing the child at the reception centre). Only the UaM who is older than 15 years might be detained for 90 days (sec. 124(6) AoRFN) and only if there is a risk that he/she might be a risk for national security or public order; or if there is reasonable doubt about his age (under 18). The Police and Social and Legal Child Protection Authority must inform the UAM about his/her right to apply for international protection in the territory of the Czech Republic within seven days' time limit after he/she was provided with such information (sec. 3b(1) AoA) and explain the application process to him/her.

The Social and Legal Child Protection Authority is obliged to take all necessary measures to protect the child's life and health and secure their fundamental needs, including healthcare services (sec. 37 AoSLPCh) whether the UaM is staying legally or illegally within the territory. Social and Legal Child Protection Authority would, therefore, immediately after the UaM is released from the detention, ensure medical examination to determine his/her health conditions and possibly place the child temporarily to the facility for children requiring immediate assistance (institution providing the necessary care and housing to the children for a limited period – six months) or to the care of a relative (if there is any relative of the child and there is no doubt about the identity of the child) if there was not yet interim order of the court released.

Without any delay (even before the child is released from the detention), the Social and Legal Child Protection Authority shall lodge a motion to the court requesting interim measure order to ensure immediate care for the child (sec. 452 et seq. AoSJP) in one of the following forms:

- the care of a relative to the child;
- the short-term foster parent care (specially trained foster parents for handling situations when a child will be placed to their care for a limited period, statutory time limit is set to one year of care at maximum (sec. 27a (9) AoSLPCh);

- the facility for children requiring immediate assistance (highest possible capacity for such a facility is 28 children, the facility must have one carer per 4 children and one social worker per 10 children);
- the institutional care (UaM should be placed to standard institutional care together with national children; only in exceptional cases should the child be placed to specialized institutional care – Facility for Children of Foreign Nationals with limited capacity to 18 children. Such extraordinary circumstances might be traumatized children (coming from war zones etc.); the completely different cultural and social origin of the child; a child who does not understand and does not speak Czech).

The court must decide on an interim measure motion within 24 hours after it was lodged. The interim order would be effective for one month and might be repeatedly prolonged by the court up to 6 months at maximum; further prolongation might be ordered only exceptionally and is not common practice (sec. 459 and 460 AoSJP).

After the placement of the UaM to the substitute or institutional care, Social and Legal Child Protection Authority further assesses his/her situation to ascertain if it is in the UaM's best interests to stay in the territory of the Czech Republic, be reunited with relatives in a different state or be repatriated to their state of origin[17].

If it is in UaM's best interests to stay in the territory of the Czech Republic, or if the UAM applied for international protection, the Social and Legal Child Protection Authority must take actions towards the meritorious modification of his situation and securing substitute care not only in terms of the interim measure but based on the judgement of the court. In such a case, the court might place the child to:

- the care of a relative to the child;
- the foster parent care;
- the institutional care. In practice, the majority of the UAM is placed in institutional care.

[17] Member States's Approaches to Unaccompanied Minors Following Status Determination. Czech Republic. EMN Study 2017, p. 51 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf [19.02.2021].

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Placing UaMs to foster care is possible under Czech law by court order, and it is considered a useful remedy. According to sec. 959 (2) of the Czech Civil Code foster care takes precedence over institutional care. Moreover, the Ministry of Labour and Social Affairs specifically recommends considering foster care (both long term and short term) to ensure that unaccompanied child has sufficient care[18]. Yet, there are not enough candidate foster parents that could accept UaM in the Czech Republic. Thus, placing such a child to foster care is more of a theoretical possibility than actual practice. However, according to the law, there is no difference between a national and migrant child.

Any child might be placed to foster care if none of the parents can personally care for the child based on a court order (sec. 958 Civil Code). The motion for such an order might be lodged to the court by the Social and Legal Protection Authority (sec. 14(1) AoSLPCh), or the court might start a procedure also without any motion if it is needed for the protection of the interests of a child. The court, in cooperation with the Social and Legal Protection Authority (sec 19a AoSLPCh), chooses a suitable foster parent. The Social and Legal Child Protection Authority shall mediate foster care, including looking for individuals eligible to become foster parents, providing training to them and maintaining a register of applicants suitable to become foster parents. Before entrusting the child to foster care, a child might also be placed to pre-foster care by the court order to supervise the course and success of the care and put him/her to actual foster care after it is proven suitable for the individual child.

[18] Ministerstvo práce a sociálních věcí. Metodické doporučení MPSV Č. 1/2016 k postupu obecních úřadů obcí s rozšířenou působností při poskytování sociálně-právní ochrany nezletilým cizincům bez doprovodu. p. 22. Available https://www.mpsv.cz/documents/20142/225508/Metodicke_doporuceni__MPSV_c.1_2016_k_postupu_obecnich_uradu_obci_s_rozsirenou_pusobnosti_pri_po.pdf/b701a25d-7e2c-20fa-75f4-15db40a9ec95 [19.02.2021].

A person who is to become a foster parent must qualify as a person who can guarantee due care, have a residence in the Czech Republic, and consent to being entrusted with foster care for the child (sec. 962 CC).

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

The adoption of the unaccompanied foreign minor is possible. In practice, a significant obstacle for successful adoption of UaM would be the lack of suitable adoptive parents and the necessity to fulfil the conditions set out by the body of laws of the state of which the adopted child is a citizen (sec. 61 AGPIL). To use only Czech law instead of a foreign body of laws would be possible only if applicable foreign law does not enable adoption or does so under exceptionally onerous circumstances.

To consider adoption a suitable remedy under Czech substantive law, a child must be in a situation with an inappropriate, unavailable, hostile or missing family environment. This condition would be usually met in the case of UaMs (if their family is not found or willing to take care). Other conditions set by the law for adoption being possible are:

- parental consent (sec. 809 et seq. CC) (could be substituted by tutor or guardian consent upon court decision, especially if parents' whereabouts are unknown);
- child's consent (sec. 806 et seq. CC) (if the child has reached at least the age of twelve, otherwise consent of a guardian is necessary);
- care of the prospective adoptive parents before adoption (sec. 795 and 823 et seq. CC);
- eligible adoptive parent/parents and their application to the court (sec. 796 et seq. CC);
- care before adoption (sec. 823 et seq. CC).

The first step leading to the adoption of UaM would be the mediation of adoption by the Social and Legal Child Protection Authority searching for individuals suitable to become adoptive parents; selecting them for a particular child for whom adoption is mediated, and arranging a personal meeting of the child with a selected individual (sec. 19a AoSLPCh).

The next step would be filing an adoption application to the court with a request for the handover of the child into the care of prospective adoptive parents before adoption. Before the decision on hando-

ver of the child, an inquiry must take place to determine whether the child and the adoptive parent are mutually suitable, especially regarding the personality of the adoptive parent and his social environment; personality rights and health condition of the child, social environment the child comes from; ethnic, religious and cultural background of the child and the adoptive parent (sec. 827 CC). The child must be in the care of the prospective adoptive parents for six months at least before the final judgement on adoption is made by the court (sec. 829 CC).

Ministry of Labour and Social Affairs does not explicitly mention the possibility of adoption in its Methodical guideline on the socio-legal protection of Unaccompanied Minor. There are no public statistics providing data about the number of UAMs adopted in the Czech Republic, but it would be a meagre number, if any.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

The civil law courts are competent in guardians' appointment, substitute care, institutional care and adoption proceedings. A tutelary judge specialized in family law matters with a focus on minors decides.

Administrative courts are competent to decide on appeals against detention, international protection and expulsion decisions (sec. 33 AoA). A judge is specialized in the specific agenda but without any particular focus on minors.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

If international protection was granted to UaM, he/she has the legal status of resident on the Czech Republic territory (in case of asylum for an unlimited period, in case of additional protection for a limited period with the possibility of prolongation). An UaM may, after five years of residency (half of the proceedings on international protection counts into that time), apply for permanent residence. If international protection was granted only in the form of additional protection, permanent residency

would provide stable legal ground for a residence without applying for prolongation of additional protection.

UaM placed to a foster care, institutional care, or another form of substitute care by an interim order of the court gets automatically temporary residence status (sec. 18 d) AoRFN). The interim order expires when UaM reaches the majority (attains 18 years of age at the latest), and at the same moment, temporary residence status expires. In such a case, there would be no legal ground for prolongation of residency (but it would be still possible to apply for international protection), and a departure order would be issued by the police (sec. 50 AoRFN).

UaM placed to a foster care, institutional care, or another form of substitute care before reaching 15 years of age by a final (meritorious) decision of the court (not interim order) has a permanent residency status and by attaining 15 years of age gets permanent residency permit automatically for an unlimited period (sec. 87 (10) and sec. 65 (1) a) AoRFN).

UaM placed to a foster care, institutional care, or another form of care after reaching 15 years of age by a final decision of the court (not interim order) have permanent residency status only until reaching 18 years of age. Nevertheless, it is possible to apply for a permanent residency permit within 60 days after attaining 18 years of age on humanitarian grounds (sec. 66 a) AoRFN). Otherwise, such a child would be staying in the territory of the Czech Republic illegally. In the majority of cases, permanent residency based on humanitarian grounds is granted.

That means all UAMs, whether they were initially staying in the Czech Republic legally or illegally, have their stay legalized from the date on which they were entrusted to substitute care on the basis of an interim order or meritorious decision until they reach the age of 18 years, regardless of whether or not they seek international protection[19].

[19] Member States's Approaches to Unaccompanied Minors Following Status Determination. Czech Republic. EMN Study 2017, p. 43. Avalilable https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf [19.02.2021].

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Education. UaM (irrespective of whether they applied for international protection) has equal access to education, extra-curricular activities, school meals and leisure activities as children of the Czech population. Specifically:

- a minor placed to the substitute care by interim court order has to start compulsory education (Elementary Schools) after 90 days he/she was placed to the care unless compulsory education was already completed abroad;
- a minor placed to the care by final court decision should be attending compulsory education unless it was already completed.

UaM staying on the Czech Republic territory expires has also right to apply for secondary and tertiary education (sec. 20 Act No. 561/2004, Education Act).

Regional authorities must ensure unpaid preparation of foreigners for elementary education, including teaching the Czech language (sec. 20(5) Education Act).

Health care. UaMs participate in public health insurance (and therefore has the right to health care services like emergency treatment, general practitioner treatment, specialist treatment, care of a clinical psychologist, vaccination, hospitalization etc.) since:

- the issuance of the court interim order placing a child to an institutional or another form of substitute care upon Social and Legal Child Protection Authority motion (sec. 18 d) 4. and sec. 48 f) of AoRFN);
- he/she has applied for international protection.

Judicial protection, right to be heard, legal aid. The minors should be heard directly by the judge in the relevant proceedings if they are over 12 years of age (sec. 867 CC, sec. 100 CPC). In practice, the court might exceptionally revert to other means on ascertaining opinion of the child, e.g. via Social and Legal Child Protection Authority or psychologist. As for special measures, in cases worthy of special consideration (e.g. traumatized persons or rape victims) according to the law, the UaM has the

opportunity to request that persons of the same sex perform administrative acts and interpreting[20].

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

Since 2009, ten regional Centers for Support of Integration of Foreigners (CPIC) were opened in the Czech Republic[21]. The operation of all CPIC is funded by the Asylum, Migration, and Integration Fund (AMIF) program.

The CPIC form a network throughout the Czech Republic, providing for the implementation of the country's integration policy of the target group of third-country nationals (coming from outside the EU), and legally staying in the Czech territory and provide social and legal counselling, Czech language courses, interpreting services, sociocultural courses, community workers and education, cultural, and social events. The target group includes UaMs staying in the territory.

UaMs may also enter the State Integration Programme (SIP)[22] and enjoy services and other benefits. The sole condition is to hold international protection and to assemble an individual integration plan within 12 months after the decision regarding the asylum (international protection) application enters into force. A large section of the SIP focuses on housing. Although all other services under the SIP may be provided as validation of certificates, help with employment (part-time) or school (coaching) and also pay for prescription medicines (in individually assessed cases[23].

[20] Member States's Approaches to Unaccompanied Minors Following Status Determination. Czech Republic. EMN Study 2017, p. 27. Available https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf [19.02.2021].

[21] Centers for Support of Integration of Foreigners. Centra na podporu integrace cizinců. Avaliable http://www.integracnicentra.cz/?lang=en [19.02.2021].

[22] See Ministerstvo vnitra. Integration of Recognized Refugees. Available https://www.mvcr.cz/mvcren/article/integration-of-recognized-refugees-913320.aspx [19.02.2021].

[23] Member States's Approaches to Unaccompanied Minors Following Status Determination. Czech Republic. EMN Study 2017, pp. 28-29. Available https://

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

In case that the child did not apply for international protection, the Social and Legal Child Protection Authority should notify the diplomatic mission of the state of children nationality if possible (sec. 37(2) AoSLPCh) to ensure help with searching parents or other persons who might take care of the child.

In any case (applicants for international protection included), the Social and Legal Child Protection Authority should notify the Office for International Protection of Children to ensure help with searching parents or other persons who might take care of the child. The role of the office might be important mainly if the child has applied for international protection (sec. 35 (2) j) AoSLPCh). If UaM has applied for international protection, the authorities should proceed in such a way as not to endanger the life and freedom of the child and his/her family, particularly in the country whose citizenship they have or, if they are stateless persons, in the country of their last residence when any actions are taken to trace her family or origin (sec. 88b AoA).

Family reunification (repatriation) is expected by Methodical guideline on socio-legal protection of Unaccompanied Minor in case of UaMs who did not apply for international protection, but only after careful consideration of all relevant facts of the case and determination of the best interests of the specific UaM. The following aspects should be considered:

- the safety, security and other conditions, including socio-economic conditions, awaiting the child upon return, including through home study, where appropriate, conducted by social network organizations;
- the availability of care arrangements for that particular child;
- the views of the child expressed and those of the caretakers;
- the child's level of integration in the host country and the duration of absence from the home country;
- the child's right "to preserve his or her identity, including nationality, name and family relations";

ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf [19.02.2021].

- the "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background"[24].

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions, and the requirements to be appointed.*

The appointment of a guardian to a UaM is foreseen in various situations as described below.

International protection application proceedings

If an applicant for international protection is an UaM, a guardian shall be appointed by the court to protect her rights and legally protected interests relating to her stay in the Czech Republic. (sec. 80(1) AoA). The guardian shall be an adult relative of an UaM; if no such person exists or if such person cannot be entrusted with the role of guardian, the role of the guardian shall be performed by a person or legal entity. In the majority of cases, the Social and Legal Child Protection Authority would be appointed as a guardian of the UaM.

The guardian should especially:

- be present to any official act performed with UaM;
- be present to an interview conducted with the applicant by the Ministry of Inferior during proceedings on UaM application (sec. 23 AoA).

The guardian may also lodge an appeal against the Ministry's decision on no reasons for granting international protection (within 15 days' time limit after delivery).

Methodical guideline on socio-legal protection of Unaccompanied Minor recommends the guardians to arrange legal representation for UaM due to the necessity of specific knowledge in the field of international protection and the fact that the Social and Legal Child Protection Authority is staffed by social workers, not lawyers[25].

[24] Methodical guideline refers to UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, Available at: https://www.refworld.org/docid/42dd174b4.html [19.02.2021]

[25] Ministerstvo práce a sociálních věcí. Metodické doporučení MPSV Č. 1/2016 k postupu obecních úřadů obcí s rozšířenou působností při poskytování sociálně-právní ochrany nezletilým cizincům bez doprovodu, p. 36.

Detention proceedings (according to sec. 124, 124b AoRFN)

The police must appoint a guardian that would represent a child in the proceedings immediately after a UaM (older than 15 of age or uncertain age if there is suspicion he is older than 18 years of age) detained (sec. 124(5) AoRFN). Usually, the Social and Legal Child Protection Authority would be appointed as a guardian. The guardian should especially:

- ensure that UaM has all the necessary information about the possibility to apply for international protection;
- provide all the help required with the application in case that UaM wishes to apply for international protection;
- meditate legal aid if needed;
- file an appeal against the detention order to the court (within 30 days after its delivery).

Expulsion order (sec. 118 et seq. AoRFN) or removal order (sec. 50a AoRFN)

The police must appoint a guardian to the UaM immediately after the expulsion or removal procedure starts (sec. 119(9) AoRFN).

The guardian should especially:

- ensure that UaM has all the necessary information about the possibility to apply for international protection;
- use all available procedural means to avoid expulsion[26].

Interim measures and care judicial proceedings (as described under question 7)

The court has to appoint a guardian for the proceedings to UaM; it might be any close or suitable person (sec. 29 CPC). The Social and Legal Child Protection Authority is appointed as the guardian in the majority of cases.

Substantive law issues

As far as parents (or other holders of parental rights and duties) of UaM are not able to represent the child in the territory of the Czech Republic (because they are typically unknown, dead or outside the territory), it is usually necessary to determine who might represent the child

[26] Ministerstvo práce a sociálních věcí. Metodické doporučení MPSV Č. 1/2016 k postupu obecních úřadů obcí s rozšířenou působností při poskytování sociálně-právní ochrany nezletilým cizincům bez doprovodu, p. 49.

(e.g. care for child's assets and liabilities, medical procedures other than common, choice of education or profession etc.).

In case of the child placed to the substitute care by the court decision (both interim order and final decision – foster parent or care of another person), such a person (or foster parent) has the right to represent the child in ordinary day-to-day matters (sec. 966 and 955 CC).

If the child was placed in institutional care, a director of the institution also has the right to represent the child in day-to-day matters (except care for child's assets and liabilities) (sec. 23(1)(l) Act No. 109/2002 Coll. on the performance of institutional care).

Thus, from the perspective of the law, the UaM must have a representative able to represent the child to a full extent. To ensure that, a court should appoint a tutor (a custodian) (sec. 928 CC). A tutor has all the rights and duties towards the child as a parent except the obligation to provide maintenance. Having regard to a person acting in the capacity of a tutor to a child or the child's circumstances and the reason why parents do not have all the rights and duties, the scope of rights and duties of a tutor may exceptionally be defined otherwise. In the case of UaM, tutorship would usually be exercised by the Social and Legal Child Protection Authority due to lack of other suitable persons (sec. 929 and 930(3) CC). The Social and Legal Protection Authority might initiate procedure leading to the appointment of the tutor (§ 37(3)(b) AoSLPCh). However, every decision made by the guardian or custodian in matters outside the day-to-day routine is subject to approval by the court.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

Nor AoRFN, neither other national law sources, provide a specific procedure for ascertaining the age of UaM. Initially, the age should be assessed by authorities handling the situation of the UaM, usually by the police, upon information provided by UaM. The medical examination is not mandatory but should be performed if there are reasonable doubts about the age claimed by the applicant for international protection (sec. 89 AoA) or UaM in other situations (e,g, detention proceedings)[27]. UaM or his guardian may deny medical examination, but in such case, he/she shall be deemed older than 18 years of age. Medical examination most often relies on x-ray examination of bone age. Also, other aspects as secondary sexual characteristics might be examined. Invasive examinations are not used, and therefore, there is no case law dealing with such a possibility.

Multidisciplinary age assessment method that would objectify data provided by the UaM and from other sources is not available in the Czech Republic, the pilot project of the Ministry of the Interior, UNHCR and the Ombudsman's Office to test another method (non-medical ones) of age determination has been stopped.

If the age of UaM is not ascertained to a sufficient level of certainty by the evidence that the authorities have at their disposal, he/she should be deemed minor.

[27] See Supreme Administrative Court Judgement 7 Azs 87/2019, 26.09.2019. Available at: http://www.nssoud.cz/files/SOUDNI_VYKON/2019/0087_7Azs_1900022_20190924140442_20191014092015_prevedeno.pdf [19.02.2021].

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

If UaM is placed into the Facility for Children of Foreign Nationals, his/her stay will start with an 8-week diagnostic, the result of which is a comprehensive appraisal of his/her needs and situation and a final report. On the basis of these findings, individual personality development plan and individual education plan are created and revised on an ongoing basis until the departure of the client from the facility up to a maximum of 26 years of age, i.e. until completing vocational preparation. The facility's stay is possible after reaching the age of majority only upon residence agreement between the facility and the child (cannot be forced). However, the client must satisfy student status, i.e. must be a full-time student of secondary school, university or equivalent[28]. There is a specific possibility to place UaM in the student department (up to 8 students, 15-26 years of age) or training flat (up to 4 students). Moreover, a socialization programme is created for individual clients by the specialists at the facility. About one year before the UaM departure from the facility, each client begins preparations for entering an independent life, receives important information concerning their rights and available assistance, important contact information (curator, public employment office, police, health insurance company, embassy, non-profit organizations etc.), and altogether they seek accommodation and employment options[29].

Foster care terminates upon reaching the age of majority. Still, material aid of this form of care (fostering fee, child needs allowance) does not terminate if the child remains dependent (living with foster parents). In such a case, material aid is maintained for the duration of supported child status (the age of 26 years at the latest).

[28] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf. pp. 47-48 [19.02.2021].

[29] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/06a_czech_republic_uam_study_en.pdf p. 76 [19.02.2021].

For a young adult who is 18-26 years of age, there is a possibility to utilize social services provided in so-called Half-Way Houses. Available services[30]:

- sheltered accommodation – in principle for 12 months;
- training in social skills (cooking, cleaning, washing – active interacting in the household; learning to economize earned money, to organize time effectively, to communicate with authorities);
- support when entering the labour market;
- social assistance – accompaniment at offices and institutions;
- social and legal support;
- help with finding proper accommodation.

State Integration Programme for helping with integration may also be applied even after UaM with international protection reaches the age of majority.

For residence permit after reaching the age of majority, see the answer to question 11.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

The ascertaining of the actual age of the UaM process and methods could be improved because there are no clear objective rules or guidelines on how to proceed. Authorities in practice have, therefore, occasionally relied on bone age tests or incomplete medical assessments and did not consider other facts and aspects of the case[31].

UaMs are mainly placed in institutional care facilities, although formally, they can be entrusted to some form of substitute family care. The system of substitute care (especially candidates for foster parents) should be strengthened and more adequately prepared to accept UaMs. Even though the Czech Republic is mostly a transit country, the institutional care system (low capacities of the Facility for Children of Foreign Na-

[30] https://www.opu.cz/en/co-delame/pravni-poradenstvi/dum-na-pul-cesty/ [19.02.2021].

[31] See Supreme administrative court judgement 5 Azs 107/2020-46.

tionals and other selected facilities) could be easily overwhelmed if any significant migration wave would come.

The procedure of notification (recognition of previous education) is criticized for its length.

Denmark

Silvia Adamo*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

The Danish legal system defines an unaccompanied foreign minor as a person under 18 years of age who enters the country and files an application for asylum in Denmark without being accompanied by either a parent or other guardian (Aliens Act, Section 9 c, subsection 3).

The age of the unaccompanied foreign child is crucial when deciding whether the child must undergo an asylum procedure or not. Unaccompanied foreign minors under 12 years of age, and some between 12 and 15 years of age, are deemed to be too young and not mature enough to go through the normal asylum procedure, and thus will automatically receive a permission to stay if they cannot be returned to their home country or another country.

Therefore, the deciding factor for the choice of procedure as regards foreign unaccompanied minors is their maturity. There is no specific discipline for children not requesting asylum, but unaccompanied foreign minors under 12 years of age will automatically receive a permission to stay without having to undergo an asylum application procedure. The only exception would be if the authorities within a short period of time could trace the minor's parents and reunite the child with them by returning them to another country.

For unaccompanied foreign minors between 12 and 15 years of age, the Immigration Service will carry out a concrete assessment of whether they are sufficiently mature to undergo a normal asylum procedure with the interviews that it requires. If the minors are not found to be mature enough, they will be granted a permission to stay automatically.

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Unaccompanied foreign minors over the age of 15 are generally deemed mature enough to undergo a regular asylum application procedure. As a general rule, unaccompanied foreign minors have to fulfill the same requirements set up in the law as regards adult applicants in order to be granted a residence permit on grounds of asylum. However, special rules apply as regards this vulnerable group. The processing of a child's asylum application must be expedited, and children are accommodated in a special children-friendly asylum center, with extra personnel dedicated to their well-being. In this respect, Section 9 c, subsection 3 of the Aliens Act establishes the possibility to grant a residence permit to a child under 18 years of age if deportation would entail an unbearable situation for the child, such as if they had no family network or possibility to stay in a dedicated reception or care center. Special procedural rules apply during their asylum application.

In case of rejection of their asylum application, the unaccompanied foreign minor has to leave Denmark within the date set by the Immigration Service. However, return of unaccompanied foreign minor requires that they have a family network in their home country, or the possibility to stay at a reception or care centre. If this is not possible, the minors, though considered rejected asylum seekers, will be granted a possibility to stay in Denmark until they reach the age of maturity. This is foreseen in the Aliens Act Section 9 c, subsection 3, where it is stated that unaccompanied foreign minors cannot be returned "if there is reason to assume, that the foreigner when returning to the country of origin or former stay, will be without family network or without the possibility of stay at a reception or care center, and thus be placed in an actual emergency. The stay cannot be extended beyond the foreigner's 18th year."

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

The national rules concerning unaccompanied children are to be found in the following statutory rules:

- Consolidated version of the Aliens Act: this is the general framework regulatory act for migrants' entry and stay in Denmark, including unaccompanied foreign minors;

- Act on amendment of Aliens Act and Integration Act (revision of the rules on unaccompanied minors, etc.): the Act now forms part of the consolidated Aliens Act, and it was introduced as an amendment to the rules on unaccompanied foreign minors in 2010 to restrict the possibility of granting a permission to stay to unaccompanied minors only in those cases where their home country could not offer appropriate reception and care centers;
- Executive order on foreigners' entry to Denmark: the ministerial order establishes the administrative rules that actualize the general rules in the Aliens Act (e.g.: travel documents, length of permission to stay, work permission, length of permission to stay, border control etc.);
- Executive order on lawyer's appointment for an unaccompanied foreign minor: this ministerial executive order establishes the administrative rules for the appointment of a lawyer to represent the unaccompanied foreign minor in their asylum application case, and, where the latter has been rejected, to provide legal representation during the appeal process at the Refugee Appeals Board;
- Guidance on case handling of representative for unaccompanied foreign minors: this 2019 guidance sets the administrative rules according to Section 56 a, subsection 1, in the Aliens Act to guarantee that a representative is appointed to take care of the interests of an unaccompanied foreign minor, who also can act as a steady personal support after their arrival to Denmark. It establishes that the representative holds rights and duties as regards the minor comparable to those of a legal custodian. The appointment of a representative was first introduced in the Danish legal system in 2003;
- EU Dublin regulation: the regulation establishes the rules and procedures for cases in which an unaccompanied foreign minor has to be returned to another country in order to lodge their asylum application there. Thus, in accordance to the rules in the Dublin regulation, another EU Member State may be responsible for the processing of the unaccompanied foreign minor's asylum application, if they arrived to Denmark through that state or if the minor has relatives there.

The EU Return directive is not implemented in Denmark, following the country's opt-out on selected issues within the area of Justice and Home Affairs.

The authorities must respect Art. 8 on the right to family life in the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC) when exercising discretionary powers. Respect of the ECHR, however, does not automatically ensure family reunification in Denmark.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

As mentioned under question 1, the special guidelines for unaccompanied foreign minors are as follows:

- quick case-handling of their asylum application;
- accommodation in dedicated, children-friendly asylum centres;
- appointment of a personal representative;
- appointment of a lawyer, paid by the Immigration Service;
- help in locating the family of origin (where applicable) in coordination with an organisation approved by the Ministry of Integration and Immigration.

Beside Section 9 c, subsection 3 (described above), Section 42 a of the Aliens Act establishes special considerations to be taken for unaccompanied minors as regards lodging in asylum centers. Section 42 b of the Aliens Act sets basic cash benefits specifically for unaccompanied minors.

Section 37, subsection 10 of the Aliens Act establishes that unaccompanied minors, while awaiting deportation, cannot be detained in prison facilities. However, in accordance with Chapter 9 a of the Aliens Act, in pressing situations children may be detained.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

To the best of my knowledge, unaccompanied foreign minors cannot be refused entry into Danish territory at the external border if they declare that they want to apply for asylum.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The legal age of maturity in the Danish criminal code is 15 years old, and this includes unaccompanied foreign minors. Consequently, if an unaccompanied foreign minor is guilty of a criminal activity punishable by expulsions, they will be expelled. See for example TfK2015.995 (Ø.L.D. 25 June 2015), where a 16 years old in 2013 had vandalised their asylum center and caused 32.000 DKK (~ 4.300 €) of damages. The Eastern High Court, to which the case was appealed from the District Court, confirmed that the expulsion of the foreigner was not in breach of international conventions. Even though the Eastern High Court considered that the criminal offence had been committed before the foreigner turned 18 years of age, their short stay in Denmark (about 2 years) and the presence of other personal relationships outside of the country could not supersede a verdict of expulsion.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The minor's first interview after entering the country is with the Police, which have the task of establishing the child's identity and travel route, and whether they are to be considered as minors. The Police register unaccompanied foreign minors according to Section 48 e, subsection 1 in the Aliens Act. This section establishes that individuals who want to file for an asylum application are registered with their name, date of birth, and nationality based on the information given by the foreigner and their documents. The Police register their photo and takes their fingerprints, and after registration they issue an asylum-seeker ID card as well. During the initial registration at the asylum centre 'Sandholm', all unaccompanied foreign minors are offered a health check-up, which serves also to initiate any necessary disease preventions.

After appointment by the Immigration Service in collaboration with Red Cross and a dedicated administrative 'Family house' (*Familieretshuset*) a personal representative is paired with the unaccompanied foreign minor. During an interview with the Immigration Service, the un-

accompanied foreign minor has to give information about their case, and what is their ground for seeking asylum. The Immigration Service decides upon the start of the asylum application case depending on the level of maturity of the child, and, as abovementioned if a child is over the age of 12, they will normally be deemed mature enough to undergo a normal asylum proceeding.

The authority with competence of deciding on the asylum application is the Danish Immigration Service (*Udlændingestyrelsen,* nyidanmark.dk). In case of a negative outcome, an appeal against the decision can be filed by reference to the Refugee Appeals Board (https://fln.dk/da/English), which is a quasi-judicial body in charge of reviewing the decisions of first instance by the Immigration Service. The decisions of the Refugee Appeals Board are final, and cannot be appealed. For a description of the cases reviewed by the board and the procedure at the Refugee Appeals Board, see https://fln.dk/da/English/General_information_regarding_fln.

The Immigration Service interviews the children once a year to assess their maturity. If their asylum application case is not concluded when they reach 17 years of age, they are placed in a regular asylum center for adults, where there are fewer resources available.

In case the unaccompanied foreign minor's asylum application is rejected and they can be returned to their home country or another country (e.g. following the Dublin regulation rules), the Police assist the minors in gathering the necessary travel documents. The Immigration Service covers the cost of transportation for the return travel.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

As they are recognised as a particularly vulnerable group, unaccompanied foreign minors are placed in specific children-friendly asylum centres (*børnecenter*). It is formally the Immigration Service which is the responsible authority for unaccompanied foreign minors' accommodation, and in practice the Immigration Service carries out this task in collaboration with the Danish Red Cross and some municipalities, which are del-

egated the realisation of the asylum centres' operation. This collaboration shall ensure that unaccompanied foreign minors have a safe and meaningful stay at the asylum centres, while they await a decision on their asylum application (whether that may result in a permission to stay, or return to another country).

The asylum centre operators have the task to support the unaccompanied foreign minors' physical, psychological, and social development in a healthy manner and contribute to a sense of continuity during the different stages of the children's stay in Denmark. A special relevance is given to the teaching opportunities at the centres, where the children are expected to acquire a knowledge of Danish culture (norms, values, and general principles of Danish society such as the principle of equal treatment among genders, the rights of children, and so forth). At the same time, the children are expected to carry out daily tasks in the asylum centre, such as meal preparation, cleaning, and laundry.

In the beginning of their housing in an asylum centre, the personnel hold a 'reception conversation' to explain to the minor the house rules and duties and rights for their stay in the centre. Upon moving out of the centre, every unaccompanied foreign minor is given a clothes package, toiletries, and a box with kitchenware.

There is a zero-tolerance policy for criminality at children-friendly asylum centres. Operators have the duty to communicate to other authorities any instance of knowledge or suspicion of criminal activities, such as harassment, sexual abuse, suspicion of radicalization, violence, vandalism, threats, use of force, arson, and self-destructive behaviour.

The personnel at the centres must respect the Danish criminal code's rules on confidentiality, and they have to be in possession of a clean criminal record (*straffeattest*) and a clean criminal record as regards children specifically (*børneattest*). The personnel have to account for the presence of unaccompanied foreign minors in the asylum center at least three times a day, and must alert the authorities of any case wherein a minor is not present in the center.

In special cases, the unaccompanied foreign minors can be accommodated in private homes, e.g. in the houses of friends or family. The Immigration Service has to approve this type of accommodation in order to make sure that the applicant, the home itself, and the owner of the ac-

commodation fulfil a series of requirement. The approval of the Immigration Service is necessary before an unaccompanied foreign minor can move into this type of accommodation.

Finally, there is a residential institution, located in Farsø (Northern Jutland) to where unaccompanied foreign minors with difficulties or problematic behaviours can temporarily be transferred from their asylum center. This can be in the case of drug abuse, psychological illness, or so-called 'street-oriented behaviour'. The objective of a stay in this specialized institution is to offer a preventive and qualified pedagogical help to unaccompanied foreign minors in order to make them able to develop the skills and competences necessary for living in an ordinary asylum center.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Until the legal amendment by the Act nr. 1543 of 2010, which revised the rules on unaccompanied minors, unaccompanied foreign minors were granted a temporary permission to stay and sometimes placed in foster care while awaiting their decision. The law in force now foresees that unaccompanied foreign minors shall live in a children's asylum center while they await the decision regarding their asylum application.

In case an unaccompanied foreign minor's application for asylum is accepted, the minor can either be reunited with family members in Denmark, or be placed in foster care if there is such a possibility in their municipality of residence.

Foster families who have an interest in welcoming an unaccompanied refugee child or young person into their family must be able to care for them and help them integrate into Danish society. Besides helping the child to learn Danish culture and language, the foster family also helps them by providing them with the family environment they lacked in their new host country. The foster family is expected to introduce the child or young person to Danish culture and values, including traditions and holidays, but with respect for the child or young person's own culture and religion. The foster family is expected to have a stable everyday life in order to support the child's schooling and leisure activities, and

provide them with a suitable arrangement in their home. Moreover, the family members are expected to be able to speak Danish and to be well integrated in Danish society.

Approval by the National Board of Social Services (a government agency under The Ministry of Social Affairs and the Interior) is a precondition for all Danish foster families, whether they take care of a foreign or Danish child. The general guidelines for approval are as follows. The National Board of Social Services must carry out a thorough examination of the applicant in order to be able to assess whether they meet the conditions for approval. The approval as a foster family is based on an application, which is sent to the social services in a municipality that approves foster families as specifically suitable in relation to a specific child or young person.

The application contains a number of basic information that is necessary to begin the approval process. On top of this basic information, more information is gathered in order to create a sufficient knowledge base for the professional assessments of the applicant's suitability as a foster family. The applicant must, among other things, participate in a compulsory basic course of a duration spanning two separate two-day sessions.

The National Board of Social Services will also have interviews with the applicant and the applicant's own children (if applicable), observe the family dynamics, and inspect the physical setting of the applicant's home. In the approval process, the applicant must be able to explain their considerations as regards delivering an effort as a foster family that has the required quality, and can contribute to the well-being and development of a foster child.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

Section 9, subsection 1, no. 2 of the Aliens Act establishes the possibility of granting a permission to stay for minors on the basis of adoption, foster care, or residence with family members. However, this general rule is not specific for unaccompanied foreign minors, but all minors who are intended to establish a life in Denmark.

For an adoption permission to be issued, the adoption requirements must be fulfilled according to Sections 2-15 of the Adoption Act. The re-

sult of the adoption investigation must indicate that the adoption will be of benefit to the person adopted. A Joint Council decides, following an inquiry carried out by the Agency of Family Law, whether an applicant may be approved as a prospective adoptive parent. It is a condition that the child will be brought up by the adopting parents. A formal approval of the adopting parents, issued by the Joint Council, is required if the adopted person is under 18. Thus, a formal approval is usually required when parents adopt a foreign child.

Permission to adopt is granted only if the child and their parents consent to it. Permission is granted without parental consent in special circumstances, if the welfare of the child definitely indicates this. The child's consent is normally required if they are over 12 years of age, unless it would cause damage to the child. When a child is under the age of 12, information on their attitude towards the adoption shall be available, but only to the extent that the child's level of maturity and the circumstances of the case make is reasonable.

It can be assumed that adoption occurs very rarely. Even more rarely, it may be possible for an adoption to occur without parental consent in the case of a minor child, where their parents and any other close relative are not to be found.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

There is no dedicated juvenile court in the Danish legal system that is devoted to the management of unaccompanied foreign minors. If unaccompanied foreign minors are undergoing an asylum application procedure, the administrative and judicial bodies involved are those described under question 6.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

Unaccompanied foreign minors can be granted a temporary residence permit according to Section 15, subsection 2 in the Executive order on foreigners' entry to Denmark. Unaccompanied foreign minors can be

granted a temporary permission to stay spanning 1-5 years, depending on which type of stay they are granted (see below). It is possible to renew the permission to stay until the unaccompanied foreign minor turns 18 years of age.

Section 16, subsection 17 in the Executive order on foreigners' entry to Denmark establishes that minors under the age of 18 can be granted a temporary residence permit on the basis of Section 9 c, subsection 3:

- before the minor's 15th birthday: until they reach 15 years of age;
- after the minor's 15th birthday: for a maximum of 1 year, though not for a longer period than the date when the minor reaches 18 years of age.

In exceptional cases, the residence permit will be based on the Aliens Act Section 9 c, subsection 3, no. 2. This rule will be applicable in case a foreign unaccompanied minor's application for asylum is rejected, after which the Immigration Service will automatically consider whether the minor should have a special residence permit, in case they were to face a real emergency situation by returning to their home country. This decision is based on a general evaluation of every minor's particular case, including whether they have relatives or other social networks in their home country. A permission to stay based on this section is given e.g. in those cases where the minor's parents are dead and there are no other relatives who could care for them. The general conditions of the minor's home country are also taken into consideration in order to ascertain whether any situation of armed conflict or famine would constitute a real emergency situation as stated in the law.

Pursuant to this Executive Order's Section 7, subsection 2, a foreigner with a residence permit issued on the basis of Section 9 c, subsection 3, no. 3 has a right to have issued a travel document/ laissez-passer (*fremmedpas*).

Moreover, a temporary residence permit is a proof of legal stay in Denmark, which gives access to the Danish society on an equal footing with other residents. This involves e.g. transfer from the asylum centre to housing in a municipality, possibility to be enrolled in educational courses, assistance by social services, etc. Unaccompanied foreign minors who have a need for special living conditions with adult support will be placed in municipalities that can offer children's homes/orphanages and other types of residential institutions for minors.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Section 56 a in the Aliens Act grants the possibility to appoint a representative forunaccompanied minors for safeguarding their interests; the possibility to have help in locating their family; and the possibility to have counseling by a court-appointed lawyer during their asylum proceedings. The procedure for the appointment of a lawyer to assist the unaccompanied foreign minor is established via Executive Order no. 448 of 2010. The lawyer assists the minors if they have to undergo a so-called 'manifestly unfounded procedure' (an accelerated procedure applied when it appears clear from the first interview that there are no protection grounds to grant asylum), or in the case the minor appeals their rejected asylum application to the Refugee Appeals Board.

Access to education and health care begins already during the children's stay at an asylum center.

Re. access to education, all unaccompanied foreign minors in the age of obligatory schooling in Denmark (between 6 and 16 years of age) receive schooling and offers of leisure activities on an equal footing as other bilingual children in the country. The schooling takes place in the public schools present in the municipality where the asylum centre is located. Activities have to take into consideration the language and previous years of schooling of the children involved. The education's objectives include the general development of the children's competences, along with an understanding of Danish societal norms and of values such as equality, democracy, participation, responsibility, rights and duties, in order to foster a general competence to be able to participate in a society – in or outside of Denmark.

Regarding access to health, the unaccompanied foreign minors have the same rights to health treatment as resident children. During the initial part of their stay at the asylum center, the unaccompanied foreign minors are screened as regards their general condition, both physical (height, weight, sight, and hearing) and psychological, and for infectious diseases. During their stay at the asylum center, unaccompanied foreign minors can have access to necessary health treatment; general guidance

on health (e.g. on eating habits or drug abuse); sex education at least six times a year (for children aged between 12 and 17 years of age); yearly health check-up; yearly dental check-up; examination with a health nurse connected to the school the children are attending; vaccinations according to the Health Ministry guidelines; and increased contact, assistance, and medical help to children with special needs.

During their stay at an asylum centre, unaccompanied foreign minor are also given pocket money every second Thursday (approximately 718 DKK [~ 96 €] every 14 days, which can in some cases be supplemented by an amount of 419 DKK [~ 56 €] every 14 days). Transportation to and from schooling activities, meetings with authorities, or moving to another center are covered by the operators of the asylum centers.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

Beside the activities described above under question 7, the operator/personnel of the asylum centre where the children are accommodated supports the children when they have to move out of the centre by preparing them accordingly. Among other things, they inform the child about the integration period that will start with the transfer to a municipality. The operator will also start a dialogue with the municipality in order to help the authorities design and tailor the integration activities for the foreigner, informing them of their personal competences and general status. The operator will also draft a statement for the Immigration Service, which will be used in the housing placement phase. The foreigner and the operator will also hold meetings to plan the practicalities as regards moving to their new municipality of residence.

When the unaccompanied foreign minors reach the age of 17 years, they are moved to a special department (*UMI 17-afdeling*), where the operators have a focus of preparing them for adulthood. The personnel offers conversations in how to structure everyday life and become an independent individual. The unaccompanied foreign minors still have to receive appropriate schooling and offers to participate in educational and other special activities.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

The Aliens Act establishes the duty for the Immigration Service to help the unaccompanied minor to help find their family of origin (pursuant to Section 56 a), if the minors give their consent in that direction. If there are reception and care centres in the unaccompanied foreign minor's home country, the Immigration Service does not have a duty to help the minor in locating their parents.

Some years ago, the Immigration Service was criticized by the Ombudsman for not adequately fulfilling its duty to provide assistance in locating the unaccompanied minor's parents. After the Ombudsman's critique, the practice has been corrected (see https://www.ombudsmanden.dk/find/udtalelser/beretningssager/alle_bsager/2011_10-2/).

In case of a rejection of the asylum application, the Danish authorities do not necessarily have to locate the family of unaccompanied foreign minors before initiating deportation procedures, as it is possible, according to the law, to return the minors to their country of origin if there are reception or care centers located there.

Family reunification is foreseen in the Aliens Act, Section 9 c, subsection 1. The possibility to grant a residence permit to an unaccompanied foreign minor depends on whether the child can be reunited with the parents in their home country or another country. If that is the case, only in exceptional cases will the family reunification permit be granted.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

As unaccompanied foreign minors are especially vulnerable, they have to overcome challenges they do not always understand in a new and unfamiliar country. For this reason, since 2003 the Danish legislation foresees the appointment of representatives for unaccompanied foreign minors to look after their best interest, help them navigate the system, assist them through their integration journey, accompany them to their interviews with authorities, etc. This is a person of reference, whose tasks are as follows:

- to prepare and accompany unaccompanied foreign minors to meetings in connection with their asylum application at the Immigration Service or the Refugee Appeals Board. The representative is involved in any decision as regard their unaccompanied foreign minor of reference;
- to support and guide unaccompanied foreign minors, for example by helping them to make new experiences and establish social relationships. The representative can make decisions as if they were the legal guardian of the minor in any cases in which they are involved.

To be appointed as a representative, a person should be over 25 years of age, with a of a clean criminal record (*straffeattest*) and a clean criminal record as regards children specifically (*børneattest*), and be independent of immigration authorities. This could be a relative, a private person, or a professional representative employed by the Red Cross. Representatives for unaccompanied foreign minors with street-oriented behaviours are always chosen among professionals employed by the Red Cross, and are not voluntary personnel.

The representative is in contact with the unaccompanied foreign minor during the meetings with the authorities (on average 3 to 5 days per year), and approximately every 14 days for social visits at the asylum center. The minor and their representative decide on the dates and visits among themselves.

If the unaccompanied foreign minor's application is rejected, an attorney will be automatically appointed to assist them with their appeals case (also filed automatically) at the Refugee Appeals Board.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

During the initial stay at the reception center Sandholm, if the Immigration Service has any doubt regarding the unaccompanied foreign minor's age, a medical procedure for ascertaining their age can be initiated. The decision on changing the age of the minor by the Immigration Service can be appealed to the Refugee Appeals Board.

The Aliens Act Section 40 c, subsection 2 establishes that the Police and the Immigration Service can require that an unaccompanied minor, who alleges to be under 18 years of age, shall participate in a medical examination to determine the age of the alien. The obligation to participate in the medical examination was inserted in the Aliens Act by the 2010 amendment. The unaccompanied foreign minor cannot refuse to participate in an examination, as the outcome of the examination has a direct influence on the possibility to be granted a permission to stay. If they do refuse the age examination, they will not be able to claim their minor age to be taken into consideration.

The procedure for age assessment is carried out by the Medical Examiner's Council (*Retslægerådet*) which comprises 12 doctors with psychiatric and somatic specialties. The council is a national organ, which is appointed to issue medical and pharmaceutical assessments and opinions to public authorities in legal cases concerning individuals. Beside age assessment, the Medical Examiner's Council issues medical opinions in several different types of cases. The council was established by law in 1961 (Act no. 60 of 25.03.1961). The relevance of the Medical Examiner's Council is illustrated by case U.2006.1370, where the Eastern High Court considered an age examination by the Council as the conclusive element in the decision regarding the age of an alleged minor who had applied for reunification with his family in Denmark.

The age assessment comprises X-ray examination of the minor's jaw (wisdom teeth) and wrist, and a doctor's evaluation of the development

of their body. The unaccompanied foreign minor's representative will accompany them and be present during the age assessment procedure.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

Upon reaching the age of majority, the unaccompanied minor has to either leave the country or apply for a new residence permit. In other words, this entails that the original temporary residence permit will be revoked, and the foreigner has to leave Denmark, or try to apply for protection on grounds of asylum.

After this shift into the age of majority, and upon receiving a positive decision on a new permission to stay, the former unaccompanied minors can be included in the integration program offered by the municipalities according to the Danish Integration Act. This program foresees (in short) housing placement, cash benefits, obligatory Danish language proficiency classes, and help in finding employment and/or internship opportunities.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

Previous research has shown that children of asylum seekers have a higher risk of developing psychological difficulties and ill-being (see Nielsen, S., et al. (2007), The mental health of asylum-seeking children in Denmark. *Ugeskrift for læger*, 169(43), 3660–3665.) Unaccompanied foreign minors are in a comparably vulnerable situation, as they are without the support of family members and may be deemed mature enough to undergo an asylum application.

The Danish NGO 'Popular movement for refugee children's future' (*Folkebevægelsen for asylbørns fremtid*) suggests that a better solution for unaccompanied foreign minors, especially the youngest among them, would be to give them a residence permit and the possibility to live with a foster family until their asylum application is decided (as it was the case before the law change of 2010). Moreover, the association suggests that the biological age-evaluation, which according to them can gives unreliable re-

sults, should be supplemented by a children specialist's evaluation of their effective maturity (see: https://www.asylboernsfremtid.dk/anbefalinger).

Attorneys have criticized the Immigration Service for not adequately informing and expediting the case handling of family reunification for unaccompanied foreign minors, in case of the acceptance of their asylum application. During the period 2011-2015, the unaccompanied foreign minors had to wait a number of years before being reunited with their family, but in this case the Ombudsman did not find that the Immigration Service's guidelines for information to unaccompanied minors was in breach of its duties (see https://www.ombudsmanden.dk/find/nyheder/alle/vejledning_af_uledsagede_mindreaarige_flygtningeborn/).

The UN Committee on the Rights of the Child visited Denmark in 2017 and on that occasion delivered Concluding observations on the fifth periodic report (available at this link). Among the issues of relevance for the present report, the Committee, at pp. 11-12 noted with concern that:

(a) Unaccompanied children may under certain circumstances be placed into detention when awaiting deportation, and, as of age 17 they are not placed in the specialized children's asylum centers but in centers for adults. Unaccompanied siblings are accommodated according to age and may thus be separated;
(b) There have been increasing disappearances between 2014–2016 of unaccompanied children from the asylum centers, who may have become victims to trafficking for sexual exploitation;
(c) Unaccompanied children who are not found mature enough to undergo the asylum procedure do not have their applications processed until a later stage when they are considered sufficiently mature.

The Committee recommended that Denmark, as a State party to the Convention on the Rights of the Child:

(a) Ensure that children are under no circumstances placed in detention, endeavor to place children in child-friendly accommodation under the child protection authorities instead of asylum centers and in the meantime ensure that all unaccompanied children are placed into the specialized children's asylum centers and that siblings are not separated;
(b) Establish all necessary safeguards, including sufficient surveillance personnel that is aware of the number and names of unaccompanied children in the asylum centers to ensure that unaccompanied children do not disappear from these centers. The State party should increase investigation efforts to search for chil-

dren who have so far disappeared from the asylum centers, provide them with adequate protection and ensure that perpetrators who are involved in child disappearance are adequately persecuted and punished;
(c) Ensure that the asylum claims of children are speedily assessed by considering to place the greater burden of proof in the determination of refugee status on the immigration authorities if the child is considered insufficiently mature. (*ibid.* pp. 11-12).

Estonia

Nele Teelahk, Anastassia Stalmeister, Merili Ratasepp, Mari Schihalejev*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

Act on Granting International Protection to Aliens (AGIPA) § 6:

(1) An unaccompanied minor alien is an alien less than 18 years of age who arrives or has arrived in Estonia without a parent, guardian or other responsible adult person or who loses a parent, guardian or other responsible person while staying in Estonia;

(2) A parent, guardian or another adult responsible person who is staying in Estonia together with a minor alien is presumed to have the right of custody. At the request of the Police and Border Guard Board or the Estonian Internal Security Service a parent, guardian or another responsible adult person is required to certify the existence of the right of custody;

(3) A minor specified in subsection (1) of this section, for whom a natural person has been appointed as a guardian by the court in Estonia, is not deemed to be an unaccompanied minor alien.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

AGIPA § 6 (unaccompanied minor alien) and § 17 (minor and unaccompanied minor applicant) – regulates representation of the unaccom-

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panied children, application for International protection, refferal to substitute home service, looking for family.

Obligation to Leave and Prohibition on Entry Act regulates issueing the precept to leave, execution of the obligation to leave, search of family members in the foreign state.

Social Welfare Act regulates the organisation of the substitute home service for unaccompanied minors, funding and preparation of the case plan.

Family Law Act regulates the appointment of a guardian to the child.

Child Protection Act provides for the obligations and functions of state and local government agencies and the officials thereof, legal persons in public and private law and natural persons upon ensuring the rights and well-being of children, the organisation of child protection, the prohibitions and restrictions established for persons working with children, the principles of treatment of children, the principles of treatment of children in need of assistance, children in danger and children separated from family, the state supervision over compliance with this Act and the liability for violation of the Act.

Convention on the Rights of the Child.

Other relevant International or European laws.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

Act on Granting International Protection to Aliens (AGIPA) § 17 provides the main following rules in the case in which the child is a refugee or has applied for international protection:

(1) In the proceedings for international protection of a minor, including upon provision of services, the rights and interests of a minor shall be taken account of in particular. In proceedings for international protection involving an unaccompanied minor, the rights and interests of the minor shall be taken into consideration above all;

(2) A minor has the right to submit an application for international protection in his or her own name if his or her active legal capacity has been extended or through his or her parent, other adult family member responsible for him or her or a representative;

(3) The provisions of the Family Law Act shall be applied to the representation of a minor alien in the procedural acts performed on the basis of this Act, taking account of the specifications provided for in this Act;

(4) If the age of an alien is unknown and there is good reason to believe that the person is less than 18 years of age, the alien is deemed to be a minor. The Police and Border Guard Board shall decide on treating an alien as a minor or an adult;

(5) If the Police and Border Guard Board have reasoned doubts regarding the information provided by the applicant in respect of his or her age, medical examination for establishing his or her age may be conducted with the consent of the applicant. The Police and Border Guard Board shall inform the applicant of the conduct of medical examinations, of the manner of the conduct thereof and of the consequences that may follow if the applicant refuses to undergo medical examination;

(6) The decision on determining the age can only be contested together with an administrative act or act relating to which the decision on determining the age was made;

(7) The active legal capacity of a minor valid in the country of origin pursuant to the law of the country of origin of the alien shall not be taken into account in the proceedings for international protection if the definition of active legal capacity differs from the corresponding definition provided for by the Estonian law;

(8) If a minor is accommodated in the accommodation or detention centre for applicants for international protection, the minor is ensured a possibility for leisure time activities, including age-appropriate games and hobby activities and activities in the open air;

(9) An unaccompanied minor shall be appointed a representative for performance of procedural acts as soon as it has been identified that the applicant is a minor. A representative shall not be appointed if the minor shall probably attain the age of maturity before the Police and Border Guard Board makes a decision on the application. In such case the unaccompanied minor may independently perform the acts provided for by law;

(10) An unaccompanied minor may be represented by a natural or legal person who is reliable and has the knowledge and skills needed for representing an unaccompanied minor;

(11) The Police and Border Guard Board may enter into a contract with a natural or legal person for the representation of an unaccompa-

nied minor in the proceedings provided for in this Act. If an organisation has been appointed as a representative of an unaccompanied minor, it shall nominate a person who shall be responsible for the performance of the duties of a representative of an unaccompanied minor;

(12) An applicant for or beneficiary of international protection who is an unaccompanied minor shall be placed in the accommodation centre, referred to substitute home service or to an adult relative. The Estonian National Social Insurance Board shall ensure the provision of services specified in clauses 32 (1) 3)-7) of this Act also in the case the unaccompanied minor is referred to substitute home service or to an adult relative;

(13) The Police and Border Guard Board shall commence family tracing of an unaccompanied minor as soon as possible after the submission of an application for international protection;

If a minor is at least ten years old or younger and the level of development of the minor permits, an authority conducting proceedings of an application for international protection shall conduct an interview with an applicant in the course of which the applicant is provided with an opportunity to present facts and give explanations with regard to the circumstances of essential importance in the proceedings of his or her application for international protection, including the circumstances that prevent the expulsion of the applicant from the country (AGIPA § 18 (4)-(5)):

If there is a need to identify a person on basis of DNA data, then according to Act on Granting International Protection to Aliens art. 13^5 (2) upon deciding of the taking of DNA probes of a minor alien, the rights and interests of a minor shall be taken into consideration in particular.

AGIPA § 20^2 (3) prescribes that the application of an unaccompanied minor, if it is in the interests of the minor, may be reviewed under the expedited procedure only in the following cases:

1. there is reason to consider the applicant's country of origin as a safe country of origin or the applicant poses a threat to national security or public order or he or she has been expelled from Estonia for the specified reasons;
2. upon the processing of the application for international protection the applicant has knowingly provided incorrect information, given incorrect explanations, has knowingly failed to provide information

or give explanations which are of essential importance to the processing of his or her application for international protection, or has knowingly submitted falsified documents and there is reason to believe that the applicant has destroyed or disposed of a document or any other evidence that would have helped to establish his or her identity or citizenship, but on condition that the special needs of the unaccompanied minor have been taken account of and he or she has been given an opportunity to justify his or her action, including to consult his or her representative;

3. the applicant has submitted an application for international protection only to avoid the compliance with the obligation to leave, but on condition that the review of the content of the application is not refused in the cases where it has been established that there are no new facts and the applicant has failed to submit new documents or evidence which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection, the application shall not be reviewed;
4. the applicant has arrived in Estonia through a country which can be considered a safe third country.

An applicant who is a minor shall be accommodated together with his or her parent, his or her single minor sister or brother or guardian on condition that it is in the interests of the minor (AGIPA § 31^1 (2)).

AGIPA § 10^2 specifies the rules about the right of access to education of minor applicant for international protection. An applicant for international protection who is subject to the obligation to attend school shall be guaranteed access to education pursuant to the procedure provided for in the Basic Schools and Upper Secondary Schools Act within three months as of the submission of the application for international protection. In order to ensure access to education a minor applicant for international protection is entitled to preparatory training, including language training. Access to upper secondary school education shall not be limited solely for the ground that the minor has come of age.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

Unaccompanied children must be treated first and foremost as children, not as migrants. The child's best interests must be a primary consideration in all actions regarding the child, regardless of the child's migration or residence status. No child should be denied access to the territory or summarily deported at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if he or she is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in his or her best interest (Unaccompanied children in Europe: issues of arrival, stay and return Report1 Committee on Migration, Refugees and Population Rapporteur: Ms Mailis REPS, Estonia, Alliance of Liberals and Democrats for Europe).

If the border guard discovers an unaccompanied minor, it has to prevent the border crossing and to identify the person. Generally persons are not held at the border points but delivered immediately to competent authorities (representative of the Police Board – there may be exceptions, e.g. if the child is afraid of returning to home country and wishes to apply for asylum, the Border Guard Authority delivers the child to the CMB35). Border Guard shall be obliged to stop a minor from crossing the border, if there is a judicial decision or regulation, and to send the child back together with the accompanying person or contact a legal representative older than 15 years.

A minor foreigner who lacks a legal basis or valid travel document for entering Estonia and who wishes to seek asylum or a residence permit based on temporary protection, shall be allowed to enter Estonia after submitting to a police institution an asylum request or application for residence permit on the basis of temporary protection.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The administrative authority that is conducting the procedural acts in the proceedings provided for in this Act is required to take into account the specific needs of minors (Obligation to Leave and Prohibition on Entry Act § 67).

The precept to leave shall be issued to an unaccompanied minor alien if upon the issue of the precept to leave the representation of the unaccompanied minor alien is ensured and his or her interests are taken into account (Obligation to Leave and Prohibition on Entry Act § 12(3)).

The obligation to leave of an unaccompanied minor alien shall be complied with taking account of the interests of the unaccompanied minor alien and if the guardian is convinced that the unaccompanied minor alien shall be sent back to his or her family member or appointed guardian or to the reception centre of the receiving state. (Obligation to Leave and Prohibition on Entry Act § 12(5)).

Obligation to Leave and Prohibition on Entry Act § 21:

(1) An unaccompanied minor may be expelled if the custody of a minor is arranged and the protection of the rights and interests of the minor are ensured in the admitting country;

(2) Expulsion of an unaccompanied minor is arranged in coordination with the competent state agencies of the admitting country and in case of necessity with the competent state agencies in the transit country.

Recommendations of UN and EU must also be taken into account, such as:

1. The child may be returned to the State of origin only if it is in the best interests of the child and such a decision has been reached after due consideration of all the circumstances. The consideration shall take into account, inter alia, the following factors:
   - security in the country of origin and socio-economic conditions for the child after return;
   - whether the child is provided with care after return;
   - the opinion of the child and the guardian on the return;
   - the level of integration of the child's country of residence and the length of time away from the country of origin.
2. The effect of the decision on the child's right to preserve his or her identity, nationality, name and family relationships; the continuity of the child's upbringing and the child's ethnic, religious, cultural and linguistic background.
3. The return of a child should be avoided if it could result in serious human rights violations: if the right to life is threatened, there is a risk of

torture or other cruel or degrading treatment, physical or mental violence, abuse, neglect, sexual abuse may occur, harmful.

If the principle of the best interests of the child does not allow the child to be returned to his or her country of origin, he or she has the right to remain in the country of residence. In this case, he is entitled to a residence permit.

Even if the child does not receive international protection (incl. subsidiary protection), he or she must be guaranteed all the rights arising from the Convention on the Rights of the Child as long as the child is in the territory of the state.

The relocation of the child to a third country may also be considered. This may be the most appropriate solution if it allows the child to settle with his or her family members.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The Police and Border Guard Board shall receive and resolve an application for international protection.

A court decides on establishment of guardianship.

Local government (the rural municipality or city government) performs the duties of a guardian.

The Estonian National Social Insurance Board shall ensure referral to a substitute home service and finance, compiles case plan.

Substitute care service provider (substitute home, accommodation centre, foster family) – provides substitute care servive and organizes everyday life.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

At first, depending on age, an unaccompanied foreign minor is placed in either a shelter or an accommodation center. A suitable form of substitute care – either a substitute home or a foster family – for long-term care

is found for a minor temporarily placed in a shelter. The requirements set for accommodation centers are described in § 32 of the AGIPA.

The translation is organized by the Estonian National Social Insurance Board and the Police and Border Guard Board in cooperation with each other. The involvement of other intermediaries will take place according to needs and possibilities.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

In the case of long-term placement, the use of substitute care (substitute home, foster family) is justified and beneficial. As a rule, an unaccompanied minor is placed on the same basis as an Estonian child (except that in the case of an unaccompanied minor, the substitute care service is financed from the state budget, in the case of Estonian children, local governments). The requirements and standards for substitute care service providers are generally the same as for substitute care provided to local children (§ 45^6 - § 45^8 of the Social Insurance Act). Additional requirements for the service provider are knowledge of a foreign language and knowledge of cultural background (if possible).

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

There is no law restricting the adoption of an unaccompanied minor. This has not happened in Estonia so far. Adoption would take place on the same basis as conventional adoption in Estonia. (Family Law Act §§ 147-170).

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

The court of the place of stay appoints (a county court) a guardian for an unaccompanied minor. There are no specialized courts in Estonia. Judges who handle family law matters, adjudicate appointing guardians as well.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

The Police and Border Guard Board in cooperation with other relevant administrative bodies must assess the best solution for the minor in the best interests of the minor. If the minor's stay in Estonia is justified, he/she must be issued a residence permit and the if interests of the minor must be taken into account when choosing the type of residence permit.

In practice if unaccompanied minor has no legal ground for staying, there is no automatic granting of residence permit.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Access to education, health services, judicial protection, right to be heard, legal aid, access to public services are granted to all children in Estonia, including unaccompanied minors.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

There is no legal instrument and integration is handled on a case-by-case basis after the child is placed upon substitute home service.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

Yes, the Police and Border Guard Board handles that.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Yes, the appointment of a legal guardian is forseen. Legal guardian is appointed by the County Courts. Appointment of a legal guardian is regulated in the Family Law Act (FLA) chapter 12.

- FLA § 171(1): If neither of the parents of a minor child has the right of representation or if it is not possible to ascertain the origin of a child, a guardian shall be appointed to the child.
- FLA § 172: A guardian has both, the right of custody over the person and property of the child. Local government may be appointed as legal guardian as well to an unaccompanied minor. Guardian may be a local.
- FLA § 179 (1): Guardians are the legal representatives of persons under guardianship. A guardian has the right and obligation to care for the person and property of the person under his or her guardianship within the limits of his or her duties.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

If the Police and Border Guard Board have reasoned doubts regarding the information provided by the applicant in respect of his or her age, medical examination for establishing his or her age may be conducted with the consent of the applicant or his or her representative. The Police and Border Guard Board shall inform the applicant of the performance of medical examination, of the manner of the performance thereof and of the consequences that may follow if the applicant refuses to undergo medical examination. If the age of an alien is unknown and there is good reason to believe that the person is less than 18 years of age, the alien is deemed to be a minor. The Police and Border Guard Board shall decide on treating an alien as a minor or an adult. The decision on determining the age can only be contested together with an administrative act or performed proceeding during which the decision on determining the age was made.

Child Protection Act § 3 states that if the age of a person is unknown and there is reason to believe that the person is below the age of eighteen years, the person shall be deemed to be a child until proven otherwise.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

If a person on an substitute service reaches the age of majority, he/she has a right to aftercare services as any other young people in Estonia. The purpose of aftercare service is to support a person leaving substitute service and guardianship on independent living and continuing studies. According to a case plan housing and needs-based grants and servies are provided (Social Welfare Act §§ 45^{15}-45^{17}).

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

The main concern in Estonia is the very low practice of receiving unaccompanied minors. No unaccompanied minors have arrived in Estonia for several years. Legislation and the legal framework are in place, but due to very little experience, the boundaries of competences between different agencies are blurred and needs assessments are difficult.

France

Christine Bidaud, Claire Brunerie, Aurore Camuzat, Margot Musson[*]

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

There is no specific legal discipline as such. French law provides that the usual measures of the child protection system are activated with regard to foreign minors. Indeed, the provisions on children in danger are applicable throughout French territory, to all minors who are there, regardless of their nationality or that of their parents (Cass. 1re civ., 27 Oct. 1964: JurisData n° 1964-700472. - Cass. crim. 4 Nov. 1992, n° 91-86-938 : JurisData n° 1992-003113. - Cass. 1re civ., 16 Jan. 1979, n° 78-80.002 : JurisData n°1979-700022).

However, there are some specific measures contained in the Code of Entry and Residence of Foreigners and the Right of Asylum (CESEDA) and the Code of Social Action and Families (CASF), it is necessary to articulate both.

According to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, an unaccompanied minor is "*a third-country national or a stateless person below the age of 18 who enters the territory of the Member States unaccompanied by an adult responsible for him/her, under the law or practice of the Member State concerned, and for as long as he/she is not effectively taken into the care of such a person; this ex-*

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pression also covers a minor who has been left unaccompanied after entering the territory of the Member States".

According to the circular of 19 April 2017 relating to the judicial protection of children (Circ. NOR: JUSF1711230C: BO min. Justice n° 2017-04, 28 Apr. 2017), in its sheet n° 10: "*A minor is considered to be unaccompanied when no adult is legally responsible for him or her on the national territory or does not effectively take care of him or her and does not show his or her wish to be entrusted with the child on a long-term basis, in particular by referring the matter to the competent judge*".

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children sorts out roles between countries to take care of unaccompanied children.

States have an obligation to look after unaccompanied children, according to the ECHR and under Article 3 of the European Convention on Human Rights (*Khan v. France*, 28.02.19, req. n° 12267), and under 20 of the International Convention on the Rights of the Child.

There are several European laws concerning unaccompanied children:

- Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries;
- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof;
- 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;

- 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):
- 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):
- 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);
- Directive 2008/115/Ec of the European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

The French Social Action and Family Code regulates their reception. The reception system is described by a ministerial circular (Circulaire du 31 mai 2013 relative aux modalités de prise en charge des jeunes isolés étrangers : dispositif national de mise à l'abri, d'évaluation et d'orientation). The CESEDA doesn't require unaccompanied foreign minor to have a residence permit and states that the minor is taken of care by the children's social welfare.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

The status of isolated minor can be obtained by a child who makes an asylum application. The French Office for the Protection of Refugees and Stateless Persons must inform the children's judge when a foreign child makes an asylum application. Apart from that, there does not seem to be any specific rules.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

An unaccompanied minor, like an adult, may be refused entry. The same procedure as for adults applies.

There does not seem to be any exception. However, the procedure is relatively more protective. In this sense, the border police must notify the

public prosecutor of the presence of an unaccompanied minor at the border so that an "ad hoc administrator" can be appointed. This administrator must be present when the refusal of entry to the territory is handed over and must sign for the person. In the absence of this administrator, the procedure is irregular.

Outside the land border of France, a minor foreigner who is not accompanied by a legal representative cannot be repatriated before the expiration of the period of one clear day, according to Article L. 213-2 of the Code of Entry and Residence of Foreigners and the Right of Asylum. (CESEDA).

From a more general point of view, Article L. 213-2 of the CESEDA provides that "special attention shall be paid to vulnerable persons, in particular minors," but it is not known what special attention is mentioned.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The normal aliens legislation applies to unaccompanied foreign minors, but they cannot be subject to an obligation to leave the country or an expulsion (art. L. 511-4 and L. 521-4 of the CESEDA).

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The assessment, reception and support arrangements for unaccompanied minors fall within the scope of child protection. Law no. 2016-297 of 14 March 2016 on child protection specifies their status: as "*minors temporarily or permanently deprived of the protection of their family 14*", they are considered to be children at risk and must therefore be taken in by child protection establishments and services, by decision of the president of the departmental council. This reception by the departmental services may also be triggered by a decision of the judicial authority (children's judge, public prosecutor, guardianship judge).

The child welfare service, a non-personalised service of the department, must provide material, educational and psychological support to minors facing difficulties, carry out urgent protection measures in favour of these minors and provide for all the minor needs entrusted to it (CASF, art. L.

221-1). While these classic child protection measures are not always sufficient (CE, 8 Nov. 2017, no. 406256: JurisData n° 2017-022115), they are most commonly used to protect unaccompanied foreign minors.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

The reception system is described by a ministerial circular (Circulaire du 31 mai 2013 relative aux modalités de prise en charge des jeunes isolés étrangers : dispositif national de mise à l'abri, d'évaluation et d'orientation) In France, it is the role of French departments to look after them: it's called educational assistance. Before that, the department has to organize their emergency reception.

The departmental board evaluates the child's situation, their age et determine the necessary actions to protect and help them. It welcomes the child for five days. If it is proven that the child is underage and isolated during this period of time, the president of the departmental board refers the case to the Prosecutor which issues an order of temporary placement in a structure handled by the children's social welfare ("aide sociale à l'enfance"). The Prosecutor then refers the case to the children's judge within 8 days.

Once the child is taken care of by the children's social welfare, there can be socio-educational back-up measures and financial support.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

There is no difference between the procedure for the placement of foreign children and the procedure for minor children since child protection is open to foreign children in the same way as it is open to nationals. (Article L. 111-2 of the Code de l'Action Sociale et des Familles; Cour d'Appel de Paris, 16 May 2000, n°99/16403 : "*The provisions relating to children in danger are police and security laws intended to protect a category*

of citizens, considered vulnerable because of their young age, and to prevent, in a concern for social cohesion, children or adolescents from being applied different measures because of their nationality; thus, in application of Article 3 paragraph 1 of the Civil Code, these provisions are imposed on French territory to all minors under the age of 18 who are on French territory, regardless of their nationality or that of their parents").

The following are the different stages in the placement of a separated minor child:

- 1st: Reception interview (Article L. 226-2-1 of the Code de l'Action Sociale et des Familles). The aim is to remove young people who are clearly not unaccompanied foreign minors.
- 2nd: Emergency temporary reception (art. L. 223-2 of the Code de l'Action Sociale et des Familles). It is the departmental council of the place where the young person declaring himself/herself to be an unaccompanied minor has been identified or has presented him/herself that must receive him/her during the 4 days. This temporary reception is financed by the State on the basis of a lump sum of 250 euros per young person and per day.
- 3rd: Evaluation of the young person's situation in order to ensure his or her minority and isolation on French territory. During the temporary emergency reception, the General Council evaluates the situation of the person concerned. Two types of investigation are carried out: on the one hand, it is a question of ensuring the minority and isolation of the person.
- 4th : End of the administrative care after the 5 days deadline. The General Council refers the matter to the Public Prosecutor. Two hypotheses emerge:

o Either the evaluation of the situation of the person concerned has been completed within the time limit of the emergency provisional reception:

- recognized minority and isolation: a temporary placement order is issued and a referral is made to the Children's Judge within 8 days, the young person remains in the care of the administrative authority.
- unrecognized minority and/or isolation: the Public Prosecutor's Office closes the case.

o Either the assessment of the situation of the person concerned has not been completed within the time limit for provisional reception, in which case the Public Prosecutor's Office issues an order for provisional placement while investigations are carried out.

- At the end of this procedure, the department to which the minor is assigned will be responsible for the placement. This placement may be made in a specific institution or in foster families. It is the department that will establish the conditions for being a foster family for an unaccompanied minor. As an example, here is the procedure carried out by the Val de Marne department: https://www.france-parrainages.org/france/france-parrainages-devient-la-premiere-association-a-mettre-en-place-un-accueil-durable-des-mna-sur-le-territoire.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

The principle is that the adoption of a child required their parent's consent. But concerning unaccompanied foreign minors, the adoption procedure can be applied: you just have to make sure there's no filiation link.

The unaccompanied foreign minors can be adopted if they are recognized as wards of the State: if they were abandoned by their parents, if they are orphans, if they are taken care of by the children's social welfare for over 6 months, if they were specifically handed over to the children's social welfare for them to be recognized wards of the State for over 2 months, or in case of unknown parentage and who are taken care of by the children's social welfare for over 2 months (art. L. 224-4 of the social work and family Code).

They can also be adopted if they are declared judicially abandoned, for example if they are taken care of by the children's social welfare and if their parents have shown disinterest in them for a year (art. 350 of the civil Code).

The adoption requires a consent by the family council (art. 349 of the civil Code), composed by the department council's representatives, members of associations and persons chosen by the State's representative in the department (art. L. 224-2 of the social work and family Code). Full adoption is only possible if the child has been taken care of by those who want to adopt them for over 6 months (art. 345 of the civil Code).

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

The judicial system can intervene at different times. The child welfare reception service may be triggered by a decision of the judicial authority (juvenile judge, public prosecutor, guardianship judge).

When an unaccompanied minor is taken in, it is necessary to check his or her minority and isolation. The review of the unaccompanied minor's situation may be carried out by the juvenile court judge or the guardianship judge.

Subsequently, it is necessary to set up a system of legal presentation for the unaccompanied minor. The family court judge may appoint a legal representative for the unaccompanied minor and decide on a guardianship measure. If no legal representative has been appointed, the juvenile judge may grant the right to a public institution or service to exercise parental authority (through a delegation of parental authority).

If the situation does not require the appointment of a guardian, an ad hoc administrator may be appointed. In this case, it will be necessary to refer the matter to the public prosecutor of the Judicial Court, the liberty and detention judge or the examining magistrate.

In all cases, in all decisions concerning him or her, in particular with regard to the placement and search for family members, his or her best interests, special needs and opinion are taken into account according to his or her age and maturity. Where his life or physical integrity or that of his close relatives remaining in the country of origin is threatened, such research shall be conducted confidentially.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

Unaccompanied foreign minor are not required to have a residence permit (art. L. 311-3 of the CESEDA). Once they come of age, for children who were under 16 when they were taken care of by the children's social welfare, a residence permit can be granted; for other children, they can ask for that residence permit (art. L. 313-11 of the CESEDA). The residence permit can't be granted if the person constitutes a threat to public

policy. It allows them to legally stay in France. It is granted reflecting the reality and serious nature of the formation tracking, the nature of their link with their families who stayed in their country of origin, and the opinion of the hosting structure regarding the child's insertion in French society.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

It is essential to meet the basic and specific needs of unaccompanied minors. The need for accommodation must be met, in particular through an emergency reception service and then by adapting accommodation solutions (right to housing). They must also be guaranteed access to health care in order to preserve their physical and mental health (right to health and access to health care). It is also necessary to set up legal representation, either through the appointment of a guardian or an ad hoc administrator (legal capacity, judicial protection). Support must be provided for their integration process, both within French society and within the national education system. Indeed, it is necessary to help them by assessing their level and then building a schooling or professional integration project. Depending on the situation, it will be necessary to monitor their schooling and/or support them in their vocational training (access to education and work). Finally, it is necessary to identify and prevent situations of human trafficking and running away.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

To our knowledge, there is no legal instrument as such. Nevertheless, the Departmental Council[1] can take initiatives to insert unaccompanied minors into the national system, such as, for example, placing them in foster families.

[1] Administrative division of the French territory placed under the authority of a prefect and administered by a General Council.

Article L. 413-2 of the CESEDA (which comes into force on May 1, former Articles L. 311-9 et seq.) provides that a minor arriving in France who is over 16 years of age must embark on a personalized Republican integration program. The objective is the foreigner's understanding of the values and principles of the Republic, learning the French language, social and professional integration and access to autonomy.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

Yes, an unaccompanied minor has the right to bring his or her parents. Since the law n° 2018-778 "asylum and immigration" of September 10, 2018, an unaccompanied minor child who has been granted protection, can also bring his/her brothers and sisters. The objective of this extension is not to make the parents choose which child will go abroad and which child will remain within the family sphere. (art. L. 313-25 et L. 313-26 of CESEDA).

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Here again, there is no distinction between the opening of a guardianship for an unaccompanied foreign minor and the opening of a guardianship for a national. In France, the rules are set out in Articles 390 and 373 of the Civil Code.

1. Opening of guardianship. Article 390 of the Civil Code provides that Guardianship is opened when the father and mother are both deceased or are deprived of the exercise of parental authority. It also opens with respect to a child whose filiation is not legally established. In the case of foreign unaccompanied minors, the parents or legal representatives are either deceased or geographically distant and therefore unable to exercise parental authority. As a result, unaccompanied foreign minors are still subject to a guardianship measure.
2. Referral to the guardianship judge who is, in France, the family court judge. The guardianship judge can:

- Either take ex officio cognizance of a letter addressed to him/her describing the situation of a minor.

- Either be seized by the request of parents or relatives or the public prosecutor's office.

3. Appointment of the guardian. In the context of this case, if the unaccompanied minor has no parents in France, the guardian is the Aide Sociale à l'Enfance (ASE), according to Article 411 of the Civil Code. If he or she has parents in France, then a family council composed of 4 members will meet to appoint the guardian.
4. The obligations/functions of the guardian are described in Article 408 of the Civil Code. The tutor takes care of the person of the minor and represents him/her in all acts of civil life, except in cases where the law or custom authorizes the minor to act himself/herself. The tutor represents the minor in court. The tutor manages the minor's property. On the practical side, the tutor will be able to carry out all the administrative paperwork to apply for the minor's asylum.
5. Termination of guardianship: guardianship ends when the minor is emancipated or reaches the age of majority. It also ends in the event of a final judgment of release or in the event of the death of the person concerned.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

The question of the real age of the young foreigner arriving on French territory is a determining factor in determining whether the latter – particularly when he or she presents himself or herself as an unaccompanied minor – can benefit from educational assistance measures.

The circular of 31 May 2013 (relating to the arrangements for taking care of young unaccompanied foreign nationals: national shelter, assessment and guidance system) describes in detail the procedure for sheltering unaccompanied minors. It has been designed to be implemented uniformly throughout the national territory to ensure the minority and isolation of young people presenting themselves as unaccompanied minors, and to ensure that they are taken into care by a child welfare ser-

vice in the department where the assessment was carried out or in another department.

According to the circular of 31 May 2013 and the decree of 20 November 2019 (JO n°0273 of 24 November 2019), the assessment of the minority is based on the combination of a set of clues drawn from one or more interviews conducted with the young person in a language understood by him or her by qualified personnel as part of a multidisciplinary approach demonstrating neutrality and benevolence, information provided to the president of the departmental council by the representative of the State in the department that is useful for determining the identity and situation of the person, and for verifying the authenticity of the identification documents presented by the young foreigner.

As part of their assessment, assessors must gather various types of information (civil status, family composition, living conditions in the country of origin, reasons for leaving the country of origin, migratory journey up to entry into France, living conditions since arrival in France, the person's plans) and ensure that they compare the physical appearance of the person being assessed, their behaviour, their ability to be independent and autonomous, their ability to reason and understand the questions asked with the age they allege. At the end of the assessment, a reasoned report is drawn up and submitted to the president of the departmental council, and to the public prosecutor in the case of a minority.

Where the unaccompanied minor has a civil status record, this must meet the conditions imposed by Article 47 of the Civil Code. Although it will be presumed conclusive if it meets the formal requirements imposed by the lex loci, it must correspond to the reality of the facts, be regular and not be falsified. Otherwise, it will not be conclusive and will not be able to prove the unaccompanied minor's minority.

However, in the vast majority of situations, the unaccompanied minor does not have a civil status document. In this case, if there is a simple doubt as to his or her minority, it is possible to carry out a medical assessment of age. The circular of 31 May 2013 specifies that the medical examination must be carried out on the basis of a single, enforceable protocol incorporating clinical, dental and radiological data on bone maturity. Radiological data on bone maturity alone are therefore not sufficient.

Since the Law of 14 March 2016 (L. n° 2016-297, 14 March 2006 : JO 15 March 2016), radiological bone examinations for the purpose of determining age can thus be ordered in the absence of valid identity documents and when the alleged age is not likely. Indeed, Article 388 of Civil Code provides that "*A minor is an individual of either sex who has not yet reached the age of eighteen years. An X-ray of the bones for the purpose to determine age, in the absence of valid identity documents and when the alleged age is not credible, may be carried out only by decision of the judicial authority and after obtaining the consent of the person concerned. The conclusions of these tests, which must specify the margin of error, cannot in themselves be sufficient to determine whether the person concerned is a minor. Doubts are to the advantage of the person concerned. In case of doubt about the minority of the person concerned, an evaluation of his or her age cannot be made on the basis of an examination of pubertal development of primary and secondary sexual characteristics*".

Only the judicial authority may order them and only after obtaining the consent of the person concerned, assisted by an interpreter if necessary. The conclusions of the examinations must specify a margin of error and cannot in themselves determine whether the person concerned is a minor. In case of doubt, the minority shall benefit. In any event, an age assessment cannot be made on the basis of an examination of pubertal development of primary and secondary sexual characteristics.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

There are no legislative tools to integrate the major. Nevertheless, the civil society is organized in such a way as to allow adults to integrate. As an example, reference is made to associations, NGOs. Some departments will also organize meetings with host families. The civil society, especially the department, plays an important role in the accompaniment of adults, especially in the schooling, administrative support etc.

As they do not need a residence permit during their minority (cf. - question 11), they will have to apply as soon as they reach the age of majority, otherwise they will be in violation of the law. In order to reside legally in France, they must have a residence permit.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

Unaccompanied foreign minors depend on two types of protection measures. On the one hand, they are considered as children in danger and fall under all child protection measures applicable to all children regardless of their nationality, situation etc. On the other hand, they are considered as children in danger and fall under all child protection measures applicable to all children regardless of their nationality, situation etc. They are mainly found in the CASF. On the other hand, there are specific texts allowing them to benefit from a derogatory or favorable regime in terms of residence permits and protection against deportation. These measures are written to the CESEDA. In addition to these two legislative codes, a few specific non-codified texts must be added, so in order to know exactly what their protection regime is, a cumulative application of these numerous texts must be made.

In addition, the question of determining the age of the minor remains a very delicate point. France has chosen to allow the use of bone tests under very strict conditions. However, in view of their reliability, the very possibility of resorting to the use of these tests remains very controversial.

Moreover, even if the complex system for unaccompanied minors takes into account the specific nature of situations, on the other hand, when the minor becomes an adult, he ceases to be protected and the texts allowing him to remain in France and benefit from support measures for young adults lack precision. As these measures are entrusted to the departmental councils, a disparity may exist depending on the department.

France

Priscilla De Corson*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

French national law does not devote a specific set of laws to unaccompanied foreign minors, but rather uses its national child protection legal provisions. It is considered that unaccompanied foreign minors are children before being foreigners, and should, as such, not be subjected to a specific set of laws such as migration or asylum law.

France started welcoming unaccompanied foreign minors in the 80's, when offering to relocate some minors from Indochina and Yougoslavia. Then, in the 90's, unaccompanied foreign minors arrived by their own, outside any relocation scheme. At this early stage, there is no definition of those minors in the French national law, although social workers and media start referring to "mineurs isolés étrangers" (isolated foreign minors). Judicial and administrative authorities have no specific legal set of measures regarding the care of these children and use French child protection laws.

In the outset of the XXIst century, French courts decide that as far as minors are concerned, the fact of being isolated (i.e. separated from its own family or from any legal representative) amounts to being in danger, and therefore child protection measures have to be applied (Article 375 French civil code and L. 221-1 CASF; Cour Appel de Poitiers 7 November 2002, n° 02-184).

A definition of unaccompanied foreign minors can be found in law n° 2007-293, adopted on March the 5th, 2007, which amends Article L. 112-3 of the Social Action and Family Code (CASF), and states that "*child protection also aims at preventing difficulties that may face minors*

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temporarily or permanently deprived of the protection of their families and ensure their care." Thanks to this provision, it is made clear that French child protection rules directly apply to foreign isolated minors.

If France initially distinguished itself by treating isolated foreign minors as French minors, this is no longer entirely true. Indeed, over the years, a set of legal measures specifically designed for foreign isolated minors has progressively been adopted, enacting in practice a difference in the treatment of the latter, who no longer benefit from the same care as national minors.

Several definitions of unaccompanied foreign minors can also be found in international and European laws. Below are a sample:

- Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03) : "*third-country nationals below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively in the care of such a person*";
- 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, Article 2 (l): 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;
- French National Consultative Commission on Human Rights : a minor of 18 who is outside his country of origin without anyone exercising legal responsibilit, i.e. without anyone to protect him and take important decisions for him[1].

[1] Avis CNCDH 20 nov. 2014

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

Many areas of French law concern unaccompanied minors, such as:

- Social Action and Family Code;
- Civil Code;
- Civil and Criminal Procedural Codes;
- Education Code;
- Public Health Code;
- Entry and residence of foreigners and right of asylum Code;

EU and international laws.

- 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;
- The Dublin Regulation (Regulation No. 604/2013; sometimes the Dublin III Regulation; previously the Dublin II Regulation and Dublin Convention) is a European Union (EU) law that determines which EU Member State is responsible for the examination of an application for asylum, submitted by persons seeking international protection under the Geneva Convention and the EU Qualification Directive;
- The Convention of 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants;
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children;
- Directive 2008/115/Ec of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, called Return Directive.

See the attached documents for detailed legal references.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

Unaccompanied minors have the same right as adults to apply for international protection. They can apply for both asylum (based either on the Geneva Convention or on the French Constitution) and subsidiary protection. See for instance Article 22 of the Convention on the Rights of the Child (26.01.1990).

The procedure is basically the same; however there are a few additional safeguards for unaccompanied minors:

- Legal guardianship or designation of an ad hoc guardian (AHG): Children have no legal capacity and as such need a guardian to apply for international protection. In the absence of legal guardianship, it is the responsibility of the French administrative authority (prefecture) to contact the Prosecutor's Office and request the designation of an AHG (Article L. 741-3 CESEDA). The appointment of an AHG is supposed to be prompt, however it is often a lengthy procedure in practice;
- The asylum claim must be conservatively registered even in the absence of an ad hoc guardian;
- Interviews and hearings can be conducted in camera;
- Administrative authorities, when informed that an asylum claim is made by an unaccompanied minor, must assess its vulnerability.

EU laws on asylum apply to unaccompanied minors, and specific laws have been designed in order to determine the Member State that should be responsible for their application. Thus, unaccompanied minors can be reunited with family members prior to their application for asylum. This procedure applies across the EU and is set out in Article 8 of the Dublin III Regulation.

Once unaccompanied minors have applied for international protection and an ad hoc guardian has been appointed, they are interviewed by the Office Français de Protection des Réfugiés et des Apatrides (OFPRA = French administrative authority competent for international protection claims). If the application is rejected, applicants have one month to lodge an appeal to the French National Court of Asylum.

Enclosed is the official Guide to Asylum for unaccompanied minors in France (published by OFPRA):

https://ofpra.gouv.fr/sites/default/files/atoms/files/maquette_livret-mna_24042020_web.pdf

Rights granted to unaccompanied minors who are refugees or beneficiaries of subsidiary protection

- Residence permit (10 years for refugees and 4 for subsidiairy protection, which can be renewed);
- Right to work;
- Access to accommodation;
- Access to health;
- Family reunification (the minor's international protection allows his siblings and his parents to join him in France and obtain a residence permit) L 752-1 CESEDA;
- Legal representation;
- Reconstitution of civil status.

Difficulties for unaccompanied minors to apply for international protection

In practice, access to asylum procedure is difficult for unaccompanied minors.

One important obstacle is the ignorance of many child protection services that asylum procedures and child protection programs are two different things and can be pursued simultaneously. Many social workers believe wrongly that, if an unaccompanied minor is into child protection care, then there is no need for him to apply for international protection. Training of professionals about asylum procedures is needed.

Many prefectures, which are responsible for the registration of asylum applications, do not take on claims from minors who are not taken into child protection care, although there is no legal basis in French law for such refusal. Training on how to request the designation of an ad hoc guardian are needed as minors who are not into child protection care have no legal representant to apply on their behalf and need such representation.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*
5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

Questions 4 and 5 will be treated jointly.

In principle, French law strictly prohibits the expulsion or removal of unaccompanied minors (Article L. 511-4 1° CESEDA prohibits removal of unaccompanied minors and L. 521-4 prohibits their expulsion).

Foreign minors are never considered as being in an unlawful situation in France and do not need to be in possession of any kind of residence permit. Therefore, as their presence in France is never unlawful, they cannot be expelled or removed from the national territory.

Although forbidden by law, expulsion of unaccompanied foreign minors happens in practice for those whose minority is contested. Thus in 2020, the Defender of Rights has alerted the UN Committee of "*the rise in referrals it was receiving about the placement in detention of young people claiming to be unaccompanied minors, whose age had not been assessed on the grounds that consultation of the 'Visabio'*[2] *or 'Eurodac'*[3] files identified previous evidence that they were allegedly of adult age."

Unaccompanied minors should not be placed in retention centers either.

There a few exceptions to the principle of prohibiton of expulsion and removal.

- The main exception concerns foreign unaccompanied minors retained at the borders. French Courts have authorized unaccompanied minors to be retained at the borders (and in particular in what's called *zones d'attente*) which can subsequently lead to their removal. One important procedural safeguard was the *jour franc* which allowed them one day (24 hours) during which they can contact a lawyer, a family member, an ad hoc guardian and / or their consulate etc in order to obtain assistance against removal). This *jour franc* has been

[2] The automated processing of personal data, VISABIO, involves the recording of fingerprints of foreign nationals applying for a visa.

[3] Large-scale information system containing the fingerprints of asylum and subsidiary protection applicants and illegal immigrants on EU territory.

suppressed at the borders since the Asylum and Immigration Law of 2018, and therefore enables border police to remove children.

- Judicial procedure exists to ensure the voluntary return of unaccompanied minors to their home country (Circulaire interministérielle 07/12/2006, Assistance for Humanitarian Return). Such return can only be granted if it is in the best interests of the child (CA Paris 7/12/2004 n° 04/08249).
- The Brussels II bis Regulation, based on the Lisbon Treaty, provides for the return of minors to another Member State.
- It is important to stress here that the EU 2008/115/CE Directive (dated 16/12/2008), called *Directive Retour* allows for the retention and removal of unaccompanied minors (subject to the respect of some procedural safeguards). However, this provision does not apply in French law as it has no direct application and has not been translated into our domestic law.
- Furthermore, some political arrangements have been made between countries such as France and Romania or France and Morocco to facilitate the removal of unaccompanied minors. Those protocols are monitored closely by human rights lawyers and NGOs as it is not uncommon that they violate the child's bests interests. Thus, one protocol between France and Romania has been deemed unconstitutional by the French Constitutional Court (Décision n° 2010-614 DC du 04 novembre 2010), as it enabled the French Prosecutor to allow the removal of unaccompanied children, and it did not grant a right to appeal against that decision to the children concerned. Such protocols would no longer be necessary among EU member states now that the Brussels II bis Regulation is in force, however, similar protocols are still being used with non-EU states.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

In France since 1982, child protection is primarily the competence of departments, i.e. local territories (Article L. 226-3 CASF). The president

of each Departmental Council is responsible for Child Protection within its territory.

Usually when foreign unaccompanied minors are identified, they are considered at risk because of their isolation and their situation must be brought to the attention of either a dedicated Cell within the Department (CRIP: cell dedicated to the treatment of preoccupying information) or to a Prosecutor. These procedures are called *signalements* (alert). Everyone is compelled to alert the local administrative authorities if a minor is in danger. Professionals can also prefer to alert the judicial authorities (Prosecutor) if the situation is particularly serious.

Once such an alert is received, there are two main kind of child protection procedures: one is administrative and the other is judicial.

If the child is brought to the local child protection bodies for immediate care, there is an obligation to inform the judicial authorities of this situation after 5 days (L. 222-1 CASF + L. 223-2 CASF + opinion of the French CNCDH dated 26/06/2014) as long term placements in care can only be ordered by the latter.

Alternatively, the situation of the child can be directly taken to the judicial authorities, which will decide on the best care option for the child.

In summary, the child protection is the competence of local bodies, who cannot act outside of the scrutiny of judicial authorities.

The State nevertheless intervenes in the age assessment process of isolated foreign minors through its prefectures. Those offices are indeed competent to check the authenticity of identity documents, and since 2019, also play an increased part in the age assessment process (via the registration of unaccompanied foreign minors seeking the protection of the child protection services).
Moreover, the Ministry of Justice is involved in the repartition of unaccompanied minors across the country, based on the capacity of each department.

We will see in more details in questions 7 and 16 how the judicial system plays a crucial role in child protection, and how central authorities tend to be more and more involved in the initial age assessment procedure.

7. Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.

In France when a person indicates being an unaccompanied foreign minor, she must most of the time undergo an age assessment procedure. Only very young children whom physical appearance is with no doubt that of a minor can be taken into chid protection care without an age assessment procedure.

Most children are requested to identify themselves in the local child protection services in order to undergo an age assessment procedure (which will be presented in question 16 below).

At this stage, the French law states that they should benefit from accommodation for a minimum period of 5 days during which the age assessment can take place (L. 223-2 CASF). This is called *accueil provisoire d'urgence* (emergency temporary care).

There are huge discrepancies among departments and many of them do not provide for such accommodation, which is illegal as it violates a fundamental liberty.

This temporary reception is funded by a national fund for the protection of children, and departments cannot refuse such initial accommodation to unaccompanied minors. Administrative judges, acting as *juge des référés* (emergency judges) have often ordered departments to provide access to food and shelter to minors pending their age assessment (L. 521-2 Administrative Justice Code).

Once their minority and isolation are established, children can benefit from child protection.

Reception system in France

Many solutions exist as part of educational assistance measures. Thus, children can be given to the Child Protection Services or, more rarely, to educative institutions.

If the Child Protection Services are given care of an unaccompanied minor, they have different accommodation and care options:

- placements in children's homes or hostels;

- placements in foster families (L. 421-2 CASF);
- placements in a MECS (Centre for children with specific difficulties);
- more rarely, placements in the care of a voluntary person designated by the child protection services.

Standards of reference

Good practice is outlined by ANESM guidelines. The latest on child protection services dates back from January 2021 and is available here:

https://www.has-sante.fr/jcms/p_3120418/fr/evaluation-globale-de-la-situation-des-enfants-en-danger-ou-risque-de-danger-cadre-national-de-reference.

French child protection services have been severely criticized lately as reports have been published on terrible care conditions of unaccompanied foreign minors living in hotels with no access to social workers, health services etc.

In his report dated July 2020 to the UN Committee on the Rights of the Child, the Defender of Rights states that:

93. The Defender of Rights also observes, through several referrals, that temporary emergency reception or care under child protection schemes following a judicial decision are carried out under particularly precarious conditions, in substandard hotel accommodation, with little in the way of subsistence costs. Supervision in the way of upbringing is often scant, if it exists at all, which can take a distressing toll on the children accommodated not least because mental health problems are neither detected nor addressed. In recent years, a number of unaccompanied minors entrusted to the child welfare services have even died, either during the assessment process or while under care.

94. In June 2019, the Defender of Rights took up on an own-initiative basis the case of a 16-year-old Guinean boy who died after being entrusted to the child protection services and placed in a hotel. The Defender of Rights is also concerned about the creation of various schemes for sustainable care provision to unaccompanied minors with excessively low day prices.

Child Protection services lack financial means to offer proper care to all children in needs. The Defender of Rights and several Children Rights charities and NGOs have condemned care conditions of unaccompanied foreign minors in several territories and have published invitations to tender that show that the daily cost of care for unaccompanied foreign minors is much inferior to the daily cost of care for French minors.

This is contrary to the text and to the spirit of French law that provides that child protection is offered to all children in need, whatever their nationality.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Many solutions exist as part of educational assistance measures, including foster care:
- placements in foster families (L. 421-2 CASF);
- placement in the care of a benevolent person designated by child protection services. (L. 221-2-1 CASF).

Sometimes, juvenile court judges also order that a child be given to the care of a *tiers digne de confiance* (a trustworthy citizen who acts as voluntary foster family). Although this can be considered a good option for the child if he knows, trusts and likes this person, it is a risky situation as such placements are not considered to be within the scope of the Child Protection system. As a result, if there are difficulties arising, there will be no alternative care. Moreover, when the minor turns 18 he will not be considered as having spent time within the Child Protection services and may therefore lose his rights to a residence permit.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

Adoption is possible and can be either simple or full. In case of simple adoption, a filiation link is created between the adopter and adoptee but the adoptee maintains his links with his family.

Adopters must be at least 15 years older than the adoptee. The latter cannot be more than 15 for a full adoption. This rule does not apply to simple adoption.

Adoption is ruled by the Civil Code (Articles 343 and following).

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

Unaccompanied minors are considered to be in danger as they are minors and are deprived of the protection of their family. As such, the Juvenile Court judge is competent to order any measure to protect them (Article 375 Civil Code).

Prosecutors play an important role in taking emergency placement measures (ordonnances de placement provisoires).

The Family Matters Judge (Juge aux Affaires Familiales) is competent to designate a legal guardian or tutor.

Both the latter and juvenile court judges therefore must cooperate to handle as best as they can the situation of unaccompanied minors.

Administrative judges (including the administrative judge acting in emergency interim proceedings) can be competent if one of the child's fundamental right or liberty is violated, to enjoin the administrative authorities to respect such rights or liberties (for instance an obligation to grant access to accommodation or to education, or to health care).

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

Foreign minors are never considered as being in an unlawful situation in France and do not need to be in possession of a residence permit.

French law (Article L. 311-1 CESEDA) states that foreign nationals who are over 18 and wish to stay in France must be in possession of a residence permit (*carte de séjour*). It can therefore be deduced that minors are not concerned by this legal obligation.

There are a few exceptions that enable minors to be granted a specific work permit, in order to be allowed to lawfully take a professional training or course in France. Such permits can only be granted to minors over 16.

Upon reaching adulthood, residence permits become mandatory, except for those who become French nationals (for more details on this issue, refer to question 17).

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Access to education

According to Article 28 and 29 of the New York Convention on the rights of the children, all children have a right to education. This obligation is translated into French law: access to education is granted to all children (Article L. 111-1 al 5 Education Code), whatever their nationality, migratory status and previous whereabouts (circulaire 2012-141 02/10/2012).

Administrative courts state that access to education is a fundamental freedom (TA Poitiers 12/07/2016 n° 1601537).

In France, education is an obligation from age 6 to 16 (L. 131-1 Education Code).

Over 16, it no longer is an obligation, but it is a right (L. 122-2 Education Code).

In practice, some obstacles often make it difficult for unaccompanied minors (especially aged 16 or more) to access education. It is even more difficult for children who have been considered as adults by the administrative authorities and are initiating lengthy legal proceedings to obtain their age and isolation re-assessed by a judge.

Education is crucial for unaccompanied minors, as it also plays an important role when they turn 18 and have to apply for a residence permit. Furthermore, it strengthens their request for social and financial help from the departments when they turn 18.

Access to health services

Due to harsh living conditions in their home countries and during their migration, unaccompanied minors often have serious health and mental health issues that need to be addressed urgently.

Article 24 CIDE and Article 375 Civil Code clearly stress that minors must have access to health services. Moreover, Article 26 CIDE states that they must benefit from social security.

In practice there are several systemic issues in France as regards access to health services.

Firstly, there is no automatic medical check-up of unaccompanied minors when they are identified in France and accommodated pending an age assessment process.

Secondly, it is often difficult for those children to benefit from social security as there are requests for paperwork that are often impossible to fulfil for such isolated children. For instance, it is requested that they prove they have a legal domiciliation, which is virtually impossible in many large cities where domiciliation structures are overwhelmed with such requests. Furthermore, there are discrepancies among local authorities with regard to the kind of paperwork that is requested to enable children to benefit from social protection: bank account or sometimes identity documents are requested, that the children do not have in their possession.

In France there are two categories of social security: one for French nationals and foreigners with a residence permit in France, called CMU, and another for foreigners in an unlawful situation, called AME (Article L. 115-6 Social Security Code). As far as minors are concerned, there is no condition based on resources or length of stay in France to benefit from social security.

As far as unaccompanied minors are concerned, those who are taken into the care of the Children Protection (ASE) can benefit from CMU, whereas those whose minority is still contested can only pretend to the ASE. This has been criticized by the French Defender of Rights, and many NGOs who urge the French government to extend the benefit of the CMU to all minors, including those who have ongoing judicial proceedings to get protection from the juvenile court judge (and therefore have their minority recognized).

The Defender of Rights also urges local authorities to harmonize their practice, and ensure that all unaccompanied children can have a legal domiciliation and have his request for social security dealt with promptly.

Example of good practice

In some French territories, children who claim to be isolated and first register for an age assessment procedure are automatically given access to the CMU (standard social security), which is valid for an initial one-year period.

This should be encouraged throughout the national territory.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

See below, question 17.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

EU law provides for family reunification of unaccompanied foreign minors.

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) allows in its Article 8 for the reunification of dependent persons in order to have their asylum claim treated in the same Member State as their relatives.

This provision applies to unaccompanied minors who therefore can join a family member and, alternatively, can be joined by this relative.

Article 8

Minors

1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.

2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.

3. Where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.
4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

Outside the scope of asylum applications, unaccompanied minors who have lost family members can seek assistance to locate them. The International Red Cross provide such assistance. For information on the ICRC services:

https://familylinks.icrc.org/en/Pages/home.aspx

Unaccompanied minors who are granted international protection can also be reunited with their family through reunification mechanisms.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Unaccompanied minors do not, by definition, have anyone able to exercise parental responsibility and to protect them. Parental responsibility is defined in Article 371-1 Civil Code.

Legal guardianship

Parental responsibility can be delegated to a legally appointed guardians who will look after the child's interests and his needs (accommodation, food, healthcare…).

Such delegation must be explicit and cannot be deduced from the juvenile court judge order for educational measures (Article 375-7 Civil Code).

Unaccompanied minors themselves can petition for the appointment of a legal guardian, or such request can be made by the child protection services (ASE). Most of the time, the ASE prefers to request tutelage rather than legal guardianship, but both options are possible.

The competent judge for tutelage and legal guardianship is the *Juge aux Affaires Familiales* (Family Judge) (L. 213-3-3 b Code of judicial organisation). However, if an unaccompanied minor has seized the juvenile court judge because of the danger in which he finds himself, the latter judge must be notified of the action taken in front of the Family Judge.

Tutelage

EU law and French law state that all minors can benefit from tutelage, notwithstanding their country of origin (The Hague Convention 19/10/1996). Orders made by the juvenile court judge for educational measures are a first step to protect the child but must be completed by tutelage (or legal guardianship) (Articles 390 and 373 Civil Code).

When parental responsibility is not exercised by the parents, then the tutelage is declared vacant and can be given to the Child Protection Services (ASE) in the department where the minor is taken into care (Article 411 Civil Code). It ends when the child reaches the age of 18 (Article 393). When there is no family member on the national territory (as this is generally the case for unaccompanied minors) tutelage is given to the Child Protection Services and there is no Family Council appointed (Article 399 CC).

The tutor has the following obligations:

- Take care of the child's interests and represent him in all acts of civil life;
- Ensure his legal representation;
- Look after his patrimony.

In case of inaptitude, negligence, bad behaviour, conflict of interests etc, the tutor is replaced by someone else art. (396 CC).

Ad hoc guardians

As outlined above (see question 3), unaccompanied minors can also benefit from the assistance of ad hoc guardian (AHG), who look after their best interests in legal issues. Such AHG are designated with regard to asylum proceedings, expulsion or removal at the border and should also be designated if there is a difficulty that needs to be settled between the child and his legal guardian (art. 388-2).

It is often recommended as good practice that all unaccompanied minors should be granted the assistance of an AHG as soon as they come forward to receive assistance from the French authorities, as this would enable them to better grasp the legal dimension of their situation and get the best possible assistance. See for instance recommendation n° 8 of the French Human Rights Consultative Commission in its opinion dated 26/06/2014.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

The temporary emergency reception

When someone presents himself in a department and states that he is a minor and that he is isolated, the department arrange for his temporary emergency reception. This initial reception lasts 5 days (L. 223-2 CASF), during which investigations can be made to assess the situation of the person, and in particular his isolation and his age.

It is mandatory that the department seizes a judicial authority after this delay so that the reception can be extended if further investigations are needed. If the Prosecutor is seized he can order a temporary placement of 8 more days. After these delays, the juvenile court judge must be seized and he can order a longer temporary placement.

Traditionally, child protection was the sole competence of the departments and as such, departments handled age assessment procedures without any formal cooperation with national authorities. The costs of this initial reception system and of the evaluation was too high for their budget and they asked to State to either take responsibility over age assessment procedures and initial reception systems or to financially compensate them. The latter solution was adopted. Maintaining the competence of departments was important in order to ensure that age assessment procedures remain within the scope of child protection and do not become part of migration policies.

This sole competence of the departments did not prevent them to seek assistance from the prefectures (national authorities), especially with regard to the verification of identity documents.

Since 2018 the law has changed in France and the social evaluation and age assessment procedure has been amended to allow a closer cooperation with the national authorities.

Article 51 of Asylum and Immigration law dated 10 September 2018 creates a new biometric file for young foreigners going through age assessment procedures (art. L. 611-6-1 CESEDA). A decree dated 30 January 2019 provides for the new role played by the prefectures (national authority) in each department in the course of age assessment procedures. It creates a new biometric file named "minority assessment support" (*aide à l'évaluation de la minorité*). These new legal provisions allow to delegate part of the age assessment procedure to prefectures in order to allegedly avoid nomadism of unaccompanied minors. Its finality is to "*better guarantee chid protection and fight against irregular entry and stay of foreigners in France*".

This change has been severely condemned by human rights Defenders, child protection organizations and syndicates as it is feared that this could lead to a grave prejudice for children as it creates a confusion between child protection and immigration policies and procedures. The new set of laws was challenged in front of the constitutional courts but to no avail, and the new system is operational[4].

This new age assessment procedure was optional for departments and many of them initially refused to be part of it. As of February 2021, there is no uniformity in the application of this new procedure as some departments have refused to cooperate with the state services and have decided to stick to the previous system, considering that the new one may infringe children's rights. As a response, the government, who pays the costs of the emergency temporary reception and the age assessment pro-

[4] In its decision dated 26 July 2019, the French Constitutional Court validated the new age assessment procedure, which was deemed not to violate the French Constitution. If the Constitutional Court has considered that the new legal provisions did not violate the Constitution, it however stressed that the new biometric file could only contain fingerprints and a picture, that a refusal to cooperate was not sufficient to consider that the foreigner is an adult and that other age assessment safeguards would not be amended..

cedure, has decided that those departments would perceive a reduced amount of money.

This financial pressure put on departments may end up with a harmonization of practices.

The first interview with state authorities and biometric filing of children data

This implies that each isolated minor who presents himself in a department to obtain protection is now requested to go to the prefecture (branch of the Ministry of Interior situated with offices in each department, throughout the national territory) and have an interview, give his fingerprints, get his data checked on AGDREF 2 and Visabio, and get his information safeguarded in a new biometric data file specially designed for unaccompanied minors.

If at this stage, any information appears that the minor previously posted as a an adult, such information will be immediately transferred to the department that can use it as proof in his age assessment procedure (R. 221-15-1; R. 221-15-2). Similarly, if the child refuse to cooperate at this stage, the age assessment service will be informed of it.

The prefecture's role is one of administrative police.

This new procedure raises several serious human rights issues for the minors:

- Firstly, information collected on Visabio are not reliable as minors often have to pose as adults either in order to cross borders, or under duress from human traffickers;
- Secondly, minors who are informed of this new procedure (and the subsequent risk of being identified erroneously as adults and therefore possibly served with an expulsion order) will be deterred from seeking the protection of the department.

Information stored on this new biometric file must in principle be deleted if the child is later taken into care by the department. However, if the department does not establish the minority, then this information will be transferred to AGEDREC, the biometric files of (adult) foreigners in France, i.e. the biometric file that encompasses information on people in an unlawful situation.

This raises serious problems in practice as, at the time when the administrative refuses to take the child into care and fills in the new biometric file, the child has not exhausted his legal remedies and should therefore not be considered as an adult.

The age assessment procedure

The French law has set up common grounds in order to harmonize age assessment practices across the country. The legal provisions make reference to a 5 days period, during which the child must be offered proper accommodation (emergency temporary reception). During this time, interviews can be conducted by a pluri-disciplinary team in order to question the child about his civil status, family situation, life conditions in his home country, reasons that made him leave his country and the conditions of his journey, his life conditions in France and his life projects. According to the legal provisions detailing the process, interviews must be conducted in a benevolent manner.

In practice, these age assessment procedures raise a variety of systemic issues, such as:

- the lack of accommodation offered in many cases to children;
- the prima facie decisions that some people are adults and therefore the refusal to grant them with an interview and a written notification of the refusal to take them into care (refered to in French as *refus-guichet*);
- decisions to refuse to take minors into care often based on stereotypes (for example: the fact that you decided alone to leave your country / that you worked to pay for your journey etc, proves that you are mature and therefore cannot be a minor – argument used in 75% of cases, based on a sample of 128 notifications of refusal to take someone into care[5]);
- interviews are often very short (15 to 30 minutes in many instances), which may not allow the child to properly explain his situation.

If the evaluators consider that they need further information, they can seize the judge in order to get an order for a medical examination (usually a bone test).

[5] See Médecins Sans Frontières, French Mission's report on unaccompanied minors, July 2019.

If minority and isolation are not established the access to care is refused to the child, who must be notified in writing of this decision (L. 222-5 ; R. 223-2).

The referral of the case to the juvenile court judge

At the end of this administrative age assessment procedure, every minor who was denied the right to be taken into care can appeal to the juvenile court judge. This is perceived as a legal appeal, and as been presented as such by the Highest French Court, that even decided that, for that purpose, children would be considered as having legal capacity (Cass civ 21.11.1995 n° 94-05102). The highest administrative court (State Council, Conseil d'Etat, in its decision dated 01.07.2015) expressly stressed that such recourses must be referred to the juvenile court judge and not to the Administrative Judge, based on Articles 375, 375-1, 375-3 and 375-5 of the Civil Code).

The juvenile court judge is competent to hear the child and order any further investigations he would deem necessary (verification of identity documents and in the last resort, medical examination).

As far as children's rights are concerned, this most serious systemic issue with the French age assessment procedure is that children are treated as adults as soon as the administration rejects their request for protection, and thus are from this point onward considered to be in an unlawful situation, even though they are still exercising their right to appeal and challenging this administrative decision. Therefore, during this legal procedure, in most cases, children are deprived of all their social rights such as accommodation, access to health etc.

Distribution across the territory of isolated foreign minors

Since 2016, a new legal provision ensures that isolated foreign minors are evenly distributed across the national territory. In that prospect, whenever a child benefits from educative assistance measures and is placed in the care of the child protection authorities, a central office (within the Ministry of Justice) is seized and will decide in which department the child must be sent. This distribution is supposed to take into account the best interests of the child.

Spotlight on medical examinations

In France, medical examinations (usually bone tests) are authorized but their use is limited by procedural safeguards.

Article 232 of the Civil Procedure Code allows the judge to order them in order to reach a decision. Such medical examinations can only be ordered by a judicial authority (= judge or Prosecutor), so administrative bodies, including child protection bodies, are not allowed to order them directly. In practice, bone tests are most of the time ordered by Prosecutors at the request of either Border Police or Child Protection authorities. However, the juvenile court judges also make use of them.

Article 1111-4 Public Health Code: the minor must consent.

Bone tests are severely criticized by medical and human rights bodies are they are invasive and there is a large margin of error (estimated between 18 months and 2 years by health experts and professionals).

According to Article 246 of the Civil Procedural Code, the judge is not bound by the result of medical examinations. According to Article 388 of the Civil Code, such tests can only be ordered as a last resort, their conclusions must mention the margin of error, and a decision cannot be based solely on their results.

More importantly Article 388 states that the doubt must benefit the minor.

In a decision dated 21/03/2019, the French Constitutional Court has authorized the use of bone tests but has set out the following safeguards:

- They can only be used in the last resort;
- The consent of the child must be given (which implies to offer him proper information beforehand, in a language he can understand);
- Majority cannot be deduced from the refusal to undertake a bone test;
- Margin of error must be mentioned in the report.

By two decisions dated 21/11/2019 the French Cassation Court (highest judicial court) has confirmed this decision and further stressed the importance of the above-mentioned safeguards.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

In France, minors do not need residence permits.

Upon reaching their majority, unaccompanied children will need one, and their options for regularization will depend on the length of time spent in the care of Child Protection services.

- Children who were taken in care before 15 can ask for French nationality (Article 21-12 Civil Code);
- Children who were taken into care before 16 can ask for a permit based on their private and family life (upon some conditions pertaining to their education and family situation – Article L. 313-11 2° bis CESEDA);
- Children who were taken into care after 16 can either apply for a permit following the same procedure as any other adults in unlawful situation (Article L 313-11 al 7 CESEDA), or apply for a work permit upon conditions pertaining to former professional training or education (L. 313-15 CESEDA).

Administrative protection of young adults

In addition to these regularization schemes, there also are social integration programs for young adults in France. As part of the child protection scheme, they are managed by the departments. They are not mandatory but at the discretion of the President of the Departmental Councils (for case law, refer to a decision from the Council of State dated 26/02/1996 n° 155639, Président du Conseil général de la Marne c/ Mlle Lesieur).

Those programs are initially designed to avoid a brutal interruption in care for those who turn 18, especially the most vulnerable. They allow to pursue some social programs up to the age of 21 (sometimes later). In practice, these programs are not unified within the territory and some are criticized as they do not offer proper housing and food. In some territories, young adults who successfully completed professional trainings or education are favored upon those who failed to complete any training and have no life project. This situation is alarming as such programs are deemed to help the most vulnerable (L. 112-13 CASF).

The refusal to offer care to young adults can be challenged either by a gracious recourse to the President of the Departmental Council, or by taking action to the administrative judge (emergency procedures called *référé suspension* (interim emergency proceedings) can be initiated as the same time as the main action in order to ensure a quick suspension of the decision (R. 223-2).

Judiciary protection of young adults

In addition, juvenile courts judges can also order judicial protection for young adults who are particularly vulnerable (see *Décret* n° 75-96 du 18 février 1975).

- Contractual framework to help children and young adults find work and become autonomous

In France, there is a contractual framework to help children and young adults find work and become autonomous; it is called PACEA (*parcours d'accompagnement contractualisé vers l'Emploi et l'Autonomie*) L. 5131-3 Labour Code.

It is coordinated by local missions, is open to children and young adults between the ages of 16 and 25 and lasts up to 2 years.

This program encompasses the Youth Guarantee (*Garantie Jeunes*), which is a shorter program for youth people who are isolated from their family, have no education, no work and no training. This program lasts for a maximum of one year.

- Integration Program through French language classes

This program is part of PACEA and only open to non-European nationals. It is open to children and young adults up to the age of 26.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

Those considerations have been shared throughout the report.

Italy

Pierangela Bisconti*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

Currently in Italy there is a specific discipline dedicated to the protection of unaccompanied minors. This is Law No. 4719 of 7 April 2017, known as Zampa Law. This Law aims to introduce an organic framework for the protection of unaccompanied minors and has the credit, immediately recognized by the scientific community, of having ratified the principle, as important as it is undisputed, of equal rights between foreign minors and Italian minors specifically sanction, in a legislative text, the vulnerability of the child.

Article 2 of the Zampa Law provides a comprehensive definition of unaccompanied foreign minor as follows: "a minor not having Italian or European Union citizenship who is for any cause in the territory of the State of Italy or who is otherwise subject to the Italian jurisdiction, without assistance and representation by parents or other adults legally responsible for him according to the laws in force in Italy".

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

The legal system for the reception and protection of minors is complex and heterogeneous, mainly as a result of the 1951 Geneva Convention and the 1989 New York Convention.

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An international reference document for the protection of children and teenagers is represented by the United Nations Convention on the Rights of the Child (20 November 1989), which expressly opens the principle of the best interests of the child, which must be given a prominent consideration in all decisions – of public or private institutions, courts, administrative authorities or legislative bodies – which concern him (Article 3, par. 1).

This applies in all circumstances, and even more in relation to particularly vulnerable category of children and adolescents as the unaccompanied, to whom particular measures must be dedicated, such as protection from violence and exploitation, assistance and protection, in order to fill the gap resulting from the absence of the family (Article 19).

The international legal system does not have a specific legally binding instrument for the protection of unaccompanied minors. However, these fall within the scope of the human rights treaties adopted at universal and regional level, as people under the state jurisdiction, without any discrimination.

At European level, the Council of Europe has over the years approved rules and circulars to standardize and improve the existing procedures and introduce additional guarantees for unaccompanied foreign minors which are valid in all territories of the Member States.

The minor who enters the EU States must not only be accepted on the basis of the principle of the best interests of the child, but must also have procedural guarantees for lasting solutions to be implemented aimed at family reunification.

The legislation on the reception and protection of unaccompanied foreign minors in force in the EU States is broad and comprehensive and the Council of Europe, in order to make the rules more organic, has introduced numerous directives valid in all regions of the Member States.

The adoption of the Directives has therefore sought to standardize procedures and introduce a status, valid throughout Europe, improving the quality of services and eliminating unequal treatment between Member States in order, above all, to prevent human trafficking and migration and to improve reception itself.

The rules are aimed at creating, as much as possible, a favorable environment to the growth of the child in his country of origin, at guaranteeing him good prospects for personal development and a dignified life,

and at protecting him from human traffickers and criminal groups. This reaffirms the importance of both the search for the family and the appointment of a guardian or legal representative as soon as the unaccompanied foreign child is identified at the border. It is also important that the first reception is a temporary solution and that within six months the decision whether to return or recognize the status of international protection or other legal status is taken in order to allow the integration of the child into the Member State of the European Union.

In order to achieve these objectives, unaccompanied minors are followed in all Member States by qualified personnel who guarantees them protection and care, although in many cases the reception processes has been proven insufficient. The approval of the Zampa Law places the Italian legal system among the first countries that have developed a special discipline for the unaccompanied foreign minors, devoting a particular attention to the phenomenon of child migration. This law is adopted at the same time as the publication of the conclusions of the European Council on the promotion and protection of the rights of the child (3 April 2017) and extends to unaccompanied minors all the guarantees implemented or whose implementation is required for minors in general.

The credit recognized to this law is that it has given, at least at a theoretical level, organicity to the matter at national level.

In addition to regulating specific aspects, this law made some amendments and additions to other acts dealing with the phenomenon, even incidentally; for example, Articles 33 and 34 of the *Testo Unico in materia di Immigrazione* (and the related implementing regulation of 31 August 1999 no. 394) and the *Decreto Accoglienza* (legislative decree no. 18 August 2015 n. 142) in addition to the rules on more specific international protection (legislative decree no. 25 of 28 January 2008, legislative decree of 19 November 2017 n. 251, d.l. 17 February 2017 n. 13).

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

The recognition of the refugee status entered our legal system after joining the Geneva Convention of 28 July 1951 (ratified by Law 722/1954).

Refugee status is granted to those who are a foreign national who, for the well-founded fear of being persecuted on the grounds of race, religion, nationality, membership of a certain social group or political opinion, is located outside the territory of the country of which he is a national and cannot or, because of this fear, does not want to avail himself of the protection of that country.

It can also be a stateless person who is outside the territory in which he previously had his habitual residence for the same reasons and cannot or does not want to return.

Subsequently, European legislation introduced the institute of international protection, which includes two distinct legal categories: refugees, defined by the Geneva Convention, and people eligible for subsidiary protection, from whom foreign nationals who do not qualify for refugee status, i.e. who are unable to prove that they are the subject of specific acts of persecution, but who, however, if they return to their country of origin, would run the real risk of suffering serious harm and who cannot or (precisely because of this risk) do not want to avail themselves of the protection of their country of origin.

The foreign national may apply for international protection in the state of first entry which, therefore, becomes competent to examine the application. In order to speed up this procedure, a number of legislative measures have been adopted concerning the staff and composition of the Territorial Commissions and their sections, as well as the articulation of the different stages of examination.

An unaccompanied minor wishing to access the application for international protection shall have the right to receive all necessary information and to participate in all judicial and administrative proceedings concerning him or her, and to be heard, in the presence of a cultural and linguistic mediator. The authority receiving the application shall immediately communicate to the Juvenile Court for the opening of protection and for the appointment of the guardian who assists the child at every stage of the procedure. The application may be made in person by the child or his guardian. The child's interview takes place before a member of the Commission with specific training, in the presence of the parent exercising parental responsibility or the guardian. If there are justified reasons, the Territorial Commission may listen to the child again even

without the presence of the parent or guardian, without prejudice to the presence of adult's, taking into account his or her degree of maturity and development, in the sole interest of the child.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

Zampa Law has introduced measures concerning the strengthening of rights and protections in favour of minors, starting from the reception phases.

Among the principles, the law explicitly introduces an absolute ban on the refoulement at the border of unaccompanied foreign minors, a refoulement that cannot be ordered under any circumstances (art. 19, co. 1-bis, Legislative Decree 286/1998, containing *Testo Unico in materia di Immigrazione*).

At the same time, however, Zampa Law protects the right to family unity of the unaccompanied child so that, if there is no risk for the child, subject to the consent of the child, specific family investigations are initiated aimed at the tracing of family members suitable to take care of it (art. 6) and, where possible, assisted and voluntary repatriation is carried out (art. 8).

The act of repatriation is a judicial order issued after evaluating the results of the family investigations carried out with the help of the competent authorities of the country of origin (and therefore the life opportunities offered to the child on return) and the examination of the report of the social services in charge of the case and obviously following the hearing of the child.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The order for the expulsion of foreign minors can only be executed for reasons of public order and state security, further establishing that, in any case, the expulsion order can be adopted provided that it does not entail "a risk of serious harm to the child".

It is also specified that the decision of the Juvenile Court, which has jurisdiction in this matter, must be taken promptly and in any case within 30 days.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The unaccompanied minor is intercepted by the police who proceed to record the data declared by the child and reported in the documents that may be in possession of the same.

The police also carry out photodactyloscopic and signalling surveys and proceed to report to the Juvenile Court (for the necessary measures) and to the Ministry of Labour and Social Policies for the census.

The child will then be placed at the first facility accomodation (first aid and immediate protection) in which, pending the appointment of the guardian, those functions will be carried out by the facility manager.

Zampa Law has thus assigned local authorities the task of raising awareness and training foster carers to accommodate minors, in order to encourage family custody in place of hospitalization in a facility (Article 7).

It provided for the establishment, at each Juvenile Court, by the regional Child and Adolescent Authority of a list of voluntary guardians available to assume the protection of an unaccompanied foreign child (Article 11). In order to monitor implementation, regional Authority guarantors are constantly cooperating with the National Child and Adolescent Authority, to which they present, every two months, a report on the activities carried out. In addition, it has shifted from the Ordinary Court to the Juvenile Court the power to open the protection and appoint the guardian, in order to concentrate all the judicial stages relating to unaccompanied foreign minors to the same judge.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

The legislation currently in force provides for a precise and organized reception system for unaccompanied minors developed in two phases that correspond to two types of dedicated interventions.

Minors may not be detained in reception centres intended for adults, but they will have to be placed in facilities designed to meet their recreational needs, with the support of specialized personnel (qualified operators and training required to be confidential).

In these facilities, the child should be placed for a period of 30 days for first aid and assistance (and identification operations) and must be informed of his rights in a language understandable to him, with the help of the cultural mediator and a psychologist.

The identification procedure should be completed within 10 days, also thanks to the cognitive dialogue with the help of the cultural mediator and at the presence of the tutor.

The rule states that, first of all, personal documents must be used, and in the event of absence, the diplomatic and consular authorities must cooperate.

As for the age assessment, if the personal data documentation is missing or is not reliable because it appears not authentic or unreliable and doubts remain about the possible age of majority, the phase that provides for the involvement of the Public Prosecutor's Office at the Juvenile Court for socio-health investigations can start.

In cases where doubt remains, the law has formulated a rule of favour which provides for the presumption of a minor in order to extend the benefits of the discipline.

In any case, a voluntary guardian is appointed to the unaccompanied minor.

It is also planned to establish a social record of the child that will allow to monitor his path within the country (if they do not lose track).

After this period, the second phase of the reception opens, which provides for the place in a foster family (preferred choice by law) or in a second reception center. The lack of adequate availability of foster families has, therefore, led to the placement of minors in second reception centres (SIPROIMI or reception centers set up by municipalities or prefectures).

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Unaccompanied foreign minors are subject to the general legislation on family custody also for Italian minors, which provides that the child

temporarily without a suitable family environment is assigned to a family, preferably with minor children, or to a single person, able to ensure the maintenance, education and emotional relationships that he or she needs, as a priority over placement in a community or other facility.

The foster carer must welcome the child and provide for his maintenance and education, taking into account the indications of the parents or guardian, and observing the requirements established by the entrusting authority. In any case, the foster carer exercises the powers connected with parental responsibility in relation to ordinary relations with the school institution and with the health authorities.

Custody may be:

- ordered by the social services and enforced by the court, in the event that there is the consent of the parents or guardian (the so-called consensual custody);
- ordered by the Juvenile Court, in the event that there is no consent of the parents or guardian (the so-called judicial custody).

The law provides that, if suitable family members are identified to care for the unaccompanied foreign child, such a solution must be preferred to the placement in the community.

The assignment referred to is that governed by Law No 184 of 4 May 1983 (as supplemented by subsequent amendments).

The foster carers are required to acquire awareness of their specific role in caring for the foreign child both from a material point of view but above all from an affective, psychological and health point of view in order to consolidate the idea that it is a temporary measure that should lead, as in the proper function of the institution, to the recovery of the relationship between the child and the family of origin in addition to guaranteeing the child a family environment that helps him in the process of growth and development favoring their social integration. Zampa Law requires local authorities to raise awareness of the reception of unaccompanied minors and to plan training periods for families to prepare them for the needs of migrant minors.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline. adozione (e l. 4 maggio 1983 n. 184).*

Adoption can only be ordered if the state of moral and material abandonment of the child is ascertained and never presumed, not even because of the precarious material conditions in which these minors find themselves, since maintaining the link with the family of origin is a precise right guaranteed at constitutional and supranational level.

In the case of an unaccompanied foreign minor, if it appears – as a result of the investigation – that there is a consolidated link between him and his family living in the country of origin, the adoption of the child cannot be declared, but must be guaranteed adequate protection also with regard to the protection of that family bond.

If the conditions are fulfilled, the Juvenile Court declares the state of adoption of the child.

Children declared adoptable may be adopted. In any case, a child over the age of fourteen must give his consent, while the child under the age of twelve must be heard.

Adoption is allowed to spouses united in marriage for at least three years inserted in special lists at the Juvenile Court.

The Court of First Instance chooses between the couples who have applied, the one which best meets the needs of the child and provides for pre-adoptive custody lasting one year. During this phase, the court supervises the smooth progress of pre-adoptive custody through local social services. Psychological and social support may be provided for parents in the event of established difficulties. Where the difficulties cannot be overcome, the custody shall be revoked, otherwise, after one year, the Court of First Instance shall declare the adoption.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

The first forms of protection for unaccompanied foreign minors were implemented by forcing law No 184 of 4 May 1983 with reference to the concept of a state of abandonment of a foreign child by supplementing

it with the principles of the New York Convention 1980 on the Rights of the Child, thus returning to the Juvenile Court, in collaboration with the social services, and at the same time subtracting it from the "exclusive competence" of the police.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

The Law no. 47/2017 (Article 10) provides that unaccompanied foreign minors may receive, when the law provides for the prohibition of refoulement or expulsion, two types of residence permit: the permit for minors and the permit for family reasons until they reach the age of majority.

The permit for minors is issued to the unaccompanied minor as a subject against whom expulsion and refoulement are generally prohibited and therefore, such permission can be requested for the only reason of being a minor.

By express provision of the law, permission for minors can be issued at the request of the same minor, also directly and even before the appointment of the guardian.

The residence permit for family reasons can be issued in the case of a foreign child up to 14 years assigned to an Italian citizen or subject to his protection, or to the child over 14 years of age in family custody or living with the Italian guardian or with a foreigner regularly staying.

According to the indications of the Ministry of the Internal Affairs, it will be possible to further develop as a system of reception and inclusion of unaccompanied foreign minors for whom the Juvenile Court provides, at the age of 18, a measure of administrative continuation pursuant to art. 13 of the Law n. 47/2017, in the presence of the conditions provided for by the same law, until the age of twenty-one.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

The Article 14 of Zampa Law explicitly introduces the right to health and education, even though it is a question of protection which in our legal system also has a constitutional status.

Accessibility to primary, secondary and higher education must be encouraged as well as the promotion of school and vocational information and guidance; promoting regular attendance is another goal of the reform..

Registration can be required at any time of the school year. With regard to integration, minors are enrolled in the class corresponding to the age of birth, unless the college of teachers decide to enroll in a different class, taking into account the organization of the studies of the country of origin, the course of study followed, the level of preparation achieved.

Unaccompanied foreign minors are entitled to registration with the Health Service (also pending the issue of a residence permit).

The reform provides that once the child has been traced, he or she will be placed in a first aid centre where he or she is assisted by a cultural mediator, a psychologist and a voluntary guardian, with parental functions. A legal aid lawyer may also be appointed to take care of the child. The right to be heard in proceedings involving him is also reaffirmed; such as the right to legal protection.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

Reception centres for unaccompanied minors, in addition to meeting the minimum standards of services and assistance provided by residential facilities for minors and being authorized or accredited in accordance with national and regional legislation on the subject, are required to guarantee a series of services aimed at supporting social inclusion paths and taking into account the specific needs of minors such as: linguistic-cultural mediation; the teaching of the Italian language and the integration of schools and vocational training; guidance and accompaniment to employment, housing and social integration; access to local services; legal guidance and accompaniment; psycho-socio-health protection; the provision of pocket money.

Testo Unico in materia di Immigrazione (Legislative Decree n. 286/1998) (Article 38) stipulates that foreign minors present in the national territory are subject to compulsory education and that all the provisions in force on the right to education, access to educational services and participation in the life of the school community apply to them.

Unaccompanied minors who are regularly staying are registered as residents on equal terms with Italian minors.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

The guidelines adopted by the United Nations General Assembly published on February 24, 2010 (Guidelines for the Alternative Care of Children) encourage, even in the case of unaccompanied foreign minors, the maintenance of the bond with the family of origin.

An unaccompanied foreign minor who has applied for international protection in Italy is entitled to family reunification in another Member State, provided that this is in his best interest; it is required that the father, mother is located regularly in that State; an adult uncle/aunt, grandfather/grandmother looking after the child are also relatives with respect to whom recognition can be obtained. The State in which the child is transferred shall have jurisdiction to examine the child's application for asylum.

The guardian and the operators of the facility can play a fundamental role in promoting the regular reunification of the child to the relative residing in another European State, in particular: informing the child about that right; supporting the child in submitting the asylum application and applying for reunification there; verifying that the procedures are carried out correctly; urging the rapid progress of each stage of the procedure; facilitating the child's contact with the relative and the collection of documentation to prove that the requirements for reunification are met.

The unaccompanied foreign child holding a residence permit for asylum or subsidiary protection can apply for the reuniting of the parent in Italy, without having to demonstrate income and accommodation requirements.

On the other hand, the holder of a different residence permit (for minors, for humanitarian reasons, for special cases, etc.) is not granted the right to reunite the parents.

We do not ignore the Dublin III Regulation which provides for a series of rules on protection of minors (according to the best interests principle) and extends possibilities of reunifying them with their relatives.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

The law provides that a guardian must be appointed for every child present on Italian territory without parents who can exercise parental responsibility.

The guardian has the legal representation of the child, i.e. acts in the name and on behalf of the protected person by carrying out legal acts on his behalf (for example, signs the asylum application and the request for the issue of a residence permit), takes care of the child's person and, possibly, administers his or her assets.

The decision appointing the guardian and other measures relating to the protection of unaccompanied minors shall be adopted by the President of the Juvenile Court or by a judge delegated by him.

The court may appoint a relative of the child, a voluntary guardian or a public body as guardian. In any case, the choice must fall on a person suitable for the office, of impeccable conduct, who entrusts the child to educate and educate the child.

The guardian must have the necessary skills for the performance of his duties and carry out his duties in accordance with the principle of the best interests of the child. Individuals or organisations whose interests are also potentially at odds with those of the child may not be appointed guardians. The guardian can only be replaced in case of need.

Zampa Law introduced the figure of the volunteer guardian. Voluntary guardians are private citizens willing to assume the protection of an unaccompanied minor or more minors, in the maximum number of three, unless there are specific and relevant reasons. The guardian is chosen from the list available at the Juvenile Court; the list is prepared on the basis of a public announcement, once the existence of the requisites indicated by the Child and Adolescence Authority has been verified; they must attend a training course before entering the list.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

The Public Prosecutor's Office at the Juvenile Court may order socio-health examinations aimed at ascertaining age, in cases where there are well-founded doubts about the age declared by an unaccompanied foreign minor and it has not been possible to ascertain their age through a personal document. Only after the analysis of such data it is possible, while persisting the doubt, to access to clinical investigations always feasible only following the consent of the child (findings on the dental apparatus, sexual, bone, etc.) and in the presence of a medical-legal team, with the clarification that such investigations must be ordered by the judicial authority.

This procedure must be conducted by a multidisciplinary team and include a social interview, also focusing on previous life experiences relevant to the assessment, an auxological paediatric examination and a psychological or neuropsychiatric evaluation, proceeding according to a criterion of progressive invasiveness.

If, at the outcome of each stage or stage of the procedure, certain information emerges as to the childhood of the person concerned, no subsequent investigation shall be carried out.

The procedure may end with a single medical assessment (e.g. a paediatric examination) where the professional in charge considers it sufficient to determine the minor age, while an assessment determining the age of majority of the person concerned on the basis of a single examination (e.g. wrist-hand X-ray or orthopantomography) can never be considered valid.

No socio-health examinations should be carried out that could compromise the psychophysical state of the person. Account must also be taken of the specific characteristics relating to the ethnic and cultural origin of the child.

If – even after the socio-health assessment – doubts remain about the minor age, this will be assumed.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

In the event that the minor has been issued a residence permit for family/custody reasons, at the age of 18 it may convert it into a residence permit for reasons of study, waiting for employment, employment or self-employment, for health or care needs, without the need to meet other requirements required by immigration rules and participation in an integration project for 2 years.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

In our legislation, the recent Zampa Law has proposed to introduce an organic and complete discipline for the protection of unaccompanied foreign minors.

After the definition and proclamation of the principle of equal treatment, the law continues by establishing the prohibition of refoulement (Article 3), identifying the reception measures (Article 4), providing for procedures for identifying the child (Article 5), establishing the figure of the voluntary guardian (Article 11) and recognizing other essential rights of the child (access to health facilities, education, right to listen and defence Articles 14-16); closes with specific rules for the child victim of human trafficking or applicant for international protection (Articles 17 to 18).

A closer analysis and implementation of this law, a few years after its promulgation, nevertheless makes clear some limits which, in any case, do not affect the validity of the fundamental principles underlying the reform.

The new system appears abstractly suitable to meet in the immediate future the first needs of "hospitalization" of minors.

For example, there is a lack of discipline in certain aspects of particular importance, such as the establishment of insurance cover for the civil liability of voluntary guardians, work permits for the performance of the task and reimbursement of expenses (since the assignment is completely free of charge). Just as some uncertainty remains about the estimation criteria relating to the number of guardians necessary to meet the needs of minors present in the territory; it happens that the largest number of

"qualified" (Emilia Romagna) do not reside in the area that has the highest number of minors (Sicily).

Although the discipline introduced by the Zampa Law is a good result having clarified some general principles, critical aspects remain such as those relating to the limitations introduced with the so-called security decree that risks nullifying the work of social integration of minors upon reaching the age of majority; the problem of the availability of economic resources is also a factor that could undermine the effectiveness of the reform.

Uneven implementation of the reform, due to the partial lack of implementing protocols, would risk undermining efforts to ensure uniform treatment by creating gaps that could undermine the effectiveness of the reform.

Netherlands

Nadia Ismaïli*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

The legal definition is "*alleenstaande minderjarige vreemdeling (AMV*)", which translates as unaccompanied foreign minor or unaccompanied minor. The Dutch national legal system does devote specific attention to the AMV.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

Yes, as mentioned the Dutch national legal system (in particular Dutch migration law is to a large extent based on EU-law) does devote specific attention to the AMV, however, this is usually part of more general laws, not laws that are focused solely on unaccompanied foreign minors. These laws primarily regulate the right to reside in the Netherlands and the entitlements of the minor during its stay in the Netherlands.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

Yes. In principle the procedure for an asylum permit is the same for minors and adults. The "*Immigratie- en Naturalisatiedienst (IND)",* or Immigration and Naturalization Service, operates on behalf of the Dutch Secretary of State of Justice and Security. The IND decides on (temporary) admission to the Netherlands and if the decision is negative, the migration

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court can review this decision. During the procedure the minor is assigned a lawyer and counseling. The IND has special hearing rooms for children under the age of 12 and the young age of the unaccompanied minor is taken into account during the interrogations. Counseling and reception is specifically aimed at the child (Article 18a – 18c "Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005" or Regulation on benefits for asylum seekers and other categories of foreigners 2005).

If it has been established that a minor is not eligible for a permit in the Netherlands (either a regular permit – for example for purposes of family reunification – or asylum) or that the child should be transferred to another EU country on the basis of the Dublin Regulation the minor is handed over to the "*Dienst Terugkeer en Vertrek (DT&V)*" or Repatriation and Departure Service, who likewise operate under the responsibility of the Ministry of Justice and Security. In this regard it is important that even it has been established that another EU country is responsible or even if it is established that the minor has been granted a status in another EU country the Dutch Secretary of State is still obliged to verify whether indeed the minor's rights will indeed be guaranteed, see Council of State 20 May 2019[1], ECLI:NL:RVS:2019:1612 (the Council of State is the highest court in immigration cases in the Netherlands). So, in part on the basis of rulings of the CJEU, there are stricter criteria in the application of mutual trust within the framework of the Dublin Regulation where it concerns minors.

After the minor has been transferred to the responsibility of the DT&V, DT&V becomes responsible for the actual departure from the Netherlands. Minors can only be returned if it is certain that upon return the minor can stay with family or in otherwise adequate care, such as a shelter. Special rules apply in this regard to minors of 15 years or younger, see question 11.

[1] ECLI:NL:RVS:2019:1612 available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2019:1612.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

No, not without having verified the identity of the minor, whether the minor is eligible for a (temporary) permit in the Netherlands or whether there is another EU country that is responsible under the Dublin regulation or whether the minor has already been given a permit in another (Dublin) country.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

If traced in the Netherlands the minor can't be expelled without having verified the identity of the minor, whether the minor is eligible for a (temporary) permit in the Netherlands or whether there is another EU country that is responsible under the Dublin regulation or whether the minor has already been given a permit in another (Dublin) country.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

A few of the main state bodies (with different locations throughout the Netherlands), not limitative:

- IND: Immigration and Naturalization services: decides on residence permit.
- Nidos: the national guardianship institution for unaccompanied and separated children in the Netherlands. Guardianship is carried out by professionals with specific expertise.
- Repatriation and Departure Service: responsible for departure of aliens, including unaccompanied minors, from the Netherlands.
- Child Protection Board ("*Raad voor de Kinderbescherming" (RvdK)*): The tasks of the Child protection board relate to research into the development of the child development; to supervising the implementation of child protection measures and to provide legal advice to the judiciary. Its main task is to function as a supervisor of Nidos' actions.

- Central Agency for the Reception of Asylum Seeker (COA): responsible for the reception of asylum seekers, including of unaccompanied minors.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

A scheme of the reception procedure for unaccompanied minors (in Dutch only) can be found in the evaluation of the new model for the reception of unaccompanied minors, see in particular p. 23 of the document "Evaluatie nieuw opvangmodel alleenstaande minderjarige vreemdelingen" available at: https://www.rijksoverheid.nl/documenten/rapporten/2018/12/20/tk-bijlage-evaluatie-nieuw-opvangmodel-amv.

Unaccompanied minors are taken care of in foster families, small-scale reception locations or in protected reception facilities. The reception of unaccompanied minors is a responsibility of both Nidos and COA.

- Unaccompanied minors under the age of 15 (or minors above 15 for whom this is considered necessary) are cared for in foster families under the responsibility of Nidos.
- Unaccompanied minors of 15 years or older receive special shelter in small-scale reception or residential facilities.
  - Nidos places unaccompanied minors aged of 15 or up with a residence permit in small-scale reception facilities in municipalities. Distinction between small-scale housing units, wherein max. 4 minors live in a single-family home in residential area, with 28,5 hours of supervision and a small-scale residential group, wherein max. 12 minors live in a residential area with 24-hour guidance a day. Guidance by youth care. Execution by Nidos.
  - COA places unaccompanied minors aged 15 or up without a residence permit in small-scale residential facilities. The same applies to unaccompanied minors aged 13-14 without a residence permit for whom Nidos does not yet have a reception family. In the small-scale residential facilities live about 16-20 minors. The facilities are located on the site of an asylum seekers' center or out-

side. The facilities outside an asylum seekers' center are for minors who are younger than 17.5 years on arrival in the Netherlands and receive support there 24/7 of employees of COA, they also prepare them for their future in the Netherlands or in country of origin (together with the DT&V). The facilities located at an asylum seekers' center are for minor of at least 17.5 years, who are independent enough and need less supervision. This way they can be easily transferred to the asylum seekers' center at the age of 18. Unaccompanied minors in residential facilities are assigned a mentor. The mentor teaches the minor about Dutch customs and practices. They also work together to develop skills by formulating development goals in a supervision plan. They coordinate the goals with the Nidos guardian.

- Unaccompanied minors with a high risk of disappearing are placed in a protected facility.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Foster care is considered a useful remedy, see question 7: unaccompanied minors under the age of 15 are cared for in foster families under the responsibility of Nidos. Guardianship/foster care of national children is the responsibility of different guardianship and foster care institutions, so this is an entirely different stream. The purpose of care also differs: foster care of national children only plays a role when child protection measures have been imposed, whereas foster care of unaccompanied minors should be considered a type of reception that also applies without specific concerns about the development of those minors. Nonetheless, if necessary child protections measures may also be applied to unaccompanied minors if there are issues regarding their development, see also question 11.

Where it concerns foster families for unaccompanied minors a distinction can mainly be made between:

- families for "first reception", children up to 15 years old are immediately placed in foster care. While residing with this family the asylum procedure is started, a medical examination is carried out and guardianship is applied for;

- families for short-term care, in crisis situations;
- families for long-term care, these families are willing to take care of a child until it has to or wants to return to its country of origin, it is reunited with its family or is mature enough to live independently (maximum up to 21 years).

When it comes to requirements to foster families, families with a culture other than the Dutch are preferred and must be able to offer the child at least the following: safety and security; adequate care and education; if possible contact with your own family and/or your own culture and stimulation in personal development. Besides: they must be able to cope with an uncertain perspective regarding residence rights: integration or return; all family members must support the placement; the living situation must be stable; cooperation with Nidos is a requirement; a foster parent may not have committed a sexual or violent offense and foster parents must be physically and mentally healthy enough to take care of a child. There are no requirements regarding size of the house, the level of income or the composition of the family. Nidos must be sure that the family is safe and suitable for children. Foster parents receive a monthly foster allowance for the costs of taking care of the child. The amount of the reimbursement depends on the age of the child. In addition, some costs are reimbursed, such as those for school (folder Nidos, Foster families for unaccompanied minors, 2019).

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

No, in principle unaccompanied minors are not eligible for adoption. The adoption procedure is regulated in the discipline of private law and is covered by an entirely separate set of regulations.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

The migration court is involved where it concerns the right to reside in the Netherlands, this court is specialized in migration cases, but not in children. The Juvenile Court is involved where it concerns guardianship

or where necessary child protection measures, this court is specialized in children but not in migration law.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

A residence permit can be granted if a minor is eligible for a regular residence permit, for example to stay with family if it turns out the minor has legally residing family members. A residence permit can also be granted if a minor is eligible for or a permit on the basis of an asylum status or secondary protection (on the basis of the Refugee Convention, the Qualification Directive , that is Directive 2011/95/EU, Article 3 ECHR and the Aliens Act 2000). While European legislation offers the possibility to treat these groups very differently, in the Netherlands the same period for both types of protection: initially 5 years and then you become eligible for a permanent asylum permit, 3.105 "*Vreemdelingenbesluit 2000*", Aliens Decree 2000. However, it is easier to revoke a permit on the basis of secondary protection than on the basis of an asylum status in case of public order considerations, Article 3.105(d and e) Aliens Decree 2000.

In addition, special rules apply to unaccompanied minors who are younger than 15 years of age during their first application for residence and who cannot return through no fault of their own, this is for example the case if upon return there is no adequate care. They can under certain conditions obtain a residence permit (Article 3.48 par. 2(a) Aliens Decree 2000 and par. B8/6 "*Vreemdelingencirculaire 2000*" Aliens Circular 2000. For minors over the age of the 15, it is not established in Dutch law that it is necessary to assess whether or not there is adequate care upon return before issuing a return decision. However, while a return decision, as mentioned in the Qualification Directive, may be issued, the minor of over 15 is not in practice expelled if there is no adequate care available, but they are not given a residence permit either. The CJEU has recently ruled that this distinction now being made by the Dutch authorities cannot be made. According to the CJEU before issuing a return decision against an unaccompanied minor, the Member State concerned must carry out a general and in-depth assessment of the situation of that minor, taking due account of the best interests of the child. In this con-

text, that Member State must ensure that adequate reception facilities are available for the unaccompanied minor in question in the State of return. (CJEU 14 January 2021, C-441/19). Hence this obligation should also apply to minors who are older than 15 years before a state can issue a return decision, as mentioned in the Return Directive (Directive 2008/115). Dutch policy should thus be amended.

Finally, as mentioned child protections measures may also be applied to unaccompanied minors, if there are concerns about their development. Most common is the supervision order, Article 1:256 of the *Burgerlijk Wetboek*, or Dutch Civil Code (DCC). Recently, on 1 October 2019, the 'policy framework for children with a child protection measure', came into effect. This policy was formulated by the INS in collaboration with the DT&V and the Child Protection Board. This policy framework provides that children for whom a supervision order has been issued for at least one year while this supervision order cannot be transferred to another country (usually the country of origin) can obtain a temporary residence permit, Article 3.48(2)(b) Aliens Decree 2000, Article 3.24aa(1)(f) *Voorschrift Vreemdelingen* or Aliens Act Implementation Guidelines, Article 3.6b Aliens Decree 2000 and par. B8/13.1-13.11 Aliens Circular 2000.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)?*

See question 3 regarding procedure, legal aid provided and right to be heard. The IND has special hearing rooms for children under the age of 12 and the young age of the unaccompanied minor is also taken into account during the interrogations. Also, interrogations done by employee with experience of interrogating minors. Someone may be present at the hearing to support the unaccompanied minor. In practice, this is usually the guardian or an employee of Nidos, or in some cases the lawyer. In addition, unaccompanied minors are entitled to shelter, education, health care and guidance. The guardian of Nidos should keep oversight that the minor has access to these entitlements.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

Legal instruments not so much. Minors have the right to go to school and if a residence permit has been granted, guidance that is offered to minors by Nidos and COA is focused on the integration of the minor in the Netherlands.

14. *Is family reunification foreseen?*

Family reunification for unaccompanied minors is foreseen. Up to three months after receiving an asylum permit, an unaccompanied minor may apply for family reunification for his or her parents. This is on the basis of art. 9-12 of the Family Reunification Directive, implemented in Art. 29 Aliens Act 2000. The Netherlands held that if the minor reached the age of 18 during the proceedings, he/she could no longer apply for family reunification. The CJEU however, has ruled in a case against the Netherlands that in this regard the age of the minor at the time of the submission of the asylum request is decisive. If he/she is an unaccompanied foreign minor at that time, he is entitled to family reunification with his parents, even if he/she has reached the age of majority at the end of his procedure (CJEU 12 April 2018, C-550/16).

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Yes, Nidos is the national guardianship institution for unaccompanied and separated children in the Netherlands. The Nidos foundation will request temporary guardianship from the juvenile court, in order to provide custody (Article 1:253q(4) of the "*Burgerlijk Wetboek*", or Dutch Civil Code in conjunction with Article 1:253r(1) DCC). For the application of Art. 1: 253r DCC, it is necessary that there is a so-called *authority vacuum* meaning the absence of parental authority. In most cases concerning unaccompanied minor asylum seekers, this criterium has been met because the parent(s) is/are not able to exercise custody, or the residence of the parent(s) who exercises custody is/are unknown. After appointment a representative of Nidos will act as a guardian for the minor's interests. Nidos will assist the unaccompanied minor who is twelve years

or older in submitting the asylum application, or, if the unaccompanied minor is younger than twelve, submit the asylum request on behalf of the minor foreign national (Nidos, annual report 2019[2]).

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

A scheme of the procedure to ascertain a minors age (in Dutch only) can be found here: https://www.igj.nl/publicaties/rapporten/2020/10/5/leeftijdsonderzoek-alleenstaande-minderjarige-vreemdelingen, see in particular p. 7.

If an unaccompanied minor does not have any papers showing his age, information is collected from other EU-member states and there is an assessment by the IND and the Royal Netherlands Marechaussee to determine the age. A training called 'age determination' has been set up, and this mandatory training has been completed by all employees of the IND who are involved in an age test. In case there are doubts about the age, the minor is often given the opportunity to undergo an age test. The IND pays the costs of such an examination, in which X-rays are made of the wrist and collarbone. Radiologists use the photos to determine the age of the child. As minors are exposed to radiation there are certain requirements to the use of an age test. The doctor who issues the letter of referral for the test must always perform an independent assessment whether the test is justified (the test is not justified where the doctor considers the asylum seeker to be evidently under or of age) or whether there are medical contra-indications and the minor must be informed in advance about the test. If you're not able to prove that you are a minor (the test says that the person concerned is min. 20 years old), you will undergo the asylum procedure as an adult.

[2] Annual Report 2019 in https://drc.ngo/media/yrbb43mp/annual-report-2019_uk.pdf, pp. 9-10.

Netherlands

Marie-Christine Alting von Geusau, Sander Schuitemaker*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

Most provisions laid down in the 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' of the United Nations High Commissioner for Refugees[1] have already been incorporated in Dutch policy on unaccompanied minors. Current legislation and regulations, and in particular the Aliens Act 2000, Aliens Decree 2000, Aliens Circular 2000 and Workinstruction's of the Immigration and Naturalisation Service (IND), include provisions and policy guidelines on the training of employees engaged in the implementation of asylum policy, and subjects related to representation, attention for child-specific problems, possible family reunification.

The following number of special measures apply.

- Unaccompanied minors are assigned a guardian until their 18th birthday.
- Unaccompanied minors under the age of 15 are placed with foster families by the Nidos Foundation. Unaccompanied minors aged 15 and over, and those under 15 who cannot be placed with foster families, are given accommodation by the Central Agency for the Reception of Asylum Seekers (COA). They are housed in small-scale reception centres with 24-hour supervision. This supervision takes account of unaccompanied minors possible outcomes: civic integration if they

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[1] From the explanatory notes of 13 May 2009 by an IND-expert in the area of international cooperation and asylum legislation.

are granted a residence permit or return if their application is denied. Unaccompanied minors in COA reception centres who are granted a residence permit are placed in foster families by the Nidos Foundation, to help them integrate in society.
- The Immigration and Naturalisation Service (IND) has special interview rooms for children under 12 (for example with toys). Certain staff members are specially trained to interview children and question them in a manner appropriate to their age.
- Unaccompanied minors in the Netherlands have the right to shelter, education, health care and support, just like other children.

An unaccompanied foreign minor is defined in Article 2(f) of Aliens Decree 2000 as someone that is:
- underage on arrival in the Netherlands (below the age of 18);
- comes from outside the European Union;
- came to the Netherlands without parent(s) or another person having authority over the young person[2].

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

European Union law
- Return Directive: Directive 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals:
  - Article 3: minors are included in the definition of vulnerable persons.
  - Article 5: taking into account the best interest of the child.

[2] https://www.rijksoverheid.nl/onderwerpen/asielbeleid/alleenstaande-minderjarige-vreemdelingen-amv#:~:text=Wat%20is%20een%20amv%3F,jonger%20dan%2018%20jaar)%3B&text=naar%20Nederland%20gekomen%20zonder%20ouder,gezag%20over%20de%20jongere%20heeft.

    - Article 10: return and removal of unaccompanied minors[3].
- Reception Directive: Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection:
    - Article 2(d): provides a definition of a minor[4].
- EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators, December 2018[5].
- European Convention on Human Rights:
    - Article 3: no one shall be subjected to torture or to inhuman or degrading treatment or punishment.
- Court of Justice of the European Union (CJEU):
    - C-441/19, TQ v Staatssecretaris van Justitie en Veiligheid[6]: according to the CJEU, a Member State must first examine whether adequate reception is available in the country of return of the unaccompanied minor, before a return decision can be made, regardless of the age of the minor. In the Netherlands, unaccompanied minors who were 15 years old or older when they applied for asylum are tolerated with a return decision and are only removed when they reach the age of majority. This is contrary to the Court's decision in TQ. Based on the judgment in TQ, this tolerated practice must be abolished.
    - C-550/16, A and S[7]: The CJEU clarified the right of a minor asylum seekers who have reached the age of majority during their asy-

[3] "*1. Voordat een terugkeerbesluit tegen een niet-begeleide minderjarige wordt uitgevaardigd, wordt met gepaste aandacht voor het belang van het kind hulp geboden, door bevoegde instanties anders dan de autoriteiten die de terugkeer uitvoeren.*

2. Voordat de autoriteiten van een lidstaat een niet-begeleide minderjarige van hun grondgebied verwijderen, overtuigen zij zich ervan dat die minderjarige wordt teruggestuurd naar een familielid, een aangewezen voogd of naar adequate opvangfaciliteiten in het land van terugkeer".

[4] "*'minderjarige': een onderdaan van een derde land of een staatloze die jonger is dan 18 jaar*".

[5] https://easo.europa.eu/sites/default/files/Guidance-on%20reception-%20conditions-%20for-unaccompanied-children.pdf.

[6] Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=236422&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6623476.

[7] Available at https://www.refworld.org/cases,ECJ,5bbb871f4.html.

lum procedure on family reunification with their parents: a third-country national or stateless person who upon arrival in a Member State was younger than 18 year during his/her asylum application, but who becomes of age during the asylum procedure and subsequently recognized as a refugee must be qualified as a "minor" within the meaning of art. 2, under f, Family Reunification Directive.

International law

- International Convention on the Rights of the Child:
  - Article 2(2): Non-discrimination;
  - Article 3: best interest of the child;
  - Article 6: right to life and development;
  - Article 12: right to be heard/express views;
  - Article 20: children without a family have the right to special protection and assistance from the state;
  - Article 22: all refugee children shall be afforded special protection
  - Article 24: right to health care for minors;
  - General Comment no. 6: treatment of unaccompanied and separated children who are outside their country of origin[8].
- Guidelines on Child friendly Justice of the Council of Europe: ensuring that minors have certain rights when they come into contact with legal proceedings[9].
- European Court of Human Rights:
  - ECHR Kudla v Poland 26 October 2000 30210/96, para. 91 ECHR 21 January 2011 M.S.S. v Belgium en Griekenland 30696/09, para. 219; ECHR 4 November 2014 Tarakhel v Switzerland 29217/12, para. 94: the test of Article 3 ECHR is relative and can be influenced by, among other things, the age of the person concerned. Unaccompanied minor asylum seekers are extra vulnerable due to the fact that they are minors and alone, so in certain situations there may be a greater risk of a violation of Article 3 ECHR.
  - ECHR 4 November 2014 Tarakhel v Switzerland 29217/12, para. 99: the EctHR emphasized that asylum seekers in general,

[8] UN CRC, General Comment nr. 6 (2005), par. 5, 7-8.

[9] https://rm.coe.int/16804b2cf3.

    and children in particular, should be considered vulnerable and therefore in need of additional protection.
  - ECHR 21 January 2011 M.S.S. v Belgium and Greece 30696/09, para. 263: the minimum level of severity is reached when the foreign national is destitute at the time of deportation and cannot mee this basic needs, is vulnerable and has no prospect of improving his situation.

Dutch law/policy

- Aliens Act 2000 (Vreemdelingenwet 2000);
- Aliens Decree 2000 (Vreemdelingenbesluit 2000);
  - Article 2(f): definition of an unaccompanied minor;
- Aliens Circular 2000 (Vreemdelingencirculaire 2000), para. B8/6: a temporary regular residence permit can be granted ex officio without further investigation if the foreign national is younger than fifteen years of age at the time of the first residence application[10].
- Youth Care Act (Jeugdwet)
  - Article 1.3: in case of lawful residence, the municipality must make facilities;
  - Article 1.3(4): in case of unlawful residence, the municipality must make facilities marginally.
- Work instructions IND:
  - WI 2019/8: The interest of a child in the Dublin procedure;
  - WI 2018/20: Further investigation family reunification procedure;
  - WI 2018/19: Age determination (including age testing Protocol);
  - WI 2015/8: Instruction 'special procedural guarantees'.
- Dutch case law:
  - ABR v S 27 May 2020[11]: in this ruling the Administrative Jurisdiction Division of the Council of State consider that the State Secretary must explain why a Dublin transfer of an unaccompanied minor to a member state where a family member resides is in the best interest of the child.

[10] "*De verblijfsvergunning regulier voor bepaalde tijd kan ambtshalve zonder nader onderzoek worden verleend, als aan de volgende voorwaarden is voldaan:*
– de vreemdeling is ten tijde van de eerste verblijfsaanvraag jonger dan vijftien jaar;".

[11] Available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2020:1281.

- ABR v S 23 November 2020[12]: the Administrative Jurisdiction Division of the Council of State considers that the State Secretary's failure to treat applications for family reunification of unaccompanied minor foreign nationals with priority and the necessary urgency, goes against the purpose of the Family Reunification Directive.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

Article 29(1)(a-b) Aliens Act 2000: the child can receive a temporary residence permit.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

Unaccompanied foreign minors follow the same asylum procedure as other foreign nationals. Article 2.1(1) Aliens Decree 2000 regulates that entrance will be refused if the foreign national has failed to make the purpose or conditions of the intended stay sufficient plausible or has failed to produce sufficient documents to substantiate this.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

Removal may take place if the asylum application of the unaccompanied minor has been rejected. The Repatriation and Departure Service (Dienst Terugkeer & Vertrek (DT&V)) will then realise the departure from the Netherlands[13].

An exception would be an unaccompanied minor who cannot be removed because adequate reception cannot be found in the country of origin or in another country. In this case, an unaccompanied foreign minor may be eligible for a regular residence permit on the basis of the no-fault policy (*buitenschuldbeleid*: foreign nationals who are unable to leave

[12] Available in https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2020:2780.

[13] https://www.dienstterugkeerenvertrek.nl/.

the Netherlands independently through no fault of their own) for unaccompanied minors[14].

This also applies if the departure from the Netherlands has not succeeded, although the unaccompanied foreign minor has actively tried to do so, on condition that the unaccompanied foreign minor is still a minor and he was younger than 15 at the time of the first asylum application[15]. However, this no-fault policy is so strict that it hardly ever applies in practice. The conditions to be eligible for this permit are hard to meet, as everything that can reasonably be done to enable the return has to be initiated by the respective child – supported by his/her guardian and lawyer – and proven to be unsuccessful to the IND. In practice, those return activities were not undertaken and therefore there are no children who can state that they are still in the Netherlands beyond their will and intentions. Consequently, applications for the 'no fault of your own' permit were considered to be doomed to fail[16].

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The bodies involved include, amongst others:

- the municipality: responsible for prevention, support, assistance and care of minors;
- Foundation Nidos (Nidos): placement of unaccompanied foreign minors younger than 15 years of age in a foster family[17];
- Agency for the Reception of Asylum Seekers (*Centraal Opvang Orgaan* - COA)): reception of unaccompanied foreign minors aged 15 and older, and unaccompanied foreign minors younger than 15 years

[14] Decree of 14 May 2013, Official Journal, 2013, 181, available at https://zoek.officielebekendmakingen.nl/stb-2013-181.html.

[15] https://ind.nl/over-ind/achtergrondthemas/paginas/kinderen-in-het-vreemdelingenbeleid.aspx.

[16] E. Zijlstra, J. Rip, D. Beltman, C. van Os, E.J. Knorth & M. Kalverboer, "Unaccompanied minors in the Netherlands: Legislation, policy, and care" in *Social Work & Society,* Volume 15, Issue 2, 2017, pp. 7-8.

[17] https://www.Nidos.nl/.

of age who cannot be placed in a foster family, in small-scale living facilities located close to each other[18].

- Repatriation and Departure Service (*Dienst Terugkeer en Vertrek* - DT&V): establish repatriation for an unaccompanied foreign minor who is not eligible for a residence permit, provided that adequate reception is available in the country of origin[19];
- Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst* - IND): investigates whether the unaccompanied foreign minor needs protection in the form of a residence permit[20];
- Aliens police (*Vreemdelingenpolitie* - AVIM): oversees compliance with the Aliens Act 2000[21];
- Dutch Council for Refugees (*VluchtelingenWerk Nederland*): provides, among other things, guidance during the asylum procedure, family reunification and language and civic integration[22].

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centres, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

There are different kinds of reception:

- Foster family via Nidos for unaccompanied foreign minors up to and including 14 years of age.
- Small-scale reception locations (*Procesopvanglocaties* - POL) via Nidos for unaccompanied foreign minors aged 15 and older with a residence permit. The daily care is outsourced to local youth care institutions. Children are guided by their guardian of Stichting Nidos, the guardianship agency, and by the Dutch Council for Refugees. They stay in this POL-amv during their procedure for a maximum of 7 weeks. If unaccompanied children receive a residence permit, Nidos is respon-

[18] https://www.coa.nl/nl/opvang-verschillende-soorten-asielzoekerscentra.

[19] https://www.dienstterugkeerenvertrek.nl/.

[20] https://ind.nl/asiel/Paginas/default.aspx.

[21] https://www.politie.nl/themas/vreemdelingenpolitie.html.

[22] https://www.vluchtelingenwerk.nl/.

sible for their accommodation. If their application is rejected, they go to small housing units.

- Small housing units (*Kleinschalige Woonvoorzieningen* - KWV). via COA for unaccompanied foreign minors aged 15 and older without a residence permit, and younger unaccompanied foreign minors who cannot be placed in a foster family. These small housing units are located in the area of a larger AZC, at a maximum distance of 15km. The capacity of the small housing units is between 16 and 20 children. The total number of children housed in the small housing and the AZC cannot exceed 100[23].
- Protected reception (*Beschermde Opvang* - BO): unaccompanied asylum-seeking children are extra vulnerable with regard to human smuggling and trafficking. Children who have a higher risk of becoming a victim, based on the experience of the decision-making authorities, are therefore placed in protection reception locations (beschermde opvang). The children are living in small locations, with 24/7 professional guidance available. When a child arrives at Ter Apel, Nidos decides whether he or she should be placed in the protection reception location. This reception is carried out by Jade, contracted by COA. Their services were inspected by the youth support unit (Jeugdzorg) which led to a report in 2017, in which the inspection concluded that still too many children disappear from these locations[24].

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Nidos is responsible to provide a foster family for the unaccompanied minor and this foster care is a useful remedy for unaccompanied minors. All guardians have the same obligations and responsibilities that parents have[25]. Therefore there shouldn't be any differences between a national child as opposed to a migrant child.

[23] https://www.pharos.nl/kennisbank/een-tweede-familie-voor-amvs/.

[24] https://asylumineurope.org/reports/country/netherlands/reception-conditions/special-reception-needs-vulnerable-persons/.

[25] Civil Code, Art. 1: 303; M. Goeman, C. Van Os, E. Bellander, K. Fournier, G. Gallizia, S. Arnold, T. Gittrich, T., Neufeld, & M. Uzelac, *Core Standards for*

Foster care procedure[26].

- Your related foster child is under 18.
- Your related foster child has no acceptable future in his country of origin.
- You are the grandparent, (half) brother, (half) sister, sister in law, brother in law, uncle or aunt of your foster child.
- You are a Dutch citizen, an EU citizen, or you have a valid residence permit.
- Your related foster child does not have a highly infectious or chronic physical or mental disease. A medical statement from the country of origin demonstrates this.
- You can provide your related foster child with the proper care and education.
- The parents or legal representatives agree to the foster child staying with your family. Sometimes you also need approval from the authorities in the country of origin. For example, when this is regulated by law in the country of origin. Or, if the parents are deceased or cannot be found.
- You have custody of your foster child.
- You have an independent sufficient and sustainable income.
- You declare that you are the sponsor of your related foster child.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

Adoption involves a foreign child coming to the Netherlands to live with the family that has adopted the child[27].

Adoption procedure[28].

- You meet the conditions set out in the Placement of Foreign Children for Adoption Act (*Wobka*):

guardians of separated children in Europe: Goals for guardians and authorities, Leiden: ECPAT The Netherlands; Defence for Children, 2011, pp. 15-18.

[26] https://ind.nl/en/family/Pages/Adopted-or-related-foster-child.aspx.

[27] See website of the Foundation for Adoption Services.

[28] https://ind.nl/en/family/Pages/Adopted-or-related-foster-child.aspx.

- ◦ You are a Dutch citizen, an EU citizen, or you have a valid residence permit.
- ◦ You have a *beginseltoestemming* from the Central authority for International Children's Affairs of the Ministry of Justice and Security. This document in principle gives you approval to adopt a foreign child.
- ◦ In addition, you have a Statement of Approval issued by the Central Authority of International Children's Affairs of the Ministry of Justice and Security in the case of an adoption under the Hague Adoption Treaty or a *beginseltoestemming op naam* issued by the Central Authority of International Child Affairs Of the Ministry of Justice and Security, in the case of a non-treaty option. In this, the Ministry of Justice and Security has given you permission to include your foreign adoption child (child's personalities mentioned in the document) in your family for adoption.
- ◦ Your adopted child does not have a highly infectious or chronic physical or mental disease. A medical statement from the country of origin demonstrates this.
- ◦ You show that the biological parents have waived their rights.
- ◦ You show that the authorities in the country of origin agree to the inclusion of your adopted child in your family.

- You declare that you are the sponsor of your adopted child.
- You prove the identity of your adopted child.

The IND will not reject the application of your adopted child without valid cross border document if you can show his identity through other means.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

For unaccompanied minors who arrive in the Netherlands, Nidos requests the juvenile court to be appointed as a guardian. An unaccompanied minor can also be placed under supervision (*ondertoezichtstelling* - OTS) by the juvenile court. One reason for such a supervision order can be that there are problems within the family regarding the educa-

tion of the child. In accordance with Article 1:254 of the Civil Code of the Netherlands, a minor can be placed under supervision by the juvenile court "*if he is growing up in such a way that his moral or spiritual interests or his health are at serious risk, and other means to avert this risk have failed or are expected to fail*"[29].

In migration cases, administrative judges deal with migration cases, also involving unaccompanied minors (this includes regional courts and the Administrative Division of the Council of State (*de Afdeling Bestuursrechtspraak van de Raad van State*) which is the highest court in migration cases. The administrative judge will only assess whether or not the IND has included the interests of the child in their report and balances this against other interests when making a decision, whereas the juvenile judge in civil proceedings places the interest of the child at the forefront[30].

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

In principle the same conditions apply to unaccompanied children and adults when it comes to eligibility for a residence permit. However, unaccompanied minors seeking asylum are considered as particularly vulnerable compared to adult asylum seekers and therefore specific guarantees apply. As a general rule, unaccompanied asylum seeking minors are interviewed by employees of the IND who are familiar with their special needs[31].

The majority of unaccompanied minors arriving in the Netherlands are granted refugee status or subsidiary protection, and the Netherlands provides a (temporary) residence permits once a positive decision on the application has been taken. The Netherlands also further grants national

[29] An unofficial English translation of the Dutch Civil Code, provided by Dutch Civil Law, is available online at: http://www.dutchcivillaw.com/civilcodegeneral.htm. For an English translation of the Dutch Civil Code in book form, see C.S. Hans Warendorf, R. Thomas and *I. Curry-Sumner*, *The Civil Code of the Netherlands*, Second Edition, The Hague, Wolters Kluwer, 2013. The original Civil Code (*Burgerlijk Wetboek*) in Dutch is available online at: http://www.wetboek-online.nl/site/home.html.

[30] Statement of the Council for Child Protection: *The Council for Child Protection in migration law*, 13 September 2018. Available (in Dutch) at: https://www.kinderbescherming.nl/actueel/nieuws/2018/09/13/de-raad-voor-de-kinderbescherming-in-het-vreemdelingenrecht.

[31] Section C1/2.11 Aliens Circular.

alternative or temporary statuses to unaccompanied minors, for example, a permit to stay based on humanitarian or medical reasons, or a form of individual protection for unaccompanied minors who have been victims of trafficking. The different residence permits have different durations and advantages. The advantages of having a residence permit is that more rights apply to the minor, such as higher education and the possibility of working or doing an internship.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Unaccompanied foreign minors are entitled to shelter, education, health care and counselling[32].

Shelter: see question 7

Education

In the Netherlands, unaccompanied minors, irrespective of their residence status, have the right to receive an education. In consultation with the municipality and school boards, a suitable place – in either primary, secondary, or vocational education – needs to be found. The municipality where the child stays is responsible for the school accommodation.

Primary education for children can take place in an asylum-seeking center as well as in a 'regular' primary school.

Children who on arrival are at the age of secondary education (12 years*)* will start in an International Transition Class (*Internationale Schakel Klas* - ISK) where they can stay for a maximum of two years. With a large focus on language education (80%) in the ISK, children will be prepared for regular education. By mastering a sufficient level of the Dutch language, the child can attend regular education. For many of them, regular education is aimed at learning a profession that will enable them to stand on their own two feet in their country of origin[33].

[32] https://www.vluchtelingenwerk.nl/feiten-cijfers/alleenstaande-minderjarigen.
[33] https://www.vluchtelingenwerk.nl/feiten-cijfers/alleenstaande-minderjarigen.

Culture families

Nidos works with so-called 'culture families' (*cultuurgezinnen*), families with a similar cultural, religious, and ethnic background as the unaccompanied minors in question. These can be family members, fellow clan or tribe members, or families from a pool of foster families. Culture families act as transitional space where a child can unite the culture from the country of origin with the new culture[34].

Legal representation

Under the Dutch Civil Code, every child must have a legal guardian (a parent or a court-appointed guardian). For unaccompanied minors, there is a separate institution – the Nidos Foundation (Foundation for Protection of Young Refugees; hereafter Nidos) – that is awarded with temporary child custody[35]. Since unaccompanied minors flee to the Netherlands without their parents, on arrival they are placed under guardianship of Nidos until their eighteenth birthday.

Unaccompanied foreign minors are only heard by specially trained staff. This takes place in a child-friendly room if the child is younger than 12 years of age. There is room for customization such as adapted questions and extra breaks. During the hearing, someone may be present to support the child (usually the guardian or an employee of Nidos)[36].

Health care

In general, unaccompanied minors have legal access to (mental) health services, irrespective of their residence status. In practice, guardians sometimes face difficulties to have their pupil's mental health problems taken seriously by the health service suppliers of the large scaled reception centres[37]. If there are serious mental health problems, the GGZ may be called in[38].

[34] WODC, Unaccompanied minor asylum seekers in the Netherlands: choice or chance? Cahier 2018-18.

[35] Civil Code, Art. 1:253r.

[36] https://ind.nl/over-ind/achtergrondthemas/Paginas/Kinderen-in-het-vreemdelingenbeleid.aspx.

[37] Nidos, personal communication, 6 October 2016

[38] https://www.pharos.nl/kennisbank/een-tweede-familie-voor-amvs/.

Unaccompanied minors can use most services provided in the Youth Act[39]. However, for undocumented children who have no legal residence status, there are deviations from these rules. There are more restrictions in the regular Youth Care System for undocumented children to be placed in family foster care, and the assessment of the need of psychosocial care has to be renewed every six months, instead of the regular twelve months for Dutch children[40]. For Unaccompanied minors under the guardianship of Nidos who stay in foster families, those restrictions have limited impact.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

Integration is facilitated if a permit has been granted. Nidos places unaccompanied minors in COA reception with a residence permit in small-scale reception facilities, such as small living units or small housing groups. From here, they can work on their social integration[41].

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

Article 3.24a of the Alien Decree 2000, states that an unaccompanied foreign minor has the right to family reunification to the blood relatives in a direct ascending line.

Within three months after their asylum request has been accepted, unaccompanied minors can apply for reunification with their parents within a specific reunification policy[42], for which many of the usual requirements for family reunification do not apply[43]. In addition, the unaccompanied minors siblings can qualify for a residence permit to stay with their parents on the grounds of Article 8 of the European Convention on Human Rights (ECHR) – right to respect for private and family

[39] Art. 1.3, section 1.

[40] Youth Act Decree (*Besluit Jeugdwet*), Art. 2.1, section 2 and 3.

[41] https://www.rijksoverheid.nl/onderwerpen/asielbeleid/alleenstaande-minderjarige-vreemdelingen-amv.

[42] Nareisbeleid; TK 2014-2015, 19637, no. 1904

[43] For instance, there are no income or integration requirements and no fees have to be paid.

life (if the requirements are fulfilled). Relatives must prove their identity and family relationship with the unaccompanied minor by documents. When documents can not be provided, there is the possibility to prove identity and relationship via a DNA test or a hearing at a Dutch embassy. It can be very difficult to reach a Dutch embassy, especially if there is no Dutch embassy present in the country of origin – as is the case in Eritrea and Syria – and relatives have to travel to an embassy in a neighbouring country. The procedure for family reunification can take a long time in times of high influx, and if documents are not available and traveling is necessary. If an application is accepted, the unaccompanied foreign minor can in principle reunite in the Netherlands with his family[44]. Once the relatives have arrived in the Netherlands, they receive an asylum permit and they are housed in an asylum seekers centre together with the unaccompanied minor, preferably in the municipality where the unaccompanied minor already lives.

On April 14, 2018, the CJEU, in response to a preliminary question (case A and S) of the regional Court Amsterdam, clarified the right of a minor asylum seekers who have reached the age of majority during their asylum procedure on family reunification with their parents: a third-country national or stateless person who upon arrival in a Member State was younger than 18 year during his/her asylum application, but who becomes of age during the asylum procedure and subsequently recognized as a refugee must be qualified as a "minor" within the meaning of art. 2, under f, Family Reunification Directive[45]. This case clarifies the right to equal treatment for unaccompanied minors whose Asylum application is granted and makes clear that the right to family reunification should not depend on the pace at which the government handles the asylum application[46]. Following the judgment, C2 / 4.1 of the Alien Circular includes a section on family reunification cases in which the sponsor is an unaccompanied minor (WBV 2018/10).

[44] https://ind.nl/over-ind/achtergrondthemas/Paginas/Kinderen-in-het-vreemdelingenbeleid.aspx.

[45] CJEU April 12, 2018, C-550/16, A and S, availabe at https://www.refworld.org/cases,ECJ,5bbb871f4.html.

[46] M.L. van Riel, "Statement in the spotlight. During asylum procedure has reached the age of majority of a single minor parents' right to asylum family reunification", in *A&MR,* 2018 no. 5.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

For children who apply for asylum in the Netherlands without their parent(s), Nidos provides for their guardianship through (temporary) custody[47].

Nidos is appointed by the court as a (temporary) guardian if the parents of a child applying for asylum have died, or they are unable to exercise custody, or the existence of one or both parents is unknown[48].

In the absence of a parent, the guardian performs the duties of the parent and oversees the proper exercise of the care provided to the young person, and intervenes when such care is inadequate. This intervention may result in directions that should lead to improvement. If these improvements are not sufficiently made or do not provide a solution, the guardian can transfer the young person to another form of care[49].

The central tasks in relation to guardianship are: to act in the best interests of the child, to create a safe and supportive environment for the child, and to stimulate the development of a strong social network in the Netherlands to ensure the child's participation in every decision that affects the child, to advocate for the rights of the child, to be a bridge between and focal point for the child and other actors involved, and to ensure the timely identification and implementation of a durable solution regarding the respective child's living environment and future perspective. For children younger than sixteen, and vulnerable children, the guardian is always present during the interviews with the migration authorities.

[47] https://www.Nidos.nl/home/voogdij-en-gezinsvoogdij/voogdij/.
[48] https://www.Nidos.nl/home/voogdij-en-gezinsvoogdij/voogdij/.
[49] https://www.Nidos.nl/home/voogdij-en-gezinsvoogdij/voogdij/.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

The age assessment procedure is governed by Paragraph C1/2 of the Aliens Circular and starts with an age inspection (this is unique throughout the national territory).

Age inspection (*leeftijdsschouw):* If an asylum seeker, who claims to be an unaccompanied minor, lodges an asylum application in the Netherlands, the Royal Police (KMar), the Border Police (AVIM) and the IND conduct an inspection (*leeftijdsschouw*)[50]. Currently, three officers from the IND, the KMar or the Border Police (AVIM) have to conduct the inspection independently from one another. There must ultimately be a unanimous judgment to conclude obvious majority or minority of the applicant, which is based on an evaluation of existing documentation, a visual assessment based on physical appearance and interviews that provide a narrative about an individual's life and circumstances[51].

Medical age assessment (*medisch leeftijdsonderzoek*): If the officers from IND, AVIM or KMar cannot conclude that the asylum seeker is evidently over 18 years of age and he or she cannot prove his or her minority, a medical age assessment takes place[52]. This is carried out on the basis of X-rays of the clavicle, the hand and wrist[53]. The IND pays the costs of such an examination. Radiologists determine the child's minimum age on the basis of the photos[54]. Only if the test clearly indicates that the child is of age, he or she will be treated as an adult. If the age as-

[50] Paragraph C1/2 Aliens Circular.

[51] T. Kamer, *Reply by the Secretary of State for Security and Justice to a parliamentary question on age assessment of unaccompanied children*, 7 November 2016, available in Dutch at: http://bit.ly/2glbqMT. See also Paragraph C1/2.2, ad b Aliens Circular.

[52] Article 3.109d(2), Aliens Decree.

[53] T. Kamer, *Report of the Committee on Age assessment*, April 2012, available in Dutch at: http://bit.ly/2xIFvky, 7.

[54] https://www.vluchtelingenwerk.nl/feiten-cijfers/alleenstaande-minderjarigen.

sessment is refused, this may not have implications for the substantive assessment of the asylum request (District court, 4 April 2014), other than that consequently the person will be further treated as an adult.

When a (supposed) minor claims that he or she is incorrectly registered as an adult in another EU Member State the Immigration authorities often does not give the benefit of the doubt as is required by the UNCRC.

The Advisory Committee on Immigration Affairs (ACVZ) is critical on the procedure with this respect as the Immigration authorities often invoke the principle of mutual thrust between Member States and refrains from further investigation[55]:

The ACVZ holds the opinion that the right balance must be struck between the interests of a properly functioning European and national asylum system and the interests and fundamental rights of individual asylum seekers, including the best interests of the child. An asylum seeker must have an effective legal remedy to rebut the age as registered in the other Member State. Invoking the principle of mutual trust in the case of age registration in the Member State of previous stay leads to a complete shift of the burden of proof to the asylum seeker. The asylum seeker certainly bears responsibility for substantiating the facts and circumstances of the asylum story and producing supporting information. Based on case law, however, it can be concluded that, for an asylum seeker to dispute a previous, incorrect registration on the basis of their own statement is practically impossible. From the case law, it is also evident that asylum seekers are seldom deemed to be unable to provide documentary evidence. For this reason, the IND does not conduct or offer further investigations or age assessments. The possibility that some minors in the Netherlands may have been incorrectly registered as adults and thus treated as adults, cannot be ruled out. The consequences of such an eventuality may have been that minors were deemed ineligible for facilities to which, as minors, they should have been entitled, that they were unable to make a claim for family reunification with their parents, and that they may have been wrongly transferred to another EU Member State.

[55] Advisory Committee on Immigration Affairs Detriment of the doubt. Age assessment and age determination in EU member states of previous stay, 30 November 2020.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

The *Kennisplatform Integratie & Samenleving* (Integration & Society Knowledge Platform) contributes to increasing the integration opportunities of migrants. Together with municipalities and civil society organisations, the KIS creates solutions so that refugees can better participate in society[56]. There is also social guidance from *Vluchtelingenwerk*: they assist refugees and help them integrate into Dutch society[57].

The unaccompanied minor doesn't keep his residence permit (based on the *buitenschuldbeleid*) upon reaching the age of majority, unless adequate care is not available in the country of return/origin.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

Strong points.

- In the Netherlands state-funded legal assistance is available for children in asylum procedures, including appeals.
- In the Netherlands, upon submitting an asylum request, an unaccompanied child is immediately informed about the appointment of a legal representative.
- In the Netherlands, unaccompanied minors for whom the juvenile judge has sanctioned a child protection measure can be granted a residence permit on humanitarian grounds.
- The Netherlands has a dedicated guardianship institution. A guardian is swiftly appointed for each child.
- In the Netherlands, Nidos has an agreement with IOM on post-return monitoring of unaccompanied children.
- The Netherlands detains unaccompanied and accompanied children for migration control purposes

[56] https://www.kis.nl/thema/vluchtelingen.

[57] https://www.vluchtelingenwerk.nl/wat-wij-doen/maatschappelijke-begeleiding.

Critical aspects.

- In the Netherlands, the views of professionals who possess the greater knowledge of the child – such as social workers, guardians, teachers, doctors, and psychologists – are not routinely sought by asylum and immigration decision-makers.
- Individualized Best Interests Assessments are not conducted during returns proceedings
- In the Netherlands, the DT&V relies on the BIA carried out by the IND during the asylum decision, and does not perform any reassessment during return procedures. The BIA and BID carried out by the IND are not thorough, not multi-disciplinary or well documented, and do not include input from the child, nor from other organizations, the guardian, or the lawyer.
- In the Netherlands, the government holds that a reception facility or orphanage amounts to "adequate reception" if it meets local standards in the country of origin, regardless of a lack of verifiability.
- Article 3 of the UNCRC is frequently adduced by lawyers in asylum cases in the Netherlands. The Administrative Division of the Council of State (de Afdeling Bestuursrechtspraak van de Raad van State), the highest court in migration cases, is however reluctant to apply this principle to individual cases, repeatedly stating that "when the weight to be attached to the best interest of the child in a concrete case is concerned, Article 3 (1) of the CRC, given the wording of the provision, does not contain a norm which is, without further elaboration, directly applicable by a judge"[58].

Aspects to be improved.

- Implementation of the best interest of the child in the Aliens Act 200
- Best Interest of the child in *all* procedures of decision making

  Best Interests Determination must be conducted and must take primary consideration before a decision to return an accompanied minor is made. A child should not be returned unless a multi-disciplin-

[58] See, for example, Afdeling bestuursrechtspraak van de Raad van State (State Council Advisory Division, ABRvS), Uitspraak [Statement] 12 maart 2014, 201303599/1/A2, ECLI:NL:RVS:2014:838. Available (in Dutch) at: https://www.navigator.nl/document/idbfa4632e1ad24de8be300a5e90017bb5?anchor=id-3b2cf95f-5e3e-48a4-9286-44d48382c4d3.

ary, documented, individual, robust, and up-to-date best interests determination has been conducted to identify the best interests of the child, a durable solution identified, and how this should be implemented. In doing so, we suggest that the Dutch procedures follow the UNHCR recommendations set forth in paragraph 9.7 of the UNHCR Guidelines on Unaccompanied Children:

> It is acknowledged that many perspectives will need to be taken into account in identifying the most appropriate solution for a child who is not eligible for asylum. Such a multidisciplinary approach may, for example, be ensured by the establishment of Panels in charge of considering on a case-by-case basis which solution is in the best interests of the child, and making appropriate recommendations. The composition of such Panels could be broad-based, including for instance representatives of the competent governmental departments or agencies, representatives of child welfare agencies (in particular that or those under whose care the child has been placed), and representatives of organizations or associations grouping persons of the same national origin as the child[59].

- Alternatives to detention
  Never detain a child for immigration purposes, including while their removal is awaited. Alternatives to detention should be made available, inclusive of accompanied children.
- Family unity and family reunification
  Arrange for family tracing for unaccompanied and separated children, but only if carried out by qualified persons and following a Best interest determination, to ensure that restoring contact would not be contrary to a child's best interests. Paragraph 9.2 of the UNHCR Guidelines on unaccompanied children state that no repatriation should take place unless*:*

> Prior to the return, a suitable caregiver such as a parent, other relative, or adult caretaker, a government agency, a childcare agency in the country of origin has agreed, and is able to take responsibility for the child and provide him/her with appropriate care and protection[60].

[59] UNHCR Guidelines, para. 9.7.
[60] UNHCR Guidelines, para. 9.2.

- Transitional arrangements for children turning 18 years of age
  Guardianship and specialized accommodation provision should continue for a transitional period past the age of 18 years old for young people who require further support.
  Make alternative pathways for regular migration available for young people not eligible for refugee status or subsidiary/humanitarian protection, taking into account their level of integration, e.g. if they are in apprenticeships, training or employed.
- Alternative options for the common treatment of children who cannot be returned
  Provide for an alternative durable solution – with long-term regular migration status – for the unaccompanied minor if he/she cannot be returned.

Poland

Bartosz Kamil Truszkowski*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

Poland belongs to the group of countries where the fate of unaccompanied foreign minors remains mainly in the field of interest of a small group of institutions and experts having direct contact with them. There are no systemic solutions that would consistently regulate all aspects of the stay in Poland of this very small but special group of foreigners. However, it is certain that the principle of respecting the rights of the child, respecting its subjectivity and acting in its best interest is respected both in the law and in the practice of individual institutions to which minors will be sent.

In accordance with the definition contained in the Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland, an unaccompanied minor is a foreigner who arrives on the territory of the Republic of Poland or stays on that territory unaccompanied by adults responsible for him/her in accordance with the law in force in the Republic of Poland.

As defined in Council Directive 2004/83/ECof 29 April 2004 on minimum standards for the qualification and status of third country nationals or statelesspersons as refugees or as persons who otherwise need international protection and the content of the protection granted, the term 'unaccompanied minors' means third country nationals or stateless persons below the age of 18 years who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the

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care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

There is no single legal act in Poland that comprehensively regulates the complex situation of unaccompanied foreign children. Individual aspects of their stay in Poland are regulated either in a very general way, because they apply to all foreigners, or in a way that takes more into account the situation of foreign minors; rarely do the regulations directly refer to unaccompanied minors. Moreover, in many cases, the provisions regulating particular issues relating to unaccompanied minors of Polish citizens apply to unaccompanied minors.

Legal acts in force in Poland concerning unaccompanied minors or affecting their status.

- International law.
  - Universal Declaration of Human Rights – a set of human rights and the principles of their application adopted by the UN General Assembly in 1948 in Paris. It has no binding character, nowadays commonly treated as customary law.
  - Declaration of the Rights of the Child – a set of demands for ensuring proper living and development conditions for children, adopted on November 20, 1959 by the UN General Assembly. It has no binding character, nowadays commonly treated as customary law.
  - The UN Convention relating to the Status of Refugees, drawn up in Geneva on 28 July 1951, together with the New York Protocol of 1967, Poland joined in September 1991.
  - The Convention on the Rights of the Child – an international convention adopted by the UN General Assembly on 20 November 1989, Poland ratified the Convention in 1991. Its regulations and its additional protocols comprehensively cover the most important rights of the child, while defining the fundamental principles that should guide the communities of all countries, including

in particular the general directive on conduct in the good of the child, the prohibition of discrimination and the prohibition of all forms of exploitation.

- Convention for the Protection of Human Rights and Fundamental Freedoms – an international agreement for the protection of human rights concluded by the member states of the Council of Europe, opened for signature in 1950, entered into force on 3 September 1953. Poland ratified it in 1993.
- Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants of 1961, Poland acceded in 1995.
- European Convention on Recognition and Enforcement of Decisions Concering Custody of Children and on Restoration of Custody of Children, done at Luxembourg on 20 May 1980. Ratified by Poland in 1996.
- The European Social Charter adopted in Turin on October 18, 1961, has been in force since 1965. Together with its modified version known as the Revised European Social Charter, Poland ratified the Charter in 1997. It contains, among other things, provisions prohibiting child abuse, regulating the child's legal status, protecting the child's health, protecting the child's education and creating an infrastructure for the rehabilitation of juvenile offenders.
- European Convention on the Exercise of Children's Rights, done at Strasbourg on 25 January 1996. In Poland in force since 2000.
- The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19.10.1996, is in force in Poland since 2010 – includes, among other things, the obligation to protect minors and their property in emergency situations and authorizes the state's jurisdictional authorities to apply national law.

◦ European law:

- The Treaty on European Union and the Treaty on the Functioning of the European Union – there are regulations affecting the legal protection of children. The standards contained in these treaties introduced directives obliging Member States to take all mea-

sures to combat discrimination on grounds of, inter alia, national, ethnic, age or health differences, as well as regulations in the field of asylum law and migration policy, including the directive on combating trafficking in human beings, especially women and children.

- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals – in the context of the protection of the rights of the child and the rights of the family, the implementation of that Directive implied the adoption of an obligation to give priority to those rights in the course of proceedings conducted under it.
- The Charter of Fundamental Rights of the European Union – a set of fundamental human rights and civil obligations adopted and signed on 7 December 2000. The document was made binding by the Treaty of Lisbon signed on 13 December 2007, which entered into force on 1 December 2009.
- 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 – contains extremely important guarantees for unaccompanied minors. They concern the appointment of a representative in order to represent the minor and provide him/her with all necessary assistance, perform various activities with his/her participation (including an interview), as well as provide him/her with access to information about the course of the procedure conducted with his/her participation and decisions issued in this procedure, as well as to conduct medical examinations aimed at determining the age of the minor in accordance with the procedures strictly defined by the directive's provisions.
- Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

- National legislation.
  - The Act of 25 February 1964 – Family and Guardianship Code – the legal situation of foreign minors is significantly influenced by the provisions on parental authority, foster care and guardianship. In the case of the stay in Poland of an unaccompanied minor, a lot depends on the arrangements concerning his/her identity and nationality, and consequently his/her relationship with parents or other legal guardians. In some situations it may be necessary for the court to issue a decision suspending parental authority, and in extreme cases even depriving that authority, if only because of permanent obstacle preventing it from being exercised.
  - The Act of 26 October 1982 on juvenile delinquency proceedings – its provisions apply to foreign minors who have committed a punishable act on the territory of the Republic of Poland and at the time of committing it are 13 years old and under 17 years old.
  - The Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland – it defines the principles, conditions and procedure for granting protection to foreigners within the territory of the Republic of Poland and the authorities competent in these matters. On the territory of the Republic of Poland, a foreigner is granted protection by: granting refugee status; granting subsidiary protection; granting asylum; granting a permit for tolerated stay; granting temporary protection.
  - The Act of 14 July 2006 on the entry into, residence in and departure from the territory of the Republic of Poland of citizens of the European Union Member States and their family members – applies to the entry and residence of foreigners not covered by the Act on Foreigners.
  - The Act of 2 April 2009 on Polish citizenship – enables the acquisition of Polish citizenship by minors who have been found on the territory of the Republic of Poland and whose parents remain unknown.
  - The Act of 9 June 2011 on family support and system of foster care – in case of threat to the child's well-being, if the use of other measures proved to be insufficient or impossible, the family court may decide to place the minor in foster custody. The provisions on foster

custody apply to foreign minors, regardless of whether or not they have legal residence title in the territory of the Republic of Poland.

- The Act of 12 December 2013 on foreigners – specifies the rules and conditions for entry into, transit through, stay in and departure from the territory of the Republic of Poland, the procedure and authorities competent in these matters. According to the adopted rule, a foreigner is everyone who does not have Polish citizenship. However, the scope of the Act is limited. It does not include, in particular, citizens of the Member States of the European Union, the Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation, and members of their families who join them or stay with them.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

The condition for initiating the procedure for granting the refugee status is the expression of a minor's desire to apply for international protection in Poland. The application for granting the refugee status is submitted to the Head of the Office for Foreigners. The application for refugee status is submitted to the Head of the Office for Foreigners through the Commander of the Border Guard Unit or the Commander of the Border Guard post: a minor applicant who does not have documents entitling him/her to cross the border shall submit the application during the border control through the commander of the Border Guard unit; a minor applicant who is staying on the territory of the Republic of Poland shall submit the application through the commander of the Border Guard unit covering the territorial range of operation of the capital city of Warsaw; a minor applicant who is staying in a guarded center for foreigners shall submit the application through the commander of the Border Guard unit covering the territorial range of operation of the guarded center. After the application is accepted, fingerprints are taken from an unaccompanied minor who is over 14 years old. The authority accepting the application for granting the refugee status submitted by an unaccompanied minor (Border Guard) shall immediately apply to the guardianship court competent for the place of the minor's residence with an application for appointing a

guardian to represent the minor in the proceedings for granting the refugee status and placing the minor in an educational care facility (foster custody). The Border Guard shall lead the unaccompanied minor to a foster family acting as a emergency family shelter or an intervention-type educational care facility, where he or she shall stay until the court issues its ruling. If an unaccompanied minor has been staying in a guarded center for foreigners, at the moment of submitting an application for refugee status, he or she is released from the center and placed in one of the mentioned institutions. The Border Guard immediately transfers the application for granting the refugee status to the Head of the Office for Foreigners for examination. If the circumstance that the applicant is an unaccompanied minor comes to light in the course of the proceedings, the Head of the Office shall apply for the appointment of a guardian and placement of the minor in an educational care facility. An unaccompanied minor who has been denied refugee status and subsidiary protection shall be left in an educational care institution until he is transferred to the authorities or organizations of the country of origin, whose statutory tasks include matters of minors. The procedures are the same for minors whose age is confirmed as for those whose age is in doubt. Until it is confirmed that a foreigner is an adult, they are treated as minors.

A minor asylum-seeker in Poland is interviewed whenever his age and psychophysical condition allow. The Border Guard performs only an initial interrogation (without the participation of a psychologist), while the proper interrogation is performed by the Office for Foreigners. The Head of the Office notifies the guardian of an unaccompanied minor about the date and place of the interrogation not later than 7 days before the date of the interrogation. Before the interview, the Office's employee shall instruct the unaccompanied minor about factual and legal circumstances which may affect the outcome of the procedure for granting the refugee status and about the possibility of requesting that the interview be held in the presence of an adult indicated by the minor. The interview shall take place in a language that the unaccompanied minor understands, in a manner adapted to his or her age, degree of maturity and mental development, taking into account the fact that he or she may have limited knowledge of the actual situation in the country of origin. It shall be conducted by an official of the Office who meets certain requirements. An

unaccompanied minor shall be interviewed in the presence of the following persons: the guardian, who may ask questions or make comments; an adult indicated by him/her if this does not hinder the proceedings; a psychologist or an educator, who prepares an opinion about the psychophysical condition of the minor. It is possible to record the course of the hearing by means of an image or sound recording device. If there are doubts about the actual age of the minor and he or she is to undergo a medical examination, the date of the interview will rather be determined after the examination, once his or her age has been confirmed.

The average length of the procedure for granting refugee status to a minor in Poland is 6 months. Procedures for minors whose age is doubtful usually last longer than those whose age is certain, because it is necessary to carry out an age assessment, which requires additional time.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

A foreigner who crosses the border is required to have: a valid travel document; a valid visa or other valid document entitling him/her to enter and stay in the territory of the Republic of Poland, if required; a permit to enter another country or a residence permit in another country, if such permits are required for transit. Minors crossing the Polish border are subject to the same entry and exit checks as adults. However, on the basis of the Schengen Borders Code and the Border Guard's own internal regulations, during border control, Border Guard officers pay special attention to minors, regardless of whether they travel under the care of adults or alone, and whether they are third-country nationals or enjoy the right to free movement within the EU/Schengen territory.

In the case of minors travelling unaccompanied by adults (i.e. alone), the Border Guard officer carrying out the check-in makes sure, among other things, through detailed control of travel documents and supporting documents and through checks in databases, that the minors do not leave the territory against the will of the person(s) exercising parental care over them. Poland, like other EU Member States, has established a national contact point for consultations concerning minors and uses the list of national contact points located in other countries, provided by the Eu-

ropean Commission, in case of doubts concerning any circumstances related to minors, whether they are travelling accompanied or alone.

An unaccompanied minor who does not apply for refugee status may not obtain an entry permit if he or she does not meet the statutory conditions for granting the border crossing. He also cannot be given an administrative decision to refuse entry, so at the same time he is deprived of the possibility to appeal against the decision, which actually means such refusal. According to national law, a minor has no legal capacity and the court should appoint a guardian for him/her for the purposes of the administrative procedure (in this case for the purpose of issuing the decision refusing entry). In practice, a minor gives up his or her entry after being informed that he or she does not meet the legally required entry conditions and cannot enter the territory of Poland (at the air passage the carrier takes the minor on board). An official note is made of the event.

An applicant for international protection, including an unaccompanied minor, cannot be refused entry. Any such person shall be accepted immediately and shall be allowed to enter and stay on the territory of Poland during the asylum procedure.

When an unaccompanied minor has no document, he or she is transferred in simplified readmission to the country of entry. In the air passage also each time an attempt is made to send the person back (taken by the carrier), from which a service note is made. If the airlines do not agree, the return procedure is initiated, i.e. the minor is admitted to the country, placed in a care centre or a guarded center (in case of minors over 15 years old), the Border Guard applies for the appointment of a guardian. If the authority has doubts about the age of the minor, during the return procedure it may request a study to estimate the age.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The legal status of underage foreigners already residing on the territory of the Republic of Poland is based on two categories of premises. The first category includes premises justifying the issuance of an expulsion decision to a minor foreigner, while the second category includes premises justifying the issuance of one of several possible residence titles (an unaccompanied minor may be granted a permanent or temporary residence permit, including for humanitarian reasons, upon an application submit-

ted by his/her guardian). From the point of view of an unaccompanied minor, important regulations concern the conditions of granting him/her a residence permit for humanitarian reasons. It may be granted in particular if the foreigner's obligation to return would violate the rights of the child as set forth in the Convention on the Rights of the Child, to the extent that its psychophysical and physical development would be seriously threatened. In practice, however, it may be problematic to determine the existence of the prerequisites contained in this provision. Not every violation of the rights of the child as a result of his or her expression justifies the granting of the aforementioned consent, but only those that could significantly affect his or her psychophysical development. Moreover, unlike a temporary residence permit issued by a *voivode* (representative of the Council of Ministers in the *voivodship* – the highest level administrative division in Poland) on the basis of the same prerequisites, only the competent body of the Border Guard may grant a permit for humanitarian reasons. In this situation it seems obvious that it would be much easier for the guardian of the minor to identify these conditions objectively than for the Border Guard authority conducting the return procedure. In both cases, however, a psychological opinion drawn up by specialists, taking into account the negative effects that the implementation of the return decision issued in the minor's case may have on his or her development, will be of significant importance. As in any administrative procedure, also in this procedure other evidence may be used to justify not only granting the minor a residence permit for humanitarian reasons, but also legalizing his or her stay for other reasons, e.g. due to his or her exceptional personal situation or due to the existence of premises justifying the recognition of an unaccompanied minor as a victim of an offence committed against him or her. However, if an unaccompanied minor is subject to a return decision and he is at least 15 years old, he may be placed in a guarded center for foreigners by court decision, while the use of detention is prohibited for minors remaining in the asylum procedure.

An asylum-seeker, including an unaccompanied minor, cannot be expelled. Any such person is in the course of the asylum procedure and during that time his/her stay in the country is legal.

An unaccompanied minor who is not seeking refugee status may be detained on the territory of the country if he does not meet the conditions for residence and should be expelled to his country of origin. For

the purpose of conducting the proceedings to oblige a foreigner to return, the authority that detained the minor requests the court to appoint a guardian. In the application to the court for the appointment of a guardian, the authority may indicate the person (close, relative of the minor) if such person is present with the minor. If the minor is over 14 years old, fingerprints are taken from him/her. An unaccompanied minor may be placed in an interventional care facility, and if his or her behaviour indicates disobedience to the rules of such facility and he or she is over 15 years old – in a guarded center for foreigners. In practice there is only one guarded center with designated places for unaccompanied minors. During the return procedure, the prerequisites for granting humanitarian protection are considered, in particular those resulting from the Convention on the Rights of the Child. After the decision to oblige a foreigner to return, an unaccompanied minor may be expelled to his/her country of origin if his/her relatives or guardianship authorities of the country of origin are waiting for him/her in that country. During the return, the unaccompanied minor shall be accompanied by a guardian appointed for the purpose of carrying out the return – in practice, in the application to the court for the appointment of such a guardian an officer of the Border Guard shall be indicated. In case of doubts about the age of the minor, the authority may ask for a study to be carried out in order to estimate the age. Until the result of the examination is obtained, a person claiming to be a minor is treated as a minor. At the border, the procedures related to the non-entry permit are applicable, i.e. either an unaccompanied minor resigns from further travel and returns voluntarily or, in case of lack of documents, is immediately transferred in simplified readmission (without issuing a decision obliging the foreigner to return).

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The following institutions are responsible for the reception of unaccompanied minors in Poland.

- Border Guard:
  - accepts an application for granting the refugee status submitted by an unaccompanied minor and applies immediately to the compe-

tent court for the place of residence of the minor with an application for appointing a guardian to represent the minor in the proceedings for granting the refugee status and placing the minor in an educational care institution;
- leads an unaccompanied minor to an interventional type of educational care facility;
- upon admission to the facility, a foreigner should have a Temporary Foreigner's Identity Card issued by the competent branch of the Border Guard (an exception is made for minors transferred from another Member State under the Dublin II agreement);
- if, during his stay in the facility, the minor turns 18 and has not been issued with a final decision on granting the refugee status, it is necessary for the Border Guard to contact the Office for Foreigners to place him in a center for foreigners;
- a minor has the right to be reunited with his family under the Dublin procedure (necessary contact between the Border Guard – Office for Foreigners – guardian);
- a minor has the right to return to his country of origin voluntarily (necessary contact between the Border Guard – Office for Foreigners – guardian);

◦ Police:
- in case of detention of an unaccompanied minor foreigner staying on the territory of the Republic of Poland (i.e. in a situation in which he is staying illegally), the police immediately puts the minor foreigner at the disposal of the Border Guard authority competent for the place of his detention;

◦ Office for Foreigners:
- conducts a proper interview with the unaccompanied minor;
- covers the costs of a minor's stay in an intervention-type care facility; covers the costs of the minor's stay in accordance with the invoices issued by the facility, and the costs of medical care – until the end of the status procedure for a foreign minor, regardless of the type of educational care facility;
- takes steps to find the relatives of an unaccompanied minor;
- accepts applications for refugee status;
- issues identity certificates to undocumented minors;

    - ensures that medical examinations are carried out in the age determination procedure;
- The courts – Family and Minority Departments:
    - determines the type of facility in which minors are to be placed;
    - in an intervention-type educational-care centre, the foreigner stays for a period of 3 months with a possibility to extend this period, then a court decision on placing the minor in an educational care centre of a socialisation type should be issued;
    - appoints a guardian to represent the minor in administrative proceedings;
- *Voivodship* Offices:
    - *voivode* shall bear the costs of the stay in a educational care institution of socialization type;
    - *voivode* issues a temporary residence permit to victims of human trafficking;
- *Powiat* (County) Family Support Centres:
    - organize care in foster families, provide care and upbringing for children totally or partially unaccompanied by their parents, in particular by organizing and running adoption and care centers, educational care facilities, for children and youth;
    - grant financial aid for independence and for continuing education to people leaving care and educational institutions.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

Unaccompanied minors, who are not under the refugee procedure, are placed – depending on the circumstances – either in foster care institutions (most often) or in guarded centers (in justified cases and on condition that they are at least 15 years old). In each case the guardianship court decides on the type of facility in which the minor is to be placed and appoints a guardian, representing the minor in administrative proceedings. The staff of the facility where the minor is staying shall exercise actual care over him/her, including ensuring his/her livelihood, health

needs, access to education and legal assistance. Persons working with children in educational care institutions must have appropriate (higher) education and documented preparation for work with children.

There can be 14 children in a educational care institution of socialization or intervention type; in an educational care institution of family type – 8 children (maximum – 10). There are no regulations concerning the number of foreign children in particular types of foster care.

The foster care facilities are open, there is no way to prevent the disappearance of unaccompanied minors other than to make the guest aware that the stay at the facility is for their own good, to ensure their safety and care. An unaccompanied foreign child is placed in foster custody based on a court decision.

In Poland, guarded centers have been profiled according to the category of detainees and their needs – only one guarded family center has been designated for the needs of unaccompanied minors (only 12 places for unaccompanied minors have been designated, which also – indirectly – indicates a negligible scale of the phenomenon in Poland).

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

The provisions on foster care apply in particular to foreign minors, regardless of whether or not they have a legal residence title in the territory of the Republic of Poland. Acting on the basis of a court ruling, a foster professional family acting as a family emergency shelter accepts, in particular, children brought by the Police or Border Guard, and thus in some cases also unaccompanied minors.

As a general rule, the performance of the function of a foster family and running a family orphanage can be entrusted to persons who meet the conditions, among others, give a guarantee of proper performance of duties, are not and have not been deprived of parental authority, are not limited in their legal capacity, are able to provide the child with appropriate living conditions, have not been convicted of an intentional crime, etc.). Candidates must have received a special training and have a certificate of completion, the program of which is approved by the Minister of Labour and Social Policy. Regardless of the training, they are obliged to

systematically improve their qualifications while taking care of minors. In Poland, there are no specific institutions of foster custody to which unaccompanied minors would be directed – so there are no special training courses organized to address the specific needs of this group of charges. A professional foster family or a non-professional foster family may have no more than 3 children or persons who have reached the age of majority in foster custody at the same time; in the case of a family orphanage, no more than 8 charges may stay at the same time (both in the foster family and in the family orphanage, it is permissible to place more children if siblings need to be admitted).

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

A "durable solution for the child" depends on the initial situation of the unaccompanied minor, i.e. the situation in which the child finds himself when he comes into contact with state institutions, which is different for different groups of unaccompanied minors. It is necessary to take into account the different destinies and different life situations of unaccompanied foreign children. The most beneficial for the child is to find his or her family (and/or return to the country of origin). In case it is not possible to return to the parents (they are unknown or it is not possible to find them) a "permanent solution" will be to provide the best possible care to the minor in Poland. From the point of view of "sustainability" the most advantageous solution seems to be adoption (especially in the case of very young children), although it is not a commonly used solution; if adoption is not possible – placement of an unaccompanied minor in an educational care institution of socialization type or in a foster family (if safe return to the country of origin and to one's own family is not possible). Adoption is possible only if the child's parents are dead or deprived of their parental rights and this option is allowed by the law of the child's country of origin.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

Within the framework of the national legal system, the control of the observance of the rights of foreign minors is based primarily on the instance

control of the authorities conducting administrative proceedings and on the judicial control of the decisions issued by these authorities. For example, in the asylum procedure, a party may appeal against the decision of the Head of the Office for Foreigners to the Refugee Board. Under EU law, the European Court of Human Rights is the judicial guardian of the rights of underage foreigners, e.g. there are cases of decisions related to violation of the prohibition of discrimination and the guaranteed right to education.

The category of other proceedings whose participants may be unaccompanied minors includes primarily criminal proceedings in which they may have the status of wronged parties or witnesses, as well as proceedings conducted against underage offenders. Among the criminal proceedings, the most noteworthy are those conducted in cases of the crime of human trafficking. Minors constitute a significant group of victims of this particular crime. The provisions of the laws regulating the legal status of foreigners contain regulations directly referring to foreigners who are victims of trafficking in human beings. They make it possible, among other things, to legalize the stay of a foreigner who has been wronged by this crime and, later on, to obtain an appropriate residence title. The status of a victim of trafficking in human beings makes it impossible to issue a return decision to such a foreigner or suspends the proceedings conducted in the case of issuing such a decision or suspends its execution.

The provisions of the Act of 26 October 1982 on juvenile delinquency proceedings apply to foreign minors who have committed a criminal act on the territory of the Republic of Poland and at the time of its perpetration are 13 years old and under 17 years old. Pursuant to the provisions of this Act the proceedings in the case of a minor are conducted by the family court, unless the criminal act of the minor is closely related to the act of an adult and the minor's welfare does not hinder the joint conduct of the case or the minor at the age of 15 has committed one of the offences enumerated in the Penal Code. Such proceedings are then conducted by the criminal court.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

The provisions of the Act of 12 December 2013 on foreigners do not provide a separate basis for legalising the stay of unaccompanied minors in Poland. Such foreigners have the possibility to legalize their stay in Po-

land on general principles. As a result of the conducted proceedings for the obligation to return, or as a result of separate proceedings, a minor may obtain a permit to stay in Poland for humanitarian reasons due to reasons connected with securing his/her rights, in particular on the basis of the Convention on the Rights of the Child, but also on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms (by obtaining a "residence card") or a permit for tolerated stay due to the impossibility of expulsion to the country of origin (by obtaining a "permit for tolerated stay"). Both permits are granted by the Border Guard in an application-free mode (proceedings conducted *ex officio*).

The authority accepting an application for refugee status issues to an unaccompanied minor a temporary foreigner's identity certificate, hereinafter referred to as an "identity certificate", valid for 30 days. After the expiry of the first identity certificate, the Head of the Office for Foreigners issues further identity certificates, valid for periods not longer than 6 months, until the completion of the proceedings for granting the refugee status. The certificate of identity, during its validity, confirms the identity of the person to whom it was issued and entitles that person to stay on the territory of the Republic of Poland. A foreigner who has the refugee status or benefits from subsidiary protection is entitled to the rights of a foreigner who has been granted a residence permit for a fixed period of time, unless the provisions of the Act or other acts provide otherwise. A foreigner who has the refugee status or benefits from subsidiary protection cannot be issued a decision obliging him/her to leave the territory of the Republic of Poland or a decision on expulsion without depriving him/her of this status or protection. A foreigner who is granted refugee status is issued with a travel document provided for in the Geneva Convention (valid for 2 years) and a residence card valid for 3 years from the date of issue (after the expiry of the card's validity, another one is issued, valid for another 3 years). A foreigner who is granted subsidiary protection is issued a residence card valid for 2 years from the date of issue (after the expiry of the card's validity – another card, also valid for 2 years). In accordance with Art. 195, paragraph 1 of the Act on Foreigners, a residence permit is granted to a foreigner for an indefinite period of time, upon his/her application, among others if immediately before submitting the application for granting him/her the permanent residence permit, he/

she has been continuously residing on the territory of the Republic of Poland for a period not shorter than 5 years on the basis of refugee status, subsidiary protection or a permit to stay for humanitarian reasons. If the foreigner is an unaccompanied minor, the application for granting him/her a permanent residence permit shall be submitted by the guardian.

In the case of unaccompanied minors who are victims of human trafficking, the provisions of the Act on Foreigners, regulating the legalization of the stay of victims of human trafficking, will apply. According to the aforementioned Act, foreigners (including minors) staying on the territory of Poland illegally when they are identified as victims of trafficking in human beings have the right to a reflection period and, in case of co-operation with a law enforcement agency, also to a temporary residence permit (in the next step – also the right to permanent residence). A foreigner who is presumed to be a victim of trafficking in human beings is issued with a certificate confirming this presumption. The foreigner's stay on the territory of the Republic of Poland is considered legal for the period of validity of the certificate issued to him/her, i.e. for a period of 3 months from the date of issue of the certificate (and in case of minors – for a period of 4 months). The certificate is issued by the authority competent to conduct proceedings on the crime of trafficking in human beings, i.e. by the Police or Border Guard or a prosecutor. A temporary residence permit for victims of trafficking in human beings is granted to a foreigner if it jointly meets the following conditions:

- is on the territory of the Republic of Poland;
- cooperated with the authority competent to investigate the crime of human trafficking;
- broke off contacts with people suspected of committing a human trafficking crime.

A temporary residence permit is granted to a foreigner at his/her request by the *voivode* competent for the foreigner's place of residence, by way of a decision. A foreigner staying on the territory of the Republic of Poland on the basis of a temporary residence permit for victims of human trafficking cannot be obliged to return. A temporary residence permit for victims of trafficking in human beings is granted for at least 6 months, up to a maximum of 3 years.

Minor foreigners staying in Poland illegally may apply for a temporary residence permit. A temporary residence permit can be granted to a foreigner due to other circumstances if: his/her departure from the territory of the Republic of Poland would violate the rights of the child as defined in the Convention on the Rights of the Child to a degree significantly threatening his/her psychophysical development, and the foreigner is staying on the territory of the Republic of Poland illegally. A temporary residence permit shall be refused to a foreigner if:

- he/she does not meet the requirements to be granted a temporary residence permit due to the declared purpose of his/her stay or the circumstances which are the basis for applying for this permit do not justify his/her stay in the territory of the Republic of Poland for a period longer than 3 months, or
- is required for reasons of national defence or security or the protection of public security and order, or
- in the proceedings for granting him a temporary residence permit:
  - he/she filed an application containing false personal data or false information or attached documents containing such data or information, or
  - he/she has testified untruthfully or withheld the truth, or forged or reworked a document to use it as authentic or used it as authentic.

Due to the above mentioned circumstances, a temporary residence permit is granted at the request of a foreigner. In order to obtain the aforementioned residence permit, the foreigner is exempt from the requirement to meet general migration conditions, such as having a place of residence ensured in Poland, health insurance and income or financial resources sufficient to cover the costs of living. This permit is granted each time for a period necessary to achieve the purpose of stay, exceeding 3 months, but not longer than 3 years. After 5 years of residence on the basis of the above mentioned permit, a foreigner will be able to apply for a residence permit for a long-term EU resident, under the conditions specified in the Act on Foreigners. The aforementioned residence permit is granted in accordance with the rules provided for in Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. The foreigners who have the prerequisites for issuing a decision obliging them to return (e.g. they

are staying in Poland despite the lack of a document entitling them to stay in this territory), in a situation where issuing such a decision would result in violation of the rights of the child, as defined in the Convention on the Rights of the Child, to a degree significantly endangering the child's psychophysical development, have the possibility to obtain a national form of protection against the application of expulsion measures in the form of a residence permit for humanitarian reasons. A decision obliging a foreigner to return is not issued, but the decision issued is not executed if the foreigner has been granted a residence permit for humanitarian reasons or there are reasons to grant it. A permit for a stay for humanitarian reasons is granted on the territory of the Republic of Poland if the foreigner is obliged to return:

- can only take place to a country in which, within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms:
  - his right to life, liberty and personal safety would be at risk, or
  - he could be subjected to torture or inhuman or degrading treatment or punishment, or
  - could be forced to work, or
  - could be deprived of the right to a fair trial or be punished without legal basis,
  - would violate his right to family or private life, as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, or
  - would violate the rights of the child, as set out in the Convention on the Rights of the Child, to the extent that it significantly endangers his or her psychophysical development.

A foreigner is denied a residence permit for humanitarian reasons if there are serious grounds to believe that he:

- committed a crime against peace, a war crime or a crime against humanity, as defined by international law, or
- is guilty of acts contrary to the purposes and principles of the United Nations as set forth in the Preamble and Articles 1 and 2 of the Charter of the United Nations, or

- committed a crime in the territory of the Republic of Poland or committed an act outside that territory which is a crime under Polish law, or
- poses a threat to national defence or security or to the protection of public security and order, or
- incited or otherwise participated in the commission of the crime.

A foreigner who, before arriving on the territory of the Republic of Poland, committed acts other than those specified above, which according to Polish law are a crime punishable by imprisonment, may be refused a residence permit for humanitarian reasons if he left his country of origin solely in order to avoid punishment. Foreigners staying on the territory of Poland on the basis of a national form of protection in the form of a humanitarian residence permit for an uninterrupted period of at least 5 years have the possibility to apply for a permanent residence permit. The aforementioned residence permit is granted without the need for the foreigners to meet general migration conditions, such as the place of residence provided in Poland, health insurance and income or financial means sufficient to cover the costs of living.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

The Code of Criminal Procedure provides for a whole range of regulations aimed at protecting underage victims or witnesses. Of particular importance are those relating to the questioning of minors under the age of 15, although their scope of their application is quite limited. More important regulations protecting the interests of the underage victim or witness also include the anonymization of personal data of the witness, the possibility for the victim to indicate persons who may be present during activities carried out in the course of preparatory proceedings with his participation, as well as the exclusion of the openness of the hearing. All other regulations in the form of prohibitions of evidence that may apply during the hearing of a minor witness also serve this purpose. In the case of an unaccompanied minor, however, the most important prohibition should be the prohibition of restricting the freedom of expression of the person

interviewed. We can find many examples of such restricting, for example, asking him or her suggestive questions. It should also be remembered that in many cases, foreign minors over the age of 15 may be interrogated on general terms and repeatedly. In practice, they may also be exposed to various types of retaliatory actions by the criminals being prosecuted.

The most important procedural guarantees for a minor include the right of defence, the right to refuse to give explanations or answer individual questions, and the right to be heard under conditions ensuring full freedom of expression. A minor offender may be detained by the Police or Border Guard if there is a reasonable suspicion that he has committed such an act and there is a reasonable fear of the minor hiding or blurring the traces of the committed act, or if his identity cannot be established. International standards for the protection of the rights of minors who are perpetrators of prohibited acts are contained in many different legal acts.

Foreigners, including unaccompanied minors, are entitled to free medical services from the moment of submitting an application for refugee status. These persons stay legally on the territory of Poland. The costs of providing medical care, until the conclusion of the procedure for granting the refugee status by a final decision, are financed from the state budget from the part which is administered by the minister in charge of internal affairs, from the funds available to the Head of the Office for Foreigners. Medical care covers health care services to the extent that persons covered by obligatory or voluntary health insurance are entitled to benefits under the Act of 27 August 2004 on health care services financed from public funds, except for spa treatment or spa rehabilitation.

Minors undergoing the asylum procedure have the same right to education until the age of 18 or to graduate from a secondary school as other children, including foreign children.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

In Poland, in institutions of the socialization type, an Individual Program for Integration of Foreign Minors is implemented (according to the pedagogical program of a given institution).

Immediately after the child's admission to the educational care institution, a psycho-physical diagnosis of the child is made, and then a plan is drawn up to help the child. The diagnosis includes an analysis of, among other things, the child's needs, the causes of the crisis situation in which the child finds himself and the impact of this situation on the child's development, the child's relationship with his immediate environment and people important for the child, as well as the analysis of the child's development. The plan to help the child takes into account, among other things, short- and long-term goals and activities and sets the goal of working with the child. In addition, according to the circumstances, the degree of mental and physical development, health condition and maturity of the child, the child's opinion is taken into account when developing the plan of assistance. In the educational care institution, in addition to the child support plan, a child residence card is kept, which records, among other things, important events in the child's life and his or her special needs, as well as a description of the child's development with special regard to the child's emotional state and independence, and information about the child's health. The residence card also contains psychological and pedagogical examination and observation sheets and information about the child's possible participation in classes conducted by a therapist, psychologist or teacher.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

The Head of the Office for Foreigners shall, as far as possible, take steps to find the relatives of an unaccompanied minor (as long as it is not contrary to the welfare of the child). To this end, the Office for Foreigners conducts practical cooperation with the Polish Red Cross. The minor is informed about the possibility of undertaking a search for family members through the Polish Red Cross during the interrogation – the condition for undertaking the above mentioned activities is his consent. The minor is informed about the results of the search, while the Office is informed that the information about the results of the search was sent to the minor.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

The authority accepting an application for granting the refugee status submitted by an unaccompanied minor (Border Guard) shall immediately (on the same day) apply to the guardianship court competent for the place of the minor's stay with an application for appointing a guardian to represent the minor in the proceedings for granting the refugee status and placing him/her in the educational care facility. The appointed guardian is a temporary representative of a person in need of help or unable to conduct his/her own affairs, he is not not the legal guardian in the sense of a person caring for the life needs of a minor who is placed under his care, raising him and taking care of his property. The scope of his duties is strictly defined by the court, in practice it is usually only representing the minor in the procedure for granting the refugee status. Legal guardians in the sense of taking care of a person are very rarely appointed for unaccompanied minors applying for refugee status. In order to appoint such a legal guardian for an unaccompanied minor, a Polish court generally needs the death certificate of both parents or a court order from its country of origin depriving the parents of such a child of parental authority. But even if the minor has any of these documents, if he has no relatives in Poland, it is difficult to find a person who would undertake to become his legal guardian, because there are no precise regulations and because it involves legal and financial responsibility for the child. If the circumstance that the applicant is an unaccompanied minor comes to light in the course of the proceedings, the Head of the Office for Foreigners applies for the appointment of a guardian and placing the minor in an educational care facility. The procedures are the same for minors whose age is confirmed as for those whose age is in doubt. Until it is confirmed that a foreigner is an adult, they are treated as minors.

If the parental authority over a foreign minor is deprived or suspended, the court should appoint a permanent guardian for the minor. Until the custody of the guardian, who may also be a substitute custodian, the court should appoint a temporary guardian for the minor. In virtually all proceedings to which an unaccompanied minor foreigner is a party, the temporary guardian shall primarily act as his procedural representative.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

The age given by the foreign minor is entered in his application for refugee status. The application is then registered in the IT system, run on the basis of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland. The procedure of determining the age is carried out in case of doubts concerning the age of a foreigner claiming to be a minor. Medical examinations to determine the actual age of a foreigner are conducted with the consent of the minor or with the consent of his/her statutory representative. Such medical examinations may be carried out only if the determination of the actual age of a foreigner is not possible on the basis of the documentation collected in the case concerning his/her identification. The result of the medical examination should indicate the age of the person being examined and should give the error limit. If, after the medical examination, there are still doubts about the actual age of the foreigner, he is treated as a minor. In the absence of consent to the above mentioned examinations, the foreigner is considered to be an adult person. If the determination of age is carried out at the stage of applying for the refugee status, the age resulting from the examination is entered in the application. The results of the examination are attached to the case file. If the age assessment is carried out already at the stage of the procedure before the Head of the Office for Foreigners, the age given by the foreigner to the Border Guard officer remains in the application, the result of the medical examination is attached to the case file, and the age of the foreigner is changed in the IT system in which the application is registered. The medical examination is ensured by the Head of the Office, and in case of doubts as to the age of the foreigner arising during the submission of the application – the authority accepting the application, i.e. the Border Guard. Before the examination is carried out, the foreigner is informed, in a language that he or she understands, about the manner of carrying out the examination and possible consequences of the result obtained, as well as

the consequences of refusal to undergo such an examination. In order to determine the age of a person, and to increase the probability of its correct estimation, the following tests are carried out together: a general test to determine the degree of physiological development through the analysis of anthropometric data of the examined person (height, weight, etc. – comparison with a constitutional type). The general examination is also aimed at determining possible malformations and possible identification of diseases (including past ones) which may affect the correct assessment of the age of the examined person; radiological examination of the left wrist bones – aimed at determining the degree of development of the skeletal system – the degree of boning (ossification); in case of radiological examination any limitations resulting from contraindications for the use of this method are applied; dental examination, based on which the age is determined by analyzing the panoramic image – phases of tooth mineralization. A specialized scientific research unit evaluates the X-rays and issues a final expert opinion/opinion. A foreigner is considered to be a person at the age specified by the lower error limit for the estimated age; if, as a result of a medical examination, a person's age is estimated to be over 18 and the assumed error limit indicates that the person may be under 18 years of age – such a person is treated as a minor. If, after the medical examination, there are still doubts as to the actual age of a foreigner, he/she is treated as a minor (the so-called privilege of doubt).

In the case of an unaccompanied minor not applying for refugee status, the first information on age and lack of care is recorded in the detention protocol. The procedure of determining the age shall be carried out in case of doubts of the authority as to the age given by the foreigner. The age obtained as a result of the results of the examination replaces in the files the age given by the foreigner. In accordance with the Act on foreigners, in case of doubts concerning the age of a foreigner admitted to a guarded center or detention center for foreigners who is reported as a minor, he shall, with his consent or with the consent of his legal representative, undergo a medical examination in order to determine the actual age of the foreigner. The results of the medical examination should inform about the error limit. In the case of lack of consent to the medical examination of a foreigner who claims to be a minor, he shall be considered an adult. Examinations to determine the actual age of a foreign-

er shall also be carried out if there are reasonable doubts as to the actual age of the foreigner: staying in a guarded center or custody for foreigners or in an educational care facility; who is not staying in a guarded center or custody for foreigners or in an educational care facility for which steps are taken to implement the decision to commit to return.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

When placement in a foster family, family orphanage, or educational care facility is based on a court ruling, a person leaving foster custody after reaching the age of majority is granted assistance for continuing education, independence and development, legal and psychological assistance and assistance in obtaining appropriate housing and employment conditions. The condition for granting such assistance is to develop an individual independence program at least one month before the person reaches the age of majority. A person who is being granted independence must also appoint a guardian of his or her independence process at least one year before reaching the age of majority. However, it is absolutely crucial to regulate the legal status of the child before he or she reaches adulthood – the absence of an identity document and an unregulated legal status are tantamount to not being able to use empowerment programs. An application for assistance for continuing education and assistance for independence and an application for development aid and assistance in obtaining appropriate housing conditions or employment is submitted to the *powiat* (county) office. Independence is supported by a guardian. Individual independence programs specify ways of obtaining education or professional qualifications and assistance in obtaining housing and work. The actual possibilities of providing housing and employment depend, on the one hand, on the possibilities of the powiat (county) and, on the other hand, on the motivation, commitment and determination of the person who is independent. The assistance for independence can be paid out once or in installments (depending on the arrangements of the individual independence program), most often after the completion of the assistance for continuing education. Development aid is paid once, and may also be granted in kind. Both types of assistance are received no later than by the age of 26 by an independent person.

Unaccompanied minors may choose from a range of material benefits to prepare them for their transition to adulthood. Worth mentioning is the existence of a very effective form of independence of the children in educational care institutions, the so called "apartment of independence". The assumption of an independent home is to create a transition stage between the facility, foster family and full independence. An independent apartment is a separate apartment located outside the institution, which can be inhabited by children between 18 and 25 years old, running an independent household.

However, unaccompanied minors applying for refugee status or international protection when they turn 18 years of age, when they apply for these forms of protection on the same basis as before they reached the age of majority, are no longer represented in the procedure by a guardian because they have legal capacity. Foreigners, regardless of their age, who apply for the refugee status or asylum, or who have been granted asylum, subsidiary protection, temporary protection or were granted the refugee status in the Republic of Poland, are refused to initiate proceedings for granting a temporary residence permit. A foreigner who has been granted asylum on the territory of the Republic of Poland is simultaneously granted a permanent residence permit. Foreigners who have been granted international protection in the Republic of Poland (refugee status, subsidiary protection) have the possibility to obtain a permanent residence permit. Foreigners who have applied for or have been granted international protection (refugee status, subsidiary protection) have a possibility to apply for a residence permit for a long-term EU resident. The provisions of the Act on foreigners do not provide for special regulations in this respect for unaccompanied minors who do not apply for refugee status. Such persons have the possibility to legalize their stay on general principles. Foreigners have the possibility to apply for residence permits granted for an indefinite period of time before the age of 18.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

The protection of the rights of foreign minors residing in the territory of Poland, including unaccompanied minors, is guaranteed by the regulations of many different acts of international law, in the vast majority

implemented in the Polish legal system. Therefore, it can be assumed that the majority of the national law provisions meet various, often complex situations in which underage foreigners, including those seeking international asylum on the territory of our country, may find themselves. The practical implementation of these regulations is undoubtedly supported by the fact that the number of unaccompanied minors arriving in Poland is not significant.

Paradoxically, however, the sense of safety of a foreign minor is not supported by the multitude of activities carried out with his participation, nor by the numerous group of persons performing those activities. Even if one omits the Border Guard officers performing the first procedural activities with the minor's participation (including the initial asylum interview, fingerprinting, photographing or recording), the minor will still soon encounter a family court judge, a psychologist, a guardian and an interpreter, as well as employees of the Office for Foreigners, and finally the persons who will be entrusted by the court with taking care of him.

It may also sometimes be problematic to initiate asylum proceedings, of which the subject is, or actually may be, a minor foreigner. The decision to initiate such proceedings is in the hands of a very limited number of persons, including mainly public officers, responsible for these matters.

A significant proportion of administrative decisions issued in cases of foreigners are of a discretionary nature, based on the result of the interpretation of general clauses and vague concepts such as "legitimate interest of the foreigner," "humanitarian considerations," or "important reasons". The majority of these are found in the regulations governing proceedings against foreigners who are outside the asylum procedure. In such cases, the active protection and proper representation of the legal interest of an foreign minor can often be illusory. The minor is not able to independently verify the reliability of actions taken in his case, either by the authorities conducting the proceedings or by his legal representatives.

It is also worth noting that the realities in which institutions responsible for the care of foreign children function are strongly individualized and generally do not take into account the differences between Polish and foreign children. The process of proper adaptation of these children depends, therefore, to a large extent, on the proper involvement of the

guardians and their preparation for performing the functions entrusted to them. The territorially dispersed system of foster care is certainly not conducive to an effective selection of institutions and foster families best prepared to perform these tasks.

The scale of the phenomenon of unaccompanied minors in Poland is not significant, which is illustrated by the number of minors in foster custody in recent years (source: Central Statistical Office).

- In family foster care (foster families and family children's homes) there were in total (as of 31 December each year):
  - 2010: 53.064 children, including 73 foreigners
  - 2011: 57.333 children, including 65 foreigners
  - 2012: 57.885 children, including 75 foreigners
  - 2013: 57.820 children, including 74 foreigners
  - 2014: 57.422 children, including 57 foreigners
  - 2015: 56.766 children, including 101 foreigners
  - 2016: 56.150 children, including 56 foreigners
  - 2017: 55.761 children, including 53 foreigners
  - 2018: 55.152 children, including 62 foreigners
  - 2019: 55.429 children, including 53 foreigners
- The total number of children in institutional foster care (as of December 31 of each year) was:
  - 2010: 18.982 residents, including 56 foreigners
  - 2011: 19.000 residents, including 66 foreigners
  - 2012: 19.184 residents including 71 foreigners
  - 2013: 19.252 residents, including 53 foreigners
  - 2014: 19.229 residents, including 51 foreigners
  - 2015: 18.876 residents, including 62 foreigners
  - 2016: 17.514 residents, including 64 foreigners
  - 2017: 16.856 residents, including 44 foreigners
  - 2018: 16.655 residents, including 64 foreigners
  - 2019: 16.668 residents, including 67 foreigners

In Poland we can also observe the opposite phenomenon, which is called euro-orphanhood. It is a particular form of orphanhood resulting from the migration of one or both parents, as a result of which children are usually left in the care of another spouse, grandparents, extended family, or even alone. Most parental migrations are rather short-term, season-

al or sporadic, i.e. one bimonthly trip within 3 years. However, there are situations, forced mainly by unemployment in some regions of the country, which result in almost permanent migration of one or both spouses. One of the effects of these migration activities of Poles turns out to be a serious disturbance of the social structure of the family. In general, euro-orphanhood is defined as a situation that affects children from families in which a parent or parents temporarily reside abroad for economic purposes to improve the economic situation of the family. According to the Educational Information System, in September 2016, the number of students from spatially separated families was 5.89%. The rate obtained from the diagnosis conducted among students is 19.9%. Nationwide, the number of students from migrant families may reach 640 thousand. Among the examined children and youth, 7.2% are brought up in families where both parents have decided to take up employment outside Poland.

Portugal

Geraldo Ribeiro Rocha[*]

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care of him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care of him?*

Article 2, no. 1, Law no. 27/2008 of 30 June 2008, establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum seeker, refugee and subsidiary protection:

"minor" means any third-country national or stateless person below the age of 18 years;

"unaccompanied minors" means any third-country national or stateless person below the age of 18 who arrives on national territory unaccompanied by an adult responsible for them whether by law or by custom, for as long as they are not effectively taken into the care of such a person or have been abandoned after entering the national territory.

This is the definition adopted by SEF. It is possible to accept unaccompanied children, as long as there are a promotion and protection procedure lodge at TFM.

Article 31 (5) (6) Immigration Law states that the child's return is only possible if the State of origin can ensure protection.

unaccompanied minors awaiting a decision on their admission into the national territory or on their repatriation shall be granted all the material support and assistance necessary to meet their essential diet, hygiene, accommodation, and medical needs assistance.

unaccompanied minors may only be repatriated to their country of origin, or to a third country willing to receive them if there are guarantees that adequate reception and assistance will be provided.

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This means that being impossible for the child to return (i.e., he/she has no family), the portuguese children protection system must ensure the protection and inclusion of the child, even if he/she was "illegal". The measure to adopt is mean to "legalise" his/her presence in Portugal.

There are special rules regarding the legitimacy to apply for asylum (Article 13, paragraph 6 Asylum Law), and reception pending the outcome of their application (Article 26, paragraph 2: the temporary accommodation of unaccompanied or separated minors shall be subject to special conditions, as recommended internationally, namely by UNHCR, UNICEF and the International Committee of the Red Cross; and Article 35b, paragraph 6 "*As far as possible, unaccompanied minors shall be provided with accommodation in institutions that are staffed and facilities that take into account the personal needs of their age*").

Also, general principles are established to guide the decision-making process, with the inclusion of the general principle set out in Article 3 of the Convention on the Rights of the Child; Article 78, paragraph 1, expressed in its paragraph 2, as the best interests of the child are embodied, and which applies specifically to unaccompanied children (Article 78, paragraph 4): (a) their placement with their proper parents or, in their absence, successively with adult relatives, with foster families, in specialised accommodation centres for minors or in places that are suitable for this purpose; (d) non-separation of fractures; (e) stability of life, with changes of place of residence limited to a minimum; (f) their well-being and social development, taking into account their origins; (g) aspects related to security and protection, especially if there is a risk of being a victim of human trafficking; (h) their opinion, taking into account their age and maturity.

There is also the special provision on representation and care of the child's interests in Article 79. Once the asylum procedure has been initiated on behalf of the child, a judicial proceeding under the LPCJP is triggered simultaneously. This almost automatic intersection between the asylum system and the national system for protecting children in danger, inspired by the principle of non-discrimination.

Minors who are applicants for or beneficiaries of international protection shall be represented by a non-governmental entity or organisation,

or by any other legally admitted form of representation, without prejudice to the protective measures applicable under the law on the protection of minors, and the minor shall be informed thereof.

It is the responsibility of SEF to communicate the application filed by a minor or incapacitated to the competent court, for representation, so that the minor or incapacitated applicant can exercise the rights and perform the duties provided by law.

The representative must be informed by SEF, in due time, of the moment and the making of the statements referred to in Article 16, to be present and may intervene in the same.

SEF must provide the representative with the opportunity to inform the unaccompanied minor of the meaning and possible consequences of the personal interview and, if appropriate, of how to prepare for it.

SEF may require the unaccompanied minor to be present at the personal interview even if the representative is present.

To determine the unaccompanied minor's age, SEF may use medical expertise, employing a non-invasive expert examination, assuming that the applicant is a minor if there are grounds for doubt.

Unaccompanied minors must be informed that their age will be determined using an expert examination, and their representative must give his or her consent.

The refusal to carry out an expert examination shall not result in the rejection of the application for international protection, nor shall it prevent a decision from being taken on it.

The provisions of Article 19(1)(g) and 19a(1)(b), (e) and (f) shall apply to applications lodged by unaccompanied minors.

Unaccompanied minors aged 16 or over may only be placed in accommodation centres for adults seeking international protection where this is in their best interests.

In cases where the life or physical integrity of a minor or his close relatives is at risk, mainly if they are in the country of origin, the collection, processing and dissemination of information concerning those persons shall be carried out on a confidential basis, to avoid jeopardising their safety.

Staff involved in examining applications for international protection covering unaccompanied minors must be adequately trained in minors'

specific needs. The duty of confidentiality shall bind it concerning any information which comes to their knowledge in the course of their duties.

Commissions for the protection of children and young people in danger with responsibilities for the protection and safeguarding of unaccompanied minors awaiting a decision on repatriation may lodge an application for international protection on behalf of the unaccompanied minor if, as a result of the assessment of their situation, they consider that the minor may need such protection.

To protect the unaccompanied minor's best interests, SEF, in liaison with the other entities involved in the procedure and with the ministry responsible for foreign affairs, should initiate the process to find family members.

If international protection has already been granted and the search referred to in the previous paragraph has not yet begun, the process should be started as soon as possible.

There is also a special provision regulating the entry and exit of children, Article 31, of the regime of entry, stay, exit and removal of foreigners from national territory.

Without prejudice to forms of tourism or youth exchange, the competent authority shall refuse entry into the country to foreign citizens under the age of 18 when they are unaccompanied by the person exercising parental power or when in Portuguese territory there is no person, duly authorised by the legal representative, who is responsible for their stay.

Except in exceptional, duly justified cases, the entry into Portuguese territory of a foreign minor is not authorised when the holder of parental responsibility or the person to whom it is entrusted is not admitted to the country.

If the foreign minor is not admitted to Portuguese territory, the person he or she has been entrusted must also be refused entry.

Resident foreign minors travelling unaccompanied by the person who has parental care and who do not have a legally certified authorisation from the person who has parental care are refused entry into Portuguese territory.

Unaccompanied minors awaiting a decision on their admission to national territory or their repatriation must be granted all the material sup-

port and assistance necessary to meet their basic needs for food, hygiene, accommodation and medical assistance.

Unaccompanied minors may only be returned to their country of origin or to a third country willing to receive them if there are guarantees that they will be given appropriate reception and assistance on arrival.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

International law
- Convention on the Rights of the Child (CRC)
- European Convention on Human Rights (ECHR)
- European Charter of Fundamental Rights
- Geneva Convention on the Status of Refugees

European Law
- 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 persons eligible for subsidiary protection, and the content of the protection granted.
- Directive 2013/32/EU of The European Parliament and of the Council of 26 June 201, on common procedures for granting and withdrawing international protection (recast).
- 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 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

As regards national law, the leading special rules governing the situation of unaccompanied children are found in the Asylum Law and the Immigration Law. There are sparse references to the condition of migrant children in the Nationality Act, the LPCJP and the law regulating family reception.

The national legal framework of reference in this matter is constituted:

- Constitution, mainly Articles: 1 (Dignity of the human person…), 13 (Principle of equality), 15 (Foreigners, stateless persons, European citizens), 68 (Family, marriage and filiation) e 69 (Childhood);
- Law No 23/2007 (last amendment Law No 28/2019) approves the legal regime for entry, stay, exit and removal of foreigners from national territory (Immigration Law);
- Law no. 27/2008 (last amendment Law No 26/2014) establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum seeker, refugee and subsidiary protection, (Asylum Law);
- Law no. 147/99 (last amendment Law no 26/2018): Law on the Protection and Promotion of the Rights of the Child (LPCJP).

3. *Are there any specific rules by which the child is a refugee or has applied for international protection?*

The Immigration Law states that unaccompanied children awaiting a decision on their admission to the national territory or their removal receive all the material support and assistance necessary to satisfy their basic needs for food, hygiene, accommodation and medical assistance;

In procedural terms, high priority is given to all decision-making processes on admission to the national territory involving children, regardless of the situation of non-accompaniment.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

Refusal of entry into national territory shall occur concerning 'foreign citizens under 18 years of age when they are unaccompanied by those exercising parental responsibilities or when in Portuguese territory there is no one, duly authorised by the legal representative, who is responsible for their stay (Article 31, paragraph 1 of the Aliens Law). If they do not meet the general or specific conditions for children' admission to the country, the minor is refused entry to Portugal and must return to his/her country of origin as soon as possible. However, the removal of minors is not admitted to their country of origin or to a third country that is willing to

receive them, and it can only occur if there are guarantees that on arrival they will be provided with adequate reception and assistance.

According to official statistics from the SEF, there were 64 refusals of entry in 2017, 136 in 2018 and 106 in 2019. In terms of protection applications, 13 applications were submitted (out of an overall total of 38) in 2017 and 16 (out of 36) in 2018. During 2019, 46 cases of international protection of unaccompanied minors were registered, 32 formulated within the national territory (30 M and 2 F), nationals of Guinea Bissau (9), Guinea (6), Gambia (6), Senegal (4), Mali (2), Nigeria (2), Sierra Leone (2), Democratic Republic of the Congo (1), and 14 at Border Post (6 H and 8 M), nationals of the Democratic Republic of the Congo (6), Guinea (3), Benin, Guinea Bissau, Cameroon, Iraq, Congo ([1]).

Article 31(6) provides that children may only be 'repatriated' if there are guarantees that they will be provided with appropriate care and assistance on arrival. The decision to refuse entry is based on assessing the existence of risk in returning to the country of origin, as enshrined in the European law and national legislation on asylum.

Finally, unaccompanied children will only be able to leave the host territory and return to their country of origin if suitable persons with legal responsibility can take them in. Suppose the only alternative offered by the country of origin is the institutionalisation of the child. In that case, consideration should be given to what is best for the child's best interest: to return to his/her cultural and social environment, or to remain in the host country, giving precedence to the stability of a daily life that may have been gained in between.

The right to apply for international protection must be guaranteed, which implies access to the territory; otherwise, there is a risk of refoulement (Article 33 of the Convention Relating to the Status of Refugees). It should also be noted that the absence of an explicit request for international protection does not inhibit the State from the duty of non-refoulement. If the child does not request international protection, their best interests should always be assessed, even if they do not adequately articulate what they want. This process necessarily takes time, since it im-

[1] https://www.sef.pt/pt/pages/conteudo-detalhe.aspx?nID=92.

plies an evaluation of the child's family relations and the situation they would find themselves after possible repatriation. It is therefore inevitable that all unaccompanied or separated children will have access to the national territory.

However, it should specify how the child's best interests should be assessed in these cases and who should be responsible for such an assessment. No guidance is provided on the risk's assessment of repatriation resulting in a human rights violation is safeguarded and on the procedural guarantees existing concerning the decision.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The detention of children who are third country nationals for forced removal for violation of the legal regime of entry and permanence of foreigner is not admissible.

Alternatively, without prejudice either to national or international efforts to identify the holders of parental responsibility or to mechanisms for granting guardianship and the possible voluntary return programmes, the law allows for the regularisation of children found to be in an irregular situation national territory.

In Portugal, third-country nationals under the age of eighteen may not be the subject of a coercive removal procedure for violation of the legal regime of entry and permanence of foreigners in the country, without prejudice to the use of voluntary return programmes, in a manner appropriate to the child status of the beneficiaries. Consequently, these minors are not detained for irregular entry or stay in the country. In this context, the law provides a special regime allowing the regularisation of minors' situation in the country through the LPCJP.

Considering the dependence of the stay in Portugal on the request for protection, the law only provides for the signposting of the unaccompanied child to the Public Prosecutor's Office after the submission of the request for international protection (Article 79, paragraphs 1 and 2 of the Asylum Law), and only then is the intervention of the Family and Minors Court triggered.

6. *What are the State, regional or local bodies involved in managing the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

- Foreign Services And Borders (Serviços De Estrangeiros E Fronteiras - SEF): The agency is responsible for controlling persons at the border under the Ministry of the Interior (it is considered to by a police authority). SEF is also responsible for controlling aliens on national territory and accepting asylum applications, examining procedures for granting refugee status, determining the State responsible for examining their applications and transferring candidates between the Member States of the European Union. SEF is now under government scrutiny because of recent events, and it is expected to be reorganised or even extinct.

- Portuguese Council for Refugees (CPR) - a non-governmental organisation that plays a crucial role in the area of asylum and refugees and, in the particular case of unaccompanied children, in following up asylum applications, in the legal representation of their interests, concerning the exercise of children's rights and ensuring law enforcement, as well as access to the rights provided therein.

- Family and Minors Courts (TFM) promotes the protection rights of children and young people in danger considering they are children at risk (because they are unaccompanied), the protection measures to be taken fall within the jurisdiction of these courts, which may extend to 25 years with the young person's consent.

- Commissions for the Protection of Children and Young People at Risk (CPCJR), formed by multidisciplinary teams, which, on a municipal basis, promote the rights of the child and young people and take care of situations likely to affect their safety, health, training and education or full development. The procedures are carried out by these committees and are authorised (non-opposition of the child over 12 years of age) by the persons concerned to intervene; otherwise, the competence lies with the family and juvenile courts. Typically, their jurisdiction will be residual, considering the status of unaccompanied children. Only in situations where the child is in the care of someone with de facto custody, can he or she legitimise their intervention.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate the reference standards and describe the accommodation procedure, including cultural, linguistic mediators, tutors, etc.*

Until a solution is defined for the child identified at the border post, he or she may remain in detention at the airport's Equipped-Temporary Installation Centre (EECIT). As a rule, the Asylum Law prevents the possibility of detention of applicants for international protection beyond sixty days, providing in its Article 79, no. 10, that Unaccompanied minors aged 16 or over may only be placed in accommodation centres for adults seeking international protection where this is in their best interests. Children under the age of 16 (accompanied or not) may not stay at EECIT for more than seven days. If there are no doubts about being minor, SEF will contact the Public Ofice (MP) of the TFM to start a promotion and protection procedure. TFM and Social Security will ensure accommodation. It is possible that in the same day of contact to lodge the child in a foster care.

There are no specif reception centers, shelters, accommodation in apartments, communities, and foster care to unaccompanied children. The institutions available are the same that are for other children. This means that depending on the project determine by TFM and the availability of response, the child can be in an apartment with a programme that promotes his/her autonomy. In this last case, Article 45 LPCJP states the measure for independent living:

1. The support measure for independent living consists of providing directly to young people over the age of 15 economic support and psycho-pedagogic and social follow-up, namely through access to training programmes, to provide them with conditions that enable them to live independently and progressively acquire an independent living.
2. The measure referred to in the preceding paragraph may be applied to mothers under the age of 15 years, where the situation warrants the application of such a measure.

The same can happen with foster care when it is available.

The temporary accommodation of unaccompanied or separated minors is subject to particular conditions, as recommended internationally,

notably by UNHCR, the United Nations Children's Fund" and the International Committee of the Red Cross.

Accordingly, it can be concluded that the UNHCR Guidelines on Policies and Procedures when Dealing with Unaccompanied Children in Asylum Seeking (1997) are closely followed in Portugal, particularly concerning the presentation of the asylum application, the procedural handling of which follows the principles of speed and priority of decisions, and the legal representation of the minor, which is done by an independent body sensitive to the interests of the minor. According to the CPR, when a child applies for asylum at the external Portuguese border and does not meet the legal conditions for admission, he or she is almost always permitted to enter the national territory. In doing so, SEF acts according to international agencies' recommendations such as the UNHCR, the United Nations Children's Fund, the Red Cross, the European Programme for Separated Children, and the CPR itself.

If the removal does not occur, namely because there are no appropriate reception and assistance guarantees in the country of origin (Article 31(6) Immigration Law), unaccompanied minors are admitted to the national territory. In this case, SEF shall inform the Family and Minors Court of the situation, and this court shall implement a measure promoting rights and protection, by the terms of the said law on the protection of children and young people in risk. Being a child at risk, TFM must assess his/her condition to determine what should be his/her life project. Depending on the age, this means to ensure education, learning of portuguese, promote his/her autonomy, promote his/her adoption (if under 15), or other civil measures, like guardianship.

All these measures are available to any child, being a foreigner or not. The mindset is to adopt the best measure to promote his/her rights. Usually, because of his/her age, the solution is the first foster care in an institution and, if the child gives his/her consent to evolve to give autonomy in special programmes and apartments.

Besides, the involvement of child protection specialists, who are qualified to identify special needs, and the support of a cultural mediator, should be ensured at an early stage to facilitate communication with the child. It is also advisable to institutionalise the caretaker's figure in Por-

tugal, which is quite expressive in other European countries, responsible for representing the child and ensuring that his/her best interests are respected throughout the stages of the process.

There is the involvement of cultural, linguistic mediators, mainly with the intervention of the High Commission for Migrations (ACM - *Alto Comissariado para as Migrações*) and the stakeholders from the Municipalities or private charitable institutions.

8. *Is foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

The protection and referral given to unaccompanied children who are nationals of third countries in Portugal are no different from that given to children who are nationals of or a resident in Portugal under the same circumstances, without prejudice the possibility of regularising their situation under the law of foreigners.

The legal and judicial framework is the same, as also the measures and social responses. However, there are flaws (or shortcomings) in their operation which frustrate their suitability as protective measures. In the face of these shortcomings, and the need for positive developments in their implementation and enforcement, when transposed to the specific problem of migrant children, it is clear that difficulties or shortcomings are not characteristic of these children, but of the functioning of the system. However, there is a recent positive note on the evolution of the measure and its protective potential.

Foster care is regulated by Law-Decree 139/2019. A natural person or a family previously selected by the fostering institution takes in a child or a young person who is in a situation of risk and with whom they have no relation of kinship.

The fostering is temporary and results from a promotion and protection measure applied by the CPCJP or TFM.

The aim is to guarantee the integration of the child into a family-like environment, provide him/her with the care appropriate to his/her needs

and well-being and the education necessary for his/her integral development until he/she can return to his/her family of origin.

The child protection system is the same, whatever the origin of the child. Once SEF (or other authority) communicates a child's existence unaccompanied, it is to the TFM (because there are no family or de facto guardian) to adopt the necessary measures. The communication is mandatory for any public agency, and police or judiciary authorities (like SEF) (Article 64 LPCJP).

The families have to submit their application and be selected by Social Security or a certified institution. A contract is concluded that provides for the payment of subsidies to the family and the establishment of rights and duties.

Article 16, of the Law Decree 139/2019, states that it could be two motives for the child's placement in foster care: planned or determined by emergencies.

Planned integration presupposes preparation, involvement and communication with the child and, whenever possible, with his or her family of origin, and implies information sharing between the entity that has applied the measure, the case manager, the managing entity and the foster institution.

Urgent placement is determined by the need for immediate protection, in a situation of current or imminent danger to life, or severe compromise of the child's or young person's physical or psychological integrity, requiring adequate protection procedures or determining the application of a precautionary promotion and protection measure.

The foster care is supervised by service of the institution that certified the family articulated with the court services and the TFM and can be reviewed at any time.

They must have material conditions to accommodate the child, and it is supposed to ensure that they are qualified to take care of he/she.

Being a protection measure, the duration of the measure will be set by TFM, and it will object to revision by periods of six months (Article 62 LPCJP). The measure will terminate when their term of duration or possible extension expires; the revision decision terminates them, the adoption

is decreed; the young person reaches the age of majority or, in cases where the continuity of the measure beyond the age of majority has been requested, reaches the age of 21; a civil measure is adopted (Article 63 LPCJP). Without prejudice to the provisions of subparagraph d) of the previous number, the promotion and protection measures of support for the autonomy of life or placement may be maintained until the age of 25, whenever educational or vocational training processes exist, and only for as long as they last, and provided the young person renews the maintenance request.

Article 26 of the Law Decree 139/2019 states the following rules.

1. The termination of foster care is duly prepared by the technical team of the foster care institution, in articulation with the case manager, and involves the participation of the child or young person, his/her family of origin, except in the situations of subparagraph g) [measure preparing the adoption] of no. 1 of Article 35 of the LPCJP, and the foster family, taking into consideration, depending on the situations, family reintegration or autonomy of life.
2. The preparation referred to in the previous number shall also be ensured in the termination of foster care due to the transition of the child or young person to an adoptive family, in which case, the specific programmes for preparing the child for adoption shall apply.
3. After the termination of the measure, the social workers of the foster care institution shall be kept informed, in articulation with the competent entities in matters of childhood and youth, about the life path of the child or young person for a minimum period of six months, with respect for the principles enshrined in the LPCJP.

8.3. There is also a measure institutional care (regime de execução do acolhimento residential) provided for in Article 58 of the LPCJP, and its regulation was approved by Decree-Law No 164/2019 of 25-10. This law establishes the rights of young people in residential accommodation, which constitute a development of those same rights, listed in the various paragraphs of Article 58 of the LPCJP, necessarily read in the light of the guiding principles set out in Article 4 of Decree-Law No. 164/2019, and Article 4 of the LPCJP.

According to Article 2 of the Convention on the Rights of the Child, which enshrines the fundamental principle of the best interests of the

child, per paragraphs 2 and 3 thereof, it is the responsibility of the State to ensure that the child is provided with appropriate care when the parents, or other persons responsible for the child, are unable to do so, by ensuring the functioning of institutions, services and establishments that have children in their care, to protect them, "*in particular in the areas of safety and health, about the number and qualifications of their staff, as well as the existence of appropriate supervision*".

Children and young people in a residential care situation are guaranteed, as they should be, all the fundamental rights, constitutionally enshrined, and all other individual and legitimate rights that are not prejudiced by the decision determining the measure for the promotion and protection of residential care.

The rights that are recognised here must also be viewed regarding residential care purposes, as expressed in Article 49, paragraph 2, of the LPCJP, which relate to the creation of conditions that meet the needs of children or young people effective exercise of their rights.

The rights enshrined in this precept have their respective counterpoint in the foster home's duties, set out in Article 26.

Considering the particularity of migrant children, Article 49(3) calls for consideration of the diversity of nationalities and the corresponding cultural and religious multiplicities found in children or young people in reception.

It enshrines this right in Article 14 of the Convention on the Rights of the Child, concerning respect for freedom of thought, conscience and religion. In this particular regard, a reference should be made here to children and young refugees, most of whom are unaccompanied, who are in reception.

These children are entitled to particular and individualised support, which will allow them to integrate as quickly as possible, without this meaning, the loss of their roots and their cultural and religious identity. Their particular situation gives them a particular vulnerability, since they are inserted in a country other than their own, with a language they do not know and with cultural and religious customs that are foreign to them and with which they do not identify.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

It is possible if the child is under 15 years (Article 1980 (2) of the Civil Code) or until the age of 18 if it was entrusted to the adopter up to the age of 15 (Article 1908, paragraph 3 of the Civil Code), and the competent law is Portuguese law (see below).

Considering the non-Portuguese nationality of the child, the conflict rules provided for in Articles 60 and 61 of the Civil Code, which determines the application of the law of the nationality of the adopter or the common nationality of the adopters (whether they are a couple) or, in their absence, that of the common habitual residence, or the law with which the family has the closest connection (Article 60(1) and (2) of the Civil Code), should be considered.

However, for adoption to be legally established and recognised, Article 60(4) determines that cumulatively with the laws provided for in Article 60(1) and (2) of the Civil Code, the law of the family shall be the law of the Member State in which the adoption takes place. However, for the adoption to be valid and to be recognised, Article 60(4) provides that, in addition to the laws provided for in Article 60(1) and (2), the law governing the relationship between the adopter and his parents shall apply, as well as the personal law of the adopter and the law governing any relationship of a family nature or of guardianship in which the adopter is involved, since Article 61 requires that the consent of both the adopter and the person to whom he or she is linked by such a relationship be respected if such laws so require.

Article 60(4), by referring to the law of the family of origin, determines its cumulative application only regarding adoption in general and its possibility, in the specific case, regarding persons in the family situation of the adopted person. The application of this law does not exclude the application of the law of the adopter, as it is the latter who is responsible for the aspects of the creation of the adoptive affiliation relationship.

Irrespective of the problem of applicable law (except the minimum age for adoption), considering the child's risk situation, the Portuguese courts may, if there is an expert assessment, conclude that the adoption

project is the child's life project. In this case, the child will be the subject of a measure of trust with a view of future adoption as part of the promotion and protection process to be carried out in the TFM. Once the measure has been adopted, Social Security will seek a suitable candidate for the child on a national list and propose to the National Council for Adoption that the child be placed on it, for a period of assessment of the binding and feasibility of adoption which will be called a pre-adoption period of a maximum of 6 months. At the end of this period, the social security team responsible issues an opinion that, if favourable, allows the candidates to apply in an autonomous process to bind adoptive membership. This is equivalent to the bond of biological affiliation, representing the court with the biological family unless the court decides that it is in the child's interest to maintain knowledge of and possible contact with the child (namely siblings).

10. *Is the judicial system (juvenile Court, tutelary judge, ordinary judge, specialised judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

The competent Court is that for family and minors. It is a specialised court of jurisdiction devoted in particular to the promotion and protection of children.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

If the unaccompanied child, asylum seeker, is undocumented and/or does not have an entry visa (when necessary), as is commonly the case, a special visa is issued on a separate sheet to allow him/her to enter national territory.

The SEF issues a provisional residence permit to the child applicant, valid for four months from the date of the decision to admit the application, and renewable for equal periods until the final decision of the procedure". After the investigation, the SEF draws up a reasoned proposal for granting or refusing asylum. Unaccompanied children who apply may be granted refugee or subsidiary protection status, which is a resi-

dence permit for humanitarian reasons, valid for two years, renewable unless imperative reasons of national security or public order prevent it.

Children who are benefiting from a promotion and protection measure enjoy resident status under Articles 123(1)(b) and 123(2) (Article 124(4)) Immigration Law.

Article 49(3) LPCJP specifically provides that In cases where the child or young person, of foreign nationality, is sheltered in a public, cooperative, social or private institution with a cooperation agreement with the State, the measure involves the attribution of a residence permit in national territory for the period required for a definitive decision on a possible naturalisation request, under the terms of no. 3 of Article 6 of Law no. 37/81, of 3 October.

Children benefiting from a civil protection measure (guardianship or similar institutes), or civil custody (fostering) of the child (Apadrinhamento Civil, Article 21 of Law No. 103/2009) could also benefit from this status.

In fact, in the case of unaccompanied children who are nationals of third countries in an irregular situation, the law provides them with the possibility of obtaining a residence permit with exemption from the visa requirement under Article 122(1)(e) Immigration Law.

The most recent amendment to the PLFCA led to the addition of Articles 58(k), 3(h) and 49(3). These additions enshrine the right of the child in residential care who has foreign nationality to obtain a residence permit in Portugal for the time necessary for the examination of the respective application for naturalisation, a procedure to which they must also have access, and the Public Prosecutor's Office is responsible for promoting, in the interest of the child, the application for the acquisition of Portuguese nationality, per Article 6, no. 3, of Nationality Law (Law No 37/81, last amendment Law No 2/2020).

The acquisition of nationality by refugees is supported by many international instruments, such as the Council of Europe Convention on nationality. However, until 2018, our Portuguese nationality law did not provide unique mechanisms for the naturalisation of persons in need of international protection. However, the Nationality Law was amended by

Law no. 2/2018 of 5 July, providing that the Public Prosecutor's Office must promote the naturalisation process with an exemption of the conditions required for general cases, for children or young foreigners under the age of 18, who are received in institutions, following a measure of definitive promotion and protection. Therefore, it was understood that children in institutions would mainly need to obtain the most stable status possible. It should be noted that although the acquisition of nationality is more pressing in cases of stateless children, the law does not require that, in order to benefit from the said right to naturalisation, the children concerned must be stateless and may retain the nationality of the country of origin. However, the amendment did not cover all unaccompanied children, not only those subject to residential care. Children in foster care or a measure of trust the right person or support for life autonomy were left out. Their best interest could also be to obtain the most stable status, depending on their particularly vulnerable situation. Nevertheless, there are mechanisms to ensure children's legal permanence through guardianship or civil custody (fostering) of the child (*Apadrinhamento Civil*, Article 21 of Law No. 103/2009).

12. *What are the rights recognised to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Once they are included in the scope of a protection measure because of their risk situation, there is no differentiation in the treatment of unaccompanied children who are nationals of third countries from what is available to children who are nationals in the same circumstances, without prejudice to the specific characteristics inherent in their status as foreigners.

Irrespective of the concrete measures applied to the refugee child, he or she shall, under his or her status as a child, and the principle of assimilation and equality. The status that both the law and the Geneva Convention on the Status of Refugees recognise in particular for refugees have access to several fundamental social rights (this results from his or her status as a child, as well as from the principle of assimilation enshrined in Article 15 of the Constitution). Directive 2011/95/EU and the asy-

lum law expressly enshrine these rights, including the right to free access to health care (Ministerial Order 25360/2001), education, psychological care, social security, justice, among others. These rights must be recognised to the child with international protection status without discrimination based on nationality, ethnicity, race, religion or other prohibited factors. Thus, Article 2 of the Convention on the Rights of the Child and Article 13 of the Portuguese Constitution expressly require it. Of course, the child also has access to the most basic fundamental rights called the first generation, such as religious freedom or privacy.

In the case of unaccompanied children who are victims of ill-treatment or any form of abuse, without prejudice to the procedures mentioned above, they shall be guaranteed access to rehabilitation services, as well as adequate psychological assistance, providing, if necessary, qualified support, namely from the Portuguese Association for Victim Support. Specifically in the area of support for victims of human trafficking, and within the framework of the National Plan to Combat Human Trafficking, the Association for Family Planning provides specialised support, using a multidisciplinary team, with a shelter in the city of Porto through which it acts in this area under a protocol with the Portuguese State. In the specific case of minors, this support includes access to education.

It should be emphasised that the law on foreigners (Article 114) guarantees that the granting of residence authorisation to children in these circumstances considers the child's best interests and the procedures must be appropriate to their age and maturity. Similarly, this law grants children, victims of trafficking in human beings or action to facilitate illegal immigration, access to the education system under the same conditions as nationals. In terms of identification, the same precept stipulates that every effort must be made to establish the identity and nationality of the unaccompanied child, locate his or her family as soon as possible, and ensure that they are legally represented including, if necessary, in criminal proceedings.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

There are no specific legal instruments except within the legal framework to promote and protect children and young people in danger. There are institutions, namely the Santa Casa da Misericórdia de Lisboa, which within the social offer, have conditions to promote children's integration. However, it is a work carried out from the support and youth care institutions, a mission given to the articulation and supervision of the Social Security and the private solidarity institutions.

Finally, to ensure the best form of integration in the host country, the refugee child must also be guaranteed access to special integration measures, such as teaching the language, habits, customs or rules of society. The process of inclusion needs to result from a two-way effort: from the host society towards the child (in terms of respecting his/her identity, culture or religion), and from the child towards the host society, in terms of respecting the basic norms of the latter. To this end, the State should provide itself with mechanisms to enable the child to be made aware of these same norms, by promoting lessons and play activities aimed at his or her inclusion into society.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

The child enjoys the fundamental right to be integrated into a family environment and maintain his or her ties (Article 36, paragraphs 6 and 69, paragraphs 1 and 2 of the Constitution). This is reflected in the principles governing measures of promotion and protection (Article 4(h) LPCJP: "*Prevalence of the family – in the promotion of the rights and protection of the child and young person, prevalence should be given to measures integrating them into the family, either in their biological family or by promoting their adoption or another form of stable family integration*"). It has been understood that, save for exceptional reasons that require otherwise, the family's closeness corresponds to the child's best interest. To this end, in cases where the child is not accompanied by his or her family – either unaccompanied or accompanied by only part of the closest relatives – the

State authorities have a positive obligation to promote family reunification. This should be done to locate the child's relatives. It will be up to the State's authorities where the unaccompanied child is to initiate all the necessary procedures to find the family, cooperate with the authorities of other countries or with international actors.

Once the family has been found, or in cases where its whereabouts are known *ab initio*, family reunification must take place. I.e., the State must issue entry permits and, subsequently, residence permits so that the next of kin can join the child in the host country. In this context, the application for reunification comes from the child himself. The child's recognition as a subject/agent of reunification means going beyond this adult-centred concept of family reunification, recognising that the child has the right to reside in the host country, promoting through the child the reunion with his/her family.

The conditions for family reunification are those laid down in the Directive on Family Reunification and the law host country's law. In Portugal, they are set out in Article 68 of the Asylum Law and Articles 98 and ss of the Immigration Law. According to these rules, the child – holder of refugee or temporary protection status – has the right to reunification with the first-degree ascendants or the legal guardian or any other relative, if the refugee has no direct ascendants not possible to locate them. In this context, the definition of "family member" provided for by law must be read with flexibility, as is clear from the case law developed by the ECtHR, which considers, rather than family legal concepts, relationships based on proximity, affectivity and effectiveness.

Article 99 of Immigration Law:

1. For the preceding article, members of the resident's family are considered;
2. The following are also considered as family members for family reunification of the unaccompanied minor refugee:

a) direct relatives in the ascending line in the first degree;
b) their legal guardian or any other relative if the refugee has no relatives in the direct ascending line or cannot be traced.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions, and the requirements to be appointed.*

These children, because they are at risk of not being included in a family environment, are in the same situation as other children at risk. As such, appropriate promotion and protection measures should be put in place to ensure a life project that enables their well-being and development towards full citizenship. Such measures are currently provided for in the LPCJP.

The determination and implementation of the most appropriate measures for each situation should be guided by the principles of intervention set out in Article 4. Thus, following the principle of proportionality and the family's prevalence, unaccompanied children should preferably be placed in foster families, and only an institutionalisation measure should be applied as the ultima ratio. After that, the measure should not lead to the separation of siblings. Thus, siblings who have arrived together in the host country and those who have been reunited subsequently through family reunification, should not be separated by applying measures of promotion and protection.

In addition to these two fundamental principles, there is also the need to take permanent account of the need for stability of life, which, common to all children, will present itself even more urgently in the case of children with international protection status, many of whom have been forced to leave their countries in traumatic conditions and then experience harsh experiences on the journey until they reach the country of destination. Therefore, this country cannot offer itself as a place of the second victimisation, where the same children will suffer new experiences of instability, which will make their uprooting even more difficult. Therefore, the solutions found should be implemented with as few changes as possible, as these children will have to be compensated for all the instability they have experienced in their lives up to now.

In the case of vulnerable children (and, thus, doubly vulnerable), such as those who have been victims of human trafficking or other forms of exploitation, any measure must also be accompanied by special protective measures, such as specific psychological counselling or, where appropriate, the measures provided for by the law on witness protection.

Finally, it should be recalled that, if a measure of promotion and protection of residential care is applied, the Public Prosecutor's Office should initiate the necessary procedures for the child's naturalisation, as mentioned above.

The appointment of a legal guardian is possible in two ways. Being in Portugal and establishing his/her residence, the portuguese law will be the competent (Hague Convention of 1996). The traditional guardianship (*tutela*) regulated in Civil Code, where it is nominated an adult to take care of the child (the powers are more or less the same as the parental responsibilities, with some differences in terms of patrimonial administration and not arising succession rights).

There is also another solution that is *apadrinhamento civil*. The law No. 103/2009) defines this measure as civil custody (fostering) of the child is a legal relationship, tending to be permanent, between a child or young person and an individual or a family exercising the powers and duties of parents and establishing emotional ties with them to enable their well-being and development, established by homologation or judicial decision and subject to civil registration.

16. *Is there a procedure for ascertaining the minor age? What happens if it is impossible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

Regarding the verification of the age of unaccompanied children wishing to enter national territory, the authorities resort to the National Institute of Legal Medicine and Forensic Sciences. This agency is independent and can call on external specialists and is responsible for age assessment examinations when there are doubts about age. Usually, X-rays are taken of the dentition and bone density of the wrist to clarify doubts about age, weighing the margin of error, since the result presents an age range to be considered, with the fact that it is less intrusive (Article 79, no. 6 Asylum Law: In order to determine the age of the unaccompanied minor, SEF may resort to medical expertise, through a non-invasive ex-

pert examination, presuming the applicant to be a child if there are still well-founded doubts). The final result is obtained by crossing bone age and dental age and also the medical assessment. The estimate, which is always an age range and never an exact age, must be clearly stated. In other words, the results can never be categorical and must be expressed as a percentage. The result is merely an indication of the real age.

Usually, the authorisation for the procedure is taken by judicial decision. In this case, the opinion is taken upper hand by the court or by a judiciary authority (SEF or Public Office). There is no information of a situation where the child refuses the examination, however, knowing the jurisprudence in criminal law, and it is not possible to coercive impose the examination, Like, if the child refuses physically, it is not possible (in terms of constitutional rights) to force him/her. Typically there will be consent (or tacit) consent to do the examination.

National Institute of Legal Medicine and Forensic Sciences has set a procedure rule (NP-INMLCF-018) that establishes the methodology to estimate age in living undocumented individuals. The highest minimum age of the age ranges is calculated in the evaluation of the left hand and wrist X-ray, orthopantomogram, and, if necessary, CT scan of the clavicles corresponds to the examinee's minimum age. A clinical interview is also conducted, where personal medical history is taken, and an objective examination is performed. This includes an anthropometric evaluation, evaluation of sexual development, screening for clinical pathologies which may condition physical, bone and/or dental development, sexual maturation, as well as an examination of the oral cavity.

For unaccompanied, undocumented minors, SEF is legally entitled to use appropriate technologies to identify them. In this context, checks are carried out in the EURODAC database on all asylum seekers aged 14 and over[2].

As far as children's data such as missing persons in individual Member States are concerned, there is a database in the Schengen countries to warn of these situations. As a rule, the country issuing the alert provides information on the procedure to follow if the young person tries to enter

[2] https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en.

another Member State (e.g. submitting the alert to the TFM or another authority responsible for children and youth). Accordingly, when an unaccompanied minor enter national territory, that database is consulted for identification purposes, as a measure for establishing the identity of the unaccompanied minor, as laid down in Immigration Law.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

Yes. Immigration Law states the right to have residence permit when children are subject to guardianship under the terms of the Civil Code (Article 122 (1)), or, by Article 124 (4) immigration Law, when a child is placed in a foster family or institutional care in public, cooperative, social or private institution with a cooperation agreement with the State, following a promotion and protection process, benefit from the resident status under the terms of paragraph b) of no. 1 and no. 2 of Article 123.

The measures can go until 25 years old (Article 63 LPCJP)

It is also possible to apply for the naturalisation: Article 6 (3) National Law.

3. In the case of children or young people under 18 years of age, sheltered in public, cooperative, social or private institution with a cooperation agreement with the State, following a definitive promotion and protection measure applied in a promotion and protection process, under the terms of paragraph 3 of Article 72 LPCJP, the Public Prosecutor's Office is responsible for promoting the respective naturalisation process with exemption from the conditions referred to in the previous number.

The judicial procedures will tend to start with the communication of SEF to the Public Office (Article 73 LPCJP).

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

According to the UNHCR, it is essential to safeguard the child's legal representation, well-being and best interests immediately after

his or her arrival in the national territory, and pending the filing of an application for international protection. In the Portuguese case, this would imply the initial action of SEF and other entities with responsibility for the promotion and defence of children's rights, such as social security. In the migration mentioned above and asylum context, a systemic gap pervades the national child protection system's initial lack of involvement when the arrival and identification of the unaccompanied or separated child.

The Portuguese regime for protecting unaccompanied or separated children does not offer a complete answer to questions that arise in the migration and asylum camps. Within the scope for action by public authorities, it is therefore essential to safeguard respect for international protection standards and seek to align procedures with the case law and recommendations of international human rights bodies such as UNHCR, UNICEF or the Council of Europe.

It is necessary to establish useful practice manuals to implement material and administrative action and the legal provision of rights.

The need to reformulate certain normative precepts and to regulate new matters in ordinary Portuguese law is associated with the importance of rethinking the role and responsibilities that each entity with competence in the area should assume. This is a collective task, as it involves, among others, the Public Prosecutor's Office, SEF, Social Security, the National Commission for the Promotion of the Rights and Protection of Children and Young People, the Family and Minors Courts and the High Commission for Migration.

Slovenia

Suzana Kraljić*

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

Slovenian national legal system does not devote specific discipline to unaccompanied foreign minors. Legal protection for unaccompanied children is provided within the framework of international protection, family law, etc., as well as within the system of protection of fundamental human and especially children's rights. Article 3(4) stipulates that the principle of the child's best interests shall be observed in relations where the minors are involved (Žakelj & Lenarčič, 2017).

Article 2(21) of the International Protection Act defines an unaccompanied minor as *"a minor who arrives on the territory of the Republic of Slovenia unaccompanied by parents or statutory representatives"*.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

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National Law (English)	National Law (Slovene)	Published – Official Gazette
Constitution of the Republic of Slovenia	Ustava Republike Slovenije	Uradni list RS, no. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99, 75/16 – UZ70a.
Foreigners Act (FA)	Zakon o tujcih (ZTuj-2)	Uradni list RS, no. 1/18 – official consolidated text, 9/18 – popr., 62/19 – odl. US.
International Protection Act (IPA)	Zakon o mednarodni zaščiti (ZMZ-1)	Uradni list RS, no. 16/17 – official consolidated text.
Family Code (FC)	Družinski zakonik (DZ)	Uradni list RS, no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI.
Provision of Foster Care Act (PFCA)	Zakon o izvajanju rejniške dejavnosti (ZIRD)	Uradni list RS, no. 110/02, 56/06 – odl. US, 114/06 – ZUTPG, 96/12 – ZPIZ-2, 109/12, 22/19.
Decree on the implementation of the statutory representation of unaccompanied minors and the method of ensuring adequate accommodation, care and treatment of unaccompanied minors outside the Asylum Centre or a branch thereof	Uredba o načinu izvajanja zakonitega zastopanja mladoletnikov brez spremstva ter načinu zagotavljanja ustrezne nastanitve, oskrbe in obravnave mladoletnikov brez spremstva zunaj azilnega doma ali njegove izpostave	Uradni list RS, no. 35/17.

The basic legal act that provides the international protection of unaccompanied children is the International Protection Act (IPA). The IPA

lays down the fundamental principles and guarantees in international protection proceedings, the procedure for granting, extending, and withdrawing of international protection, the duration, and content of international protection, and the scope of the rights and obligations of applicants for international protection and persons who have been granted international protection (Article 1 of the IPA).

Slovenia is contracting party to important international treaties related to the protection of unaccompanied children:

a) Convention on the Rights of the Child (1989);
b) Convention Relating to the Status of Refugees (1951);
c) International Covenant on Civil and Political Rights (1966);
d) European Convention on Human Rights (1950);

Slovenia has transposed with IPA three EU directives into the Slovenian legal order:

a) the Asylum Procedures 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);
b) the Reception Conditions 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;
c) the Qualification 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.

IPA lays down obligations related to the implementation of:

a) the EURODAC Regulation (Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in a Member State by a third-country national

or a stateless person and on requests for a comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice;

b) the Dublin Regulation (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 a Member State by a third-country national or a stateless person;

c) Council Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas;

d) Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States;

e) Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

In procedures involving an applicant who is an unaccompanied minor, due account shall be taken of the following:

a) his or her identity must be established and the procedure for finding his or her parents or other relatives initiated in the shortest possible time;

b) a legal representative of the applicant shall be appointed before the procedure commences (Article 16(1) of the IPA).

The procedure pursuant involving an unaccompanied minor shall be conducted in a child-appropriate manner, taking into consideration his age and degree of maturity (Article 16(2) of the IPA).

The legal representative shall represent an unaccompanied minor in the procedure for granting international protection, and in matters of health protection, education, the protection of property rights and benefits, and in relation to the exercise of reception rights, until the decision issued in the procedure for international protection becomes enforceable (Article 16(3) of the IPA).

Prior to receiving an application, unaccompanied minors shall be informed of the rights and obligations of applicants; such provision of information shall take a form appropriate to their age and degree of maturity (Article 16(5) of the IPA). Unaccompanied minors and their legal representative shall be present during all activities constituting the procedures pursuant to IPA (Article 16(6) of the IPA). Provisions related to legal representatives shall not apply to a minor older than 15 years who has entered into marriage (Article 16(9) of the IPA).

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

According to Article 10 of the Foreigners Act (FA), a foreigner (threfore also unaccompanied minor) can be refused at Slovenia's external border. The entry to Slovenia can be refused on grounds set out in the Schengen Borders Code, while the Minister of the Interior defines the reasons that an entry to a foreigner can be denied on the grounds of presenting a threat to public order, the internal security of Slovenia or public health.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

An unaccompanied minor can be expelled from Slovenian territory for the following reasons:

a) if an unaccompanied minor has refused to undergo the age assessment. But the dismissing of an application must not be based exclusively on such refusal (Article 17(7) of the IPA);
b) the competent authority may dismiss an application by an unaccompanied minor as manifestly unfounded only in relying on the

concept of a safe country of origin. If the country of origin is not a safe country, the unaccompanied minor should not be expelled;

c) if there are well-founded reasons to believe that the applicant (unaccompanied minor) presents a threat to the public order, public security or national security of the Republic of Slovenia or if the applicant was forcibly expelled due to substantial reasons of a threat to public order, public security or national security (Article 49(2) of the APA).

A minor foreigner (therefore also an unaccompanied minor) may not be removed to the country of origin or to a third country that is prepared to receive him until he has been granted admission there. Before removal, it is necessary to ensure that the minor foreigner will be returned to a family member, selected guardian or appropriate reception center in the country of return. In no case may an unaccompanied minor foreigner be removed in contravention of the:

a) Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols no. 3, 5 and 8 and supplemented by Protocol no. 2 and its protocols no. 1, 4, 6, 7, 9, 10 and 11 (Official Gazette of the Republic of Slovenia - MP, No. 7/94);
b) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Official Gazette of the RS - MP, No. 1/94);
c) Convention on the Rights of the Child (Official Gazette of the Republic of Slovenia - MP, No. 9/92);
d) European Convention on the Exercise of Children's Rights (Official Gazette of the Republic of Slovenia - MP, No. 26/99) (Article 82(2) of the FA).

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

The Ministry of Interior conducts international protection procedures and takes decisions therein according to the IPA.

The Ministry of Labour, Family, Social Affairs and Equal Opportunities is responsible for the list of (legal) guardians. Currently, there are 33

guardians for unaccompanied children. Candidates for guardians for unaccompanied minors are appointed to the list of legal guardians upon applying to the public tender and must meet specific conditions. Before being appointed, candidates also have to attend special training.

The Police inform a Social work Centre if they find an unaccompanied child.

The Social Work Centre is the competent authority that has immediately to appoint a legal representative (guardian) to the unaccompanied minor in line with the Family Code's provisions. The territorial jurisdiction has the Social Work Centre, where an unaccompanied minor under international protection is staying (Article 100(1) of the IPA).

The Government Office for the Support and Integration of Migrants provides asylum seekers accommodation, support, and psychosocial assistance and offers integration support to persons granted international protection. Asylum seekers are received by the Reception and Support Division, which provides accommodation at the Asylum Centre or one of its units. Through different programs carried out at the Asylum Centre, asylum seekers may exercise their rights in accordance with the applicable legislation. Following the successful completion of the procedure, persons granted international protection are assisted by the Integration Division to better integrate into Slovenian society. Each person granted protected status is provided accommodation at one of the integration houses and assigned an integration counsellor, who helps devise a personal integration plan.

Medical Court Expert shall prepare the expert opinion on the actual age of the unaccompanied minor if necessary.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

In Slovenia, the most important legal acts related to unaccompanied minors are the Foreigners Act (FA) and the International Protection Act (IPA). FA sets out the conditions for and methods of foreigners (also for unaccompanied children) entry into, a departure from and residence in

Slovenia. The FA is applied if the unaccompanied foreign minor has not yet applied for refugee or subsidiary protection status or if he decides not to apply for it. Such unaccompanied child is placed in the Centre for the Foreigners near the town of Postojna.

Article 82 of the FA provides that in case where Police find an unaccompanied foreign minor who is residing illegally in the Republic of Slovenia, the child is accommodated in the Centre for Foreigners in Postojna. The Police shall immediately notify a competent Social Work Centre. The Social Work Centre will immediately assign a guardian for a special case to the unaccompanied foreign minor. The Police shall issue a decision on the return of an unaccompanied minor after this guardian has carefully examined all the circumstances and has established that the return is in the best interests of the unaccompanied foreign minor. An unaccompanied foreign minor should not be returned to his country of origin or in the third county, ready to accept him until he has granted the reception in this county. Before the removal, it is necessary to be assured that the unaccompanied minor will be returned to the family member, appointed guardian, or appropriate reception center in the country of return. An unaccompanied minor is placed in agreement with the guardian in the proper institution for the minor. If this is not possible, the unaccompanied minor will be placed in the Centre for Foreigners. An unaccompanied foreign minor, accommodated in the Centre for Foreigners, can engage in leisure activities, including games and recreational activities, appropriate to his age. If the minor's identity is not verified and there is a doubt about his minority, the Police may establish the minor's age with expert helps. Against the unaccompanied foreign minor is not allowed to order the accommodation under the stricter police supervision.

But if the unaccompanied minor has applied for international protection, the IPA is used. In that case, in the procedure for granting international protection, it will be assessed whether the applicant fulfills the conditions to be granted international protection in the Republic of Slovenia (refugee status or subsidiary protection). If the applicant is an unaccompanied minor, a legal representative will be appointed (Article 16(1) of the IPA), and the minor is transferred to the Asylum Centre in Ljubljana.

The legal representative shall represent an unaccompanied minor in the procedure for granting international protection, and in matters of

health protection, education, the protection of property rights and benefits, and concerning the exercise of reception rights, until the decision issued in the procedure for international protection becomes enforceable (Article 16(3) of the IPA). Before receiving an application, unaccompanied minors shall be informed of the rights and obligations of applicants; such provision of information shall take a form appropriate to their age and degree of maturity (Article 16(5) of the IPA). Unaccompanied minors and their legal representative shall be present during all activities constituting the IPA procedures (Article 16(6) of the IPA). Provisions related to legal representatives shall not apply to a minor older than 15 years who has entered into marriage (Article 16(9) of the APA).

The provisions governing guardianship pursuant to the Slovenia Family Code (hereinafter: FC) shall apply *mutatis mutandis* to a legal representative referred to before mentioned Article 16 of the IPA (hereinafter: guardian). The guardian may be any person who fulfills the requirements for a guardian stipulated by the FC and has received adequate training. A person qualified to be a legal representative is included in the ministry's list responsible for family and social affairs.

FC stipulates in Article 241 the requirements for guardians. The guardian cannot be a person:

a) who has been deprived of parental care;
b) who is not legally capable;
c) whos benefits are in conflict with the benefits of the client;
d) who has concluded a lifelong maintenance contract with the ward;
e) whose spouse or cohabitation partner has entered into a lifelong maintenance contract with the ward;
f) who, in view of his personal characteristics or his relationship with the ward or his parents, cannot be expected to perform guardianship duties properly (more Kraljić & Križnik, 2021).

Requirements concerning the adequate training are regulated with the IPA (Article 18) and detailed with the 'Decree on the implementation of the legal representation of unaccompanied minors and the method of ensuring adequate accommodation, care and treatment of unaccompanied minors outside the Asylum Centre or a branch thereof' (hereinafter: Decree). The training of candidates for legal representatives lasts

40 hours (16 hours of theoretical work and 24 hours of practical work). After completing the training, the Faculty of Social Work of the University of Ljubljana issues a certificate of qualification for a legal representative to the candidate. Every three years from the inclusion on the list of legal representatives, the legal representative must complete additional training lasting eight hours. The training comprise family law, social work, psychology, the protection of the rights and obligations of children, protection of human rights and fundamental freedoms, and asylum legislation (Article 7 of the Decree).

The decision appointing the legal representative of an unaccompanied minor shall be issued by the Social Work Centre with territorial jurisdiction in the area in which the unaccompanied minor has been accommodated. The Social Work Centre shall select a legal representative from the list of legal representatives administered by the ministry responsible for family and social affairs.

As mentioned, if the unaccompanied minor has applied for international protection, the appointed legal representative will support the minor by filling the application. An application for a minor who is younger than 15 shall be filed by his legal representative in the presence of the minor. Minors older than 15 and unaccompanied minors shall file an application personally in the presence of a statutory representative (Article 45(2) IPA).

The competent authority shall decide within the shortest time possible unless this could impact the appropriateness and integrity of the examination. A decision in the regular procedure shall be made within six months at the latest. A decision in the accelerated procedure shall be made in two months at the latest after the filing of an application (Article 47(1) of the IPA).

While waiting for the decision, an unaccompanied minor obtains applicants' rights (Articles 78-79 of the IPA). These rights include residence in the Republic of Slovenia, the supply of materials in the event of accommodation at the Asylum Centre or its branches (housing, meals, clothing and essential toiletries), healthcare, financial assistance if private accommodation is found, education, access to the labor market and pocket money (18 EUR per month). Exceptionally, the unaccompanied minor

could also be accommodated in some other appropriate institution in the Republic of Slovenia when the minor's health or other needs so require.

The legal representative has to protect the unaccompanied minor's right to be heard in matters relating to the minor and protect his interests by taking into account the ethnic, linguistic, religious, and educational background of the child. The best interest of the child should be the main principle in all matters concerning the unaccompanied child.

When the application for international protection of an unaccompanied minor was granted, the Social Work Centre with territorial jurisdiction for the area where an unaccompanied minor under international protection is staying shall immediately appoint a guardian for this minor following the regulations of Slovenian FC. The territorial competent Social work Centre shall carry out the procedure for accommodating the unaccompanied minor. As far as possible, siblings shall be kept together, taking into account the best interests of unaccompanied minors, particularly their age and degree of maturity. Unless already in progress, the search for an unaccompanied minor's family members shall begin immediately after his international protection status has been granted. At the same time, the competent authority shall protect the interests of the minor. If the search for a family member is already in progress, the competent authority shall continue the search insofar as practicable. In cases of a threat to the life or physical integrity of an unaccompanied minor or his or her close relatives, particularly if they have remained in the country of origin, it should be ensured that the collection, processing and circulation of information about these persons is undertaken on a confidential basis (Article 100 of the IPA).

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

The Constitution of the Republic of Slovenia defines in Article 56(3) that children and minors without parental care, who have no parents or any proper family care, enjoy the state's special protection. Following Article 10 of the Slovene FC is foster care, a special (alternative) care for children in need of care and upbringing by persons other than their parents. Foster care aims to enable children at persons other than their par-

ents to have healthy growth, upbringing, education, harmonious personal development, and training for independent living and work (Article 232(1) of the FC). Therefore, foster care is also used for unaccompanied children but rather for unaccompanied children younger than ten years. Foster care was thus used for unaccompanied children where their particular vulnerability was detected, determined by age, gender, trauma, disability, or medical condition. In 2017 have been placed in foster care only two children, and in 2019, three siblings. All children have been reunited with their families.

As mentioned, foster care is one of the alternative forms of support provided by society for children. It is meant to be a temporary measure, but experience from the past shows that many times a placement grows into a long-term measure (approximately seven years). A child will be placed in foster care if he has no own family, if the child cannot live with his parents for any reason, or if his/her surroundings endanger the child's physical and mental development. A child may also be placed in foster care if he/she is legally deemed to be a child with special needs (Article 233 of the FC).

In the FC, there are only general provisions regarding foster care. A special legal act regulates foster care. The Provision of Foster Care Act (hereinafter: PFCA) governs the conditions to be fulfilled by a foster parent, the requirements for the provision of foster care as a profession, the procedures for obtaining permission to provide foster care, the rights and duties of a foster parent under the requirements of the Social Work Centre, and the provisions of contracts for foster care and fosterage allowance (Article 1 of the PFCA).

A foster child is a child placed in a foster family based on a decision made by the court in the non-contentious procedure (since April 2019).

The PFCA regulates the conditions to be fulfilled by a foster parent, the requirements for the provision of foster care as a profession, the procedures for obtaining permission to provide foster care, the rights and duties of a foster parent under the requirements of the Social Work Centre, and the provisions of contracts for foster care and fosterage allowance (Article 1 PFCA). Since April 2019, the jurisdiction in foster care matters is transferred to non-contentious courts. The court in non-conten-

tious procedure will place the child under the foster care, but the Social Work Centre still has a significant role in the foster-care.

Following the PFCA, any person providing foster care under the conditions prescribed by the PFCA and in line with the FC is a foster parent. A person wishing to provide foster care must fulfil the following preconditions – the intended foster parent must have:

a) permanent residence in the RS;
b) completed professional or vocational education (in exceptional cases, this condition may be waived and foster care can be undertaken by a person with a lower level of education if this found to be for the benefit of the child);
c) attained the age of majority (Article 5 of the PFCA).

The PFCA also defines negative preconditions which must not be present in any person who wants to be a foster parent. The foster parent cannot be a person:

a) deprived of parental care;
b) living together with a person who has been deprived of parental care;
c) deprived of legal capacity;
d) who has been convicted of an intentional criminal offence prosecuted ex officio or of a criminal offence against life and limb and of a criminal offence against sexual integrity for which the perpetrator is prosecuted on the motion;
e) living with a person who has been convicted of an intentional criminal offence prosecuted ex officio or of an offence against life and limb and an offence against sexual integrity for which the perpetrator is prosecuted on motion (Article 6 of the PFCA).

Foster care may be undertaken by a relative of the child if the Social Work Centre establishes, regarding the circumstances of the individual case, that it is for the child's benefit. In such cases, the PFCA enumerates who is considered to be a relative of the child including grandparents, uncle/aunt, brother and sister (Article 7 of the PFCA).

The PFCA differentiates between two kinds of foster parents, the 'ordinary' foster parent and the 'professional' foster parent. Anyone wishing

to become a 'ordinary' foster parent must obtain permission and be entered into the registry at the ministry. Candidates send their applications to their local branch of the Social Work Centre. The Social Work Centre establishes first whether the required formal conditions are met. The suitability of the candidate and their family are then considered for the provision of foster care. The ministry annually sends a request for a number of new foster parents to the Social Work Centre. The Social Work Centre sends completed applications that have been positively evaluated to the ministry. The commission for the selection of candidates then sends the selected candidates for training. Candidates who successfully pass the training course obtain permission to provide foster care from the ministry and are entered into the register of permissions (Article 13 PFCA; Kraljić & Rijavec, 2014).

A foster parent who wishes to carry out a foster care activity as a profession ('professional' foster parent) must have a ministry permission and may not

a) be in a full-time employment relationship;
b) be a partner or shareholder of companies established under the law governing companies, or a founder of institutes and cooperatives, who is at the same time a manager and on this basis included in the compulsory pension and disability insurance;
c) be retired;
d) perform other activities based on which he is included in the compulsory pension and disability insurance under the law governing pension and disability insurance (Article 18 PFCA).

Besides, the foster parent wishing to offer foster care professionally must file an application with the local Social Work Centre office. The Social Work Centre sends the application to the ministry for evaluation. If all of the required conditions are met, the foster parent candidate is entered into the register of foster care providers and files a confirmation of entrance.

An 'ordinary' foster parent may care for a maximum of three foster children simultaneously, and a larger number only exceptionally (e.g., in the case of siblings). Foster parents providing foster care on a professional basis usually look after three foster children at the same time. This number may be lowered in certain cases (e.g., in case of a child's severe illness).

The procedure for placing a child in foster care, which is not part of the procedure for deciding on measures to protect children's interests, is initiated at the proposal of the Social Work Centre (Article 116(1) of the NCCPA-1). The court shall decide on the child's placement in foster care and the appointment of a foster parent when the court decides on measures under the FC and when the reasons for placement in foster care are fulfilled. The court sends a final court decision on the placement of a child in foster care to the competent Social Work Centre (Article 235 of the FC).

The Social Work Centre will select a foster parent, who will take care for the child in the best way. Social Work Centre will conclude a written contract with the chosen foster parent care. In the contract rights and duties of both contract parties are set out. The contract for foster care must be made separate for each child and must specifically define:

a) the range of care for the foster child;
b) the rights and obligations of the parties to the contract;
c) the amount and method of payment of fosterage allowance;
d) the term and duration of the contract for foster care;
e) special requirements of foster care in each case (Article 45 PFCA).

A foster parent is also obliged to allow contact between the foster child and his/ her parents. The exemption is given except if the parents are barred from contact based on a court's decision. The foster parent must cooperate in an individual project group nominated by the Social Work Centre and take part in additional training.

Following the interviews with unaccompanied minors, aged between 16 and 18, do not want to be placed in foster care.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

The Constitution of the Republic of Slovenia defines in Article 56(3) that children and minors without parental care, who have no parents or any proper family care, enjoy the state's special protection.

The FC provides for only one form of adoption, i.e., full adoption (*adoptio plena)*. Following Article 218(1) of the FC, only a child may be admitted for adoption if parents after the child's birth have consented to

the adoption before the Social work Centre or court. Consent must be confirmed after the child is eight weeks old, otherwise, the consent has no legal effect. The consent of one of the parents who has been deprived of parental care or who is permanently unable to express his will is not required.

A child whose parents are unknown or whose residence has not been known for a year (relevant for the unaccompanied children) may also be placed for adoption (Article 218(2) of the FC). A child who does not have living parents may also be placed for adoption (Article 218(4) of the FC).

In all named cases, the adoption is possible after the lapse of six months from the fulfillment of the condition referred to the parent's given consent or since the parent's residence is unknown. Exceptionally, adoption is also possible before the expiry of this period if the court finds that this would be in the child's best interests. This is especially true if parental care is taken away from both parents (Article 218(3) of the FC).

Since April 2019, the adoptions are subject to the non-contentious procedure, but the Social Work Centre performs preparatory works.

Spouses, cohabitants, or individuals (hereinafter: applicants) must submit a written application (with relevant documents) to the Social Work Center, in which they express their wish for adoption (Article 223 of the FC). The application must be submitted to the competent Social Work Centre, where the future adopters have a common permanent residence. On the basis of a complete application, the Social Work Centre will start the procedure for determining the suitability of the applicants for adoption. The suitability of the applicant (ie fulfillment of the prescribed conditions for adoption), motives for adoption, and other circumstances relevant for adoption will be determined (Kraljić, 2019).

The Center for Social Work will also obtain for the applicant ex officio:

a) an extract from the birth register;
b) an extract from the register of marriages;
c) certificate of citizenship;
d) confirmation that the applicant has not been deprived of parental care;

e) a certificate that the applicant is not in criminal proceedings – the Social Work Centre will obtain an extract from the Criminal Records from the Ministry of Justice (i.e., a certificate of impunity);
f) a certificate that no final indictment has been filed – this certificate proves that the applicant is not in criminal proceedings. It is obtained in the district court;
g) a certificate that the applicant is not under guardianship.

The conditions that future adopters must meet are:
a) the existence of a marriage or cohabitation in both joint and unilateral adoption (Article 213 of the FC);
b) the absence of a degree of kinship, which is an obstacle to adoption (adoption is not possible between blood relatives in a straight line and not in a sideline to the other knee);
c) the absence of guardianship, as the guardian cannot adopt the ward as long as the guardianship lasts (Article 214 of the FC);
d) the age of majority – the adopter can only be an adult who is at least 18 years older than the child. In exceptional cases, adoption may also be granted to an applicant, who is not 18 years older than the child when all the circumstances of the case have been investigated and it has been established that such adoption would be in the best interests of the child;
e) the future adoptive parent must also have the legal capacity and must not be deprived of parental care (Kraljić, 2019).

The Social Work Centre also examines the motives for adoption. Adoption is intended to ensure the child's well-being. The primary motive of the future adoptive parent should be focused on providing the child's interests. The Social Work Centre has to find the most appropriate adopter, judged according to the child's age, needs (e.g., religion, language, illness, special needs), and other relevant circumstances. Other circumstances important for adoption are also verified. For example, applicants' previous life (e.g. impunity, job, health condition) is also assessed, as well as their personal characteristics (e.g. inclusion in the social environment), relationships between spouses or cohabitants as potential adoptive parents, to family members and the broader social environment. The Social Work Centre has to investigate applicants' temperament and character characteristics, their cultural and religious views,

their level of education, their housing, and general material preconditions for life (Kraljić, 2019).

The procedure for determining the applicant's suitability may not last longer than one year from the day of applying. Based on the findings (requirements, motives, others), the Social Work Centre prepares an expert opinion on the applicant (Article 224 of the FC). By issuing a positive expert opinion, the applicant acquires the status of a candidate for adoption and is entered in the Central database of candidates for adoption. The Social Work Centre concludes an agreement with the candidate for adoption on preparation for adoption (Article 225 of the FC).

When a child suitable for adoption appears, the Social Work Centre selects the most qualified candidate, mainly according to the child's characteristics and needs. The time of registration of the candidate in the central database of candidates is also taken into account. However, the latter need not be taken into account if it is in the child's best interests to be adopted by a particular candidate.

The Social Work Centre then files a proposal for adoption to the non-contentious court (Article 226 of the FC). The adoption procedure may also be initiated at the proposal of the spouse or cohabitant partner of the child's parent (Article 12 of Non-Contentious Civil Procedure Act (hereinafter: NCCPA-1). In non-litigious proceedings, the court determines whether the conditions for adoption are met, both on the part of the future adoptive parent (active adoptive ability) and the child who is to be adopted (passive adoptive ability). To determine whether the child and the future adoptive parent will be able to live in the new situation and whether the adoption will be in the best interest of the child, the non-contentious court may decide that the child spends some time in the family of the future adoptive parent before the decision on adoption. During this time, foster care rules apply. After the end of the trial period, the court will decide on adoption. If all the conditions will be fulfilled and the adoption is the child's best interest, the court will issue a decision on adoption (Article 229(1) of the FC).

Adoption requires the child's consent if they can understand the meaning and consequences of the adoption (Article 215(3) of the FC). According to the available information, none of the minors with recog-

nized international protection has been adopted. They even do not want to be adopted.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

No, the involvement of the judicial system is not envisaged in the management of unaccompanied foreign minors.

At the end of the international protection procedure, everyone (also the unaccompanied foreign minor) has the right to file a lawsuit to the Administrative Court. A constitutional appeal is also possible.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

An applicant shall enjoy the right to residence in the Republic of Slovenia upon his reception. This right is gained by filing an application and shall be able to exercise until the enforceability of the competent authority's decision on the application (Article 78(1-2) of the IPA.

From the date of filing an application for international protection to the finality of the decision on the application, an applicant cannot apply for a residence permit in the Republic of Slovenia (Article 34(1) of the IPA).

The decision granting refugee status in the Republic of Slovenia shall at the same time serve as a permanent residence permit in the Republic of Slovenia as of the day of service. The decision granting or extending subsidiary protection in the Republic of Slovenia shall also have the effect of a temporary residence permit in the Republic of Slovenia as of the day of service and the duration of the protection (Article 92 of the IPA).

An unaccompanied foreign minor who has been granted international protection shall have the right to:

a) receive information about the status, rights, and obligations of persons under international protection in the Republic of Slovenia
b) reside in the Republic of Slovenia

c) financial compensation for private accommodation
d) social assistance
e) employment and work (Article 90(1) of the IPA.

Following the FA, an unaccompanied foreign minor whose application for international protection has been rejected or who did not apply for asylum will be allowed to stay in the Republic of Slovenia based on a temporary authorization, following the request of his guardian (Article 72(2) of the FA).

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Following Article 16(3) of the IPA shall legal representative represent an unaccompanied minor also in matters of healthcare and education.

Access to education. In the Republic of Slovenia, unaccompanied foreign minors with a residence have the same right to education in Slovenia as Slovenian children. The legal age of entry to primary education in Slovenia is six years. Since primary education in Slovenia is compulsory, the guardian of the unaccompanied minor is obliged under Article 45 of the Basic School Act to enroll the child in the first grade of primary school who will reach the age of six in the calendar year in which they start attending school. Access to education is granted up to 26 years. Applicants shall be guaranteed the right to primary education no later than three months after filing an application. In cooperation with a legal representative, unaccompanied minors shall have access to education in vocational and secondary schools under the conditions applicable to citizens of the Republic of Slovenia. Applicants (unaccompanied foreign minors) shall be allowed access to higher, university, and adult education under the conditions that apply to citizens of the Republic of Slovenia. Access to the education system shall be provided within three months at the latest following the filing of an application. If necessary, minors shall be provided preparatory study assistance in order to facilitate their access to the education system. Public transport costs for applicants included in

the regular education system who demonstrate regular attendance shall be covered by the Office (Article 88(1-2) of the IPA).

Access to healthcare. Applicants who are unaccompanied foreign minors shall be entitled to health care equivalent to that enjoyed by children under mandatory health insurance as family members. School children aged 18 years or older shall be entitled to health care to the same degree until they leave school, but not after they reach the age of 26 (Article 88(3) of the IPA). Children granted international protection are entitled to healthcare services to the same extent and under the same conditions as children who are covered by mandatory health insurance as family members. School children aged 18 years or older are entitled to health care to the same extent until they leave school, but not after they reach the age of 26 (Article 98 of the IPA).

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

To facilitate the child's integration into the national system, children, as already mentioned, are enabled to join the Republic of Slovenia's education system in the same way as citizens of the Republic of Slovenia. In this way, the right to education is also exercised for unaccompanied children. However, to make integration into the school system as easy as possible, they should be provided with preparatory learning assistance, if necessary, to facilitate access to the education system. Funds for this preparation are provided by the Office of the Government of the Republic of Slovenia for the Care and Integration of Migrants (hereinafter: the Office). Funds for ensuring the rights to primary, vocational, and secondary education of these children are provided by the ministry responsible for education. Additional material resources to cover the expenses of purchasing teaching aids and part of other costs for the implementation of education (for example, workbooks, notebooks, slippers, crayons, drawing accessories, excursions, cultural, natural, sports, and technical days) not provided by the ministry, responsible for education, or a self-governing local community, is provided by the Office. An applicant who is guaranteed the right to education and regularly attends education is entitled to cover the costs of public transport to educational institu-

tions. Transport costs are borne by the Office. The applicant is also entitled to school meals.

An unaccompanied child with international protection must submit (child's legal representative) for admission to kindergarten must submit a certificate from a doctor (pediatrician) about the child's health condition. For a reduced kindergarten fee, the legal representative of the child must submit an application to the locally competent Social Work Centre one month before the child enters the kindergarten.

Unaccompanied children with international protection, older than 15 years, have free access to the Republic of Slovenia's labor market and do not need a work permit. Employers can thus employ them under the same conditions as Slovenian citizens, and they do not have to arrange additional documentation (Article 102 of the IPA).

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

The procedure for finding parent or other relatives of an unaccompanied foreign minor shall be initiated in the shortest possible time (Article 15(1) of the IPA).

Following the FA, the right to family reunification shall be granted to a foreigner who has been granted refugee status in the Republic of Slovenia based on the IPA, but only if the family existed before the refugee entered the Republic of Slovenia (Article 47.a(1) of the FA).

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Before the commencement of the proceedings for international protection, the applicant's (unaccompanied foreign minor) legal representative shall be appointed (Article 16(1) of the IPA). The legal representative is appointed according to provisions of guardianship in the Slovenian Family Code (FC). A person who fulfills the requirements for a guardian stipulated by the FC and has received adequate training may be appointed as guardian. FC stipulates in Article 241 the requirements for guardians. The guardian cannot be a person:

a) who has been deprived of parental care;

b) who is not legally capable;
c) whos benefits conflict with the benefits of the client;
d) who has concluded a lifelong maintenance contract with the ward;
e) whose spouse or cohabitation partner has entered into a lifelong maintenance contract with the ward;
f) who, in view of his personal characteristics or his relationship with the ward or his parents, cannot be expected to perform guardianship duties properly.

Requirements concerning the adequate training are regulated with the IPA (Article 18) and detailed with the 'Decree on the implementation of the legal representation of unaccompanied minors and the method of ensuring adequate accommodation, care and treatment of unaccompanied minors outside the Asylum Centre or a branch thereof' (hereinafter: Decree).

The ministry, for the family and social affairs, shall, if necessary, publish a public tender for candidates for legal representatives. After the public tender, the ministry will invite candidates for legal representatives who meet the requirements laid down for the guardian by the FC to an interview at which the fulfillment of the conditions for a legal representative is additionally verified. After the interviews, the selected candidates are invited to training for legal representatives (Article 5 of the Decree).

The training of candidates for legal representatives lasts 40 hours (16 hours of theoretical work and 24 hours of practical work). After completing the training, the Faculty of Social Work of the University of Ljubljana issues a certificate of qualification for a candidate's legal representative. Every three years from the inclusion on the list of legal representatives, the legal representative must complete additional training lasting eight hours. The training comprises family law (e.g., guardianship, foster care and child's rights), social work (e.g., standards of care of unaccompanied children, religious topics,..), psychology (e. g. needs of minors, motivation, empathy,…), the protection of the rights and obligations of children, protection of human rights and fundamental freedoms, and asylum legislation (Article 7 of the Decree; more Kraljić & Křižnik, 2021).

The decision appointing the legal representative of an unaccompanied minor shall be issued by the Social Work Centre with territorial jurisdic-

tion in the area in which the unaccompanied minor has been accommodated. The Social Work Centre shall select a legal representative from the list of legal representatives administered by the ministry responsible for family and social affairs.

The guardian represents the minor in the same manner and to the extent specified in the IPA. The guardian shall consult with the minor in every important task and decision concerning him, considering his opinion according to age, maturity, and developmental capacity. The guardian shall inform the minor appropriately and regularly about the performed activities and shall consult with him beforehand. If an unaccompanied minor also needs legal representation in an area that is not covered by the authorization referred to Article 16(3) of the IPA, a guardian shall be appointed for that purpose following the FC. The guardian may represent a maximum of three unaccompanied minors at the same time. Where it is not possible to provide legal representation for each minor in need, the guardian may exceptionally represent a maximum of five minors at a time (Article 2 of the Decree; Kraljić, 2019).

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

An unaccompanied minor and his legal representative shall be notified in writing, in a language the unaccompanied minor understands, of the possibility of having to undergo age assessment by an expert. The notification shall include information on the manner of examination and the possible consequences of the assessed age on the processing of his or her application and the consequences of unjustified refusal to undergo such an assessment. In the processing of an application for international protection, officials or persons involved in work with an unaccompanied minor believe that doubts have arisen as to the unaccompanied minor's actual age, the competent authority may order that an expert opinion shall be prepared. The expert opinion that shall be prepared by a medical professional, who may consult other relevant experts as part of the prepa-

ration of the opinion, as necessary. An examination to determine the age of an unaccompanied minor may be performed only upon the written consent of the unaccompanied minor and his or her legal representative. Where the unaccompanied minor and his or her legal representative refuse an examination of age assessment without providing any valid reasons, the unaccompanied minor shall be regarded as an adult concerning the processing of his or her application. In the event of remaining uncertainty about whether the applicant is a minor or an adult after the expert opinion has been obtained, the applicant shall be regarded as a minor. The decision dismissing an application lodged by an unaccompanied minor who has refused to undergo such an examination must not be based exclusively on such refusal. The costs of preparing an expert opinion shall be borne by the Ministry of Interior (Article 17 of the IPA). This procedure is unique for the whole territory of the Republic of Slovenia.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

There are no special provisions in the IPA concerning the integration of unaccompanied minors after they reach the age of maturity. Article 103 of the IPA provides the general provisions on assistance with integration into society. A person under international protection (therefore also an unaccompanied minor) has the right to assistance integrating into society for three years following the granting of status. Assistance with integration into society is based on a personal integration plan prepared and implemented based on the individual's (an unaccompanied minor) needs, knowledge, abilities, and skills, and includes an activity plan for easier integration into Slovenian society. In preparing and planning activities as part of a personal integration plan, translation into a language the person under international protection understands may be provided in the first year in well-founded cases solely to communicate with the Office's official. The preparation of a personal integration plan is the responsibility of the Office, which may transfer responsibility for the preparation and implementation of the personal integration plan in part or entirely to other organizations. During the implementation of a personal integration plan, for easier integration into Slovenian society, a person

under international protection has the right to attend a Slovenian language course and a course on Slovenian society, which the Office shall provide such person in the shortest time possible following the granting of status. The Slovenian language course and the course on Slovenian society may be combined and implemented as a single program.

Following the guidelines, the guardians must inform the child of the legal proceedings concerning the situation when they are eighteen. They should explain the role of guardianship before and after the child reaches the age of majority. They should stay in touch with the child and offer him support even after he will be eighteen years and the guardianship following the FC officially ends.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

The IPA from 2017 brought improvements in international protection in general and concerning the protection of unaccompanied foreign minors. But following the implementation of the principle of the child's best interest (Article 3 of the CRC), there are still noticeable inconsistencies and gaps. In practice, one of the gaps is related to the missing of durable solutions for unaccompanied minors in Slovenia – especially when they reach the age of maturity (Žakelj & Lenarčič, 2017).

The problems could be also seen in the appointment of a guardian or legal representative as this means that a minor can meet several people in a short time. Thus, it can sometimes be impossible for a child to establish a good and quality relationship with these people who would care for his best interest. On the other hand, the qualifications of the people working with these children (guardians, legal representatives) have risen over the years based on training and experience gained (Sedmak & Medarić, 2017).

Slovenia still does not represent the wanted, but rather a transitional country for adult refugees and unaccompanied minors. However, regardless of the latter, Slovenia has to follow international conventions, EU regulations, standards, and good practices in this area. It must strive for further improvements (e g., accommodation, healthcare, education,…)

and child-friendly procedures. Slovenia shall assure unaccompanied children an environment that will enable them to be well-being, safe, necessary protection, better integration into Slovenian society, and family reunification.

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Spain

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1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

The legal regulations on the rights and freedoms of foreigners in Spain are the Organic Law 4/2000, of January 11th, on rights and freedoms of foreigners in Spain and their social integration (hereinafter, the LOEX) and its development through the regulation approved by the Royal Decree 557/2011, of April 20th (hereinafter, the REX). Articles 185-198 of the REX refer to foreign minors, and specifically 189-198 to unaccompanied foreign minors (*menores extranjeros no acompañados*, who have become known as *MENAs*).

Article 189 of the REX defines the MENAs as "*foreigners under 18 of age who arrive in Spanish territory without being accompanied by an adult responsible for them, either legally or in accordance with custom, being appreciable the risk of lack of protection for the minor, as long as the adult responsible has not effectively taken care of the minor, as well as any foreign minor who once in Spain finds himself in that situation*". This definition agrees with the UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997: "*An unaccompanied child is a person who is under the age of eighteen, unless under the law applicable to the child majority is attained earlier, and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so*".

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2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

Article 35 of the LOEX refers to unaccompanied children, being developed by the REX.

Articles 189-198 of the REX regulate some aspects of unaccompanied children: definition, age determination, repatriation procedure, possibility of residence permit, and arrival of the minor to the age of majority.

There is a Frame Protocol for Unaccompanied Foreign Minors (hereinafter, the Protocol), derived from the agreement of several public institutions: the Ministries of Justice; Employment and Social Security; Health, Social Services and Equality, Interior and Foreign Affairs and Cooperation, and the Prosecutor-General. This Protocol seeks to coordinate the intervention of all affected institutions and administrations, from the location of the minors or alleged minors to their identification, determination of their age, making them available to the Public Service for the protection of minors, and documentation.

The regulation of residential care for the unaccompanied children and of the centers where it is carried out is made by regional regulations.

There is also an abundant case law on this topic, to which we refer in the annex.

General Observations No. 6 and No. 14 of the UN Committee on the Rights of the Child, adopted respectively on September 1st, 2005 and February 1st, 2013, highlight the particularly vulnerable situation of unaccompanied minors, and that the concept of the minor's best interests is complex and its content must be determined on a case-by-case basis.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

Applicants of asylum under the age of 18 in a situation of helplessness will be referred to the competent services for the protection of minors, informing the Public Prosecutor's Office. The guardian who will be legally assigned to the minor will represent him during the processing of the file. Asylum applications will be processed in accordance with the criteria contained in the international conventions and recommen-

dations applicable to minors seeking asylum (Article 15.4 of the Regulation for the application of Law 5/1984, of March 26th, regulating the right to asylum and refugee status, approved by Royal Decree 203/1995, of February 10th).

According to the Protocol, once these formalities have been fulfilled, in particular the giving knowledge to the Public Prosecutor's Office, the determination of his age, the making him available to the competent Public Entity for the protection of minors and the corresponding assignment of a legal representative, the MENA will be informed by the Public Entity for the protection of minors under whose legal guardianship, custody or provisional protection is, in a reliable way and in a language that can reasonably understand, about the basic content of the right to international protection and the procedure provided for his request, being recorded in writing. For the effective formalization of the application for international protection, the MENA must appear in the administrative offices provided for this purpose together with the person designated by the Public Entity for the protection of minors responsible for his guardianship in order to assist him in the corresponding formalization and processing, guaranteeing the minor's best interests and completing his capacity to act when necessary. The Spanish authorities will not be allowed to contact the diplomatic representations of the country of origin of a MENA who is requesting international protection.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

No, in no way, whenever it is appreciated that he is at risk. All minors detected will be subjected to the procedure contemplated in the Protocol. In this sense, the Protocol establishes that it will apply, among others, to foreign minors who are at risk for having entered the national territory clandestinely or surreptitiously or intending to cross the Spanish border together with an adult who, pretending to be his parent, relative or person in charge of the child, does not provide true or reliable documentation of the alleged bond, and also shows an objective danger for the comprehensive protection of the minor.

Only at the end of the procedure, they may be repatriated, when it is considered that the minors' best interests are satisfied by reuniting with

their family or making them available to the protection services of their country of origin. The minor is allowed to make allegations and appeal the final decision, personally or through his representative. Minors over 16 years old will be able to intervene in the repatriation procedure.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

All minors detected in the national territory will be subjected to the procedure contemplated in the Protocol. Only at the end of the procedure, they may be repatriated, when it is considered that the minors' best interests are satisfied by reuniting with their family or making them available to the protection services of their country of origin. The minor is allowed to make allegations and appeal the final decision. Once the impossibility or inadvisability of the minor's repatriation has been proven, he shall be given a residence permit.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

Any institution that welcomes an unaccompanied foreign minor must communicate it immediately to the Provincial Brigade of Foreigners and Borders of the National Police Corps, as well as the corresponding Delegation or Sub-delegation of the Government and the Public Prosecutor's Office.

The Police will check that the minor is already registered. If not, he will be entered in the Registry of unaccompanied foreign minors (RMENA), and shall be given a Foreign Identity Number (NIE) and a Personal Identity Number (NIP).

When the Police locates a MENA to whom the legal regime of the European Union is applicable, it will immediately inform the Public Prosecutor's Office and the Consulate or diplomatic representation of that country.

The Regional Public Entity for the protection of minors. In cases of lack of protection of minors (foreigners or Spanish), their guardianship is assumed by this entity. Article 171.1 of the Spanish Civil Code (CC) states:

When the Public Entity to which, in the respective territory, the protection of minors is entrusted, finds that a minor is in a situation of distress, it has the guardianship of the minor by operation of law and must adopt the necessary protection measures to its guardianship, bringing it to the attention of the Public Prosecutor's Office and, where appropriate, of the Judge who agreed to the ordinary guardianship. The administrative resolution that declares the situation of helplessness and the measures adopted will be notified in legal form to the parents or guardians and to the affected minor if he is sufficiently mature and, in any case, if he is over twelve years of age, immediately without that it exceeds the maximum period of forty-eight hours. The information will be clear, understandable and in an accessible format, including the causes that gave rise to the intervention of the Administration and the effects of the decision adopted, and in the case of the minor, adapted to the degree of maturity of him. Whenever possible, and especially in the case of the minor, this information will be provided in person. / A situation of helplessness is considered to be one that occurs in fact due to non-compliance or the impossible or inadequate exercise of the protection duties established by the laws for the care of minors, when they are deprived of the necessary moral or material assistance. / The assumption of guardianship attributed to the Public Entity entails the suspension of parental authority or ordinary guardianship. Notwithstanding, acts of patrimonial content carried out by parents or guardians on behalf of the minor and which are made in the interest of the minor will be valid. / The Public Entity and the Public Prosecutor's Office may promote, if applicable, the deprivation of parental authority and the removal of guardianship.

The Child Protection Center where the minors have their residence, under the supervision of the Public Entity for the protection of minors and the Public Prosecutor's Office. They are publicly owned by the regional government or private (often managed by NGOs), and are ruled by regional regulations for the protection of minors in distress.

The Public Prosecutor's Office supervises all the procedures, according to its statute. When a procedure is necessary in order to the determination of the foreigner's age, the file concludes through a decree from it.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

They will have their residence in a Child Protection Center, under the supervision of the Public Entity for the protection of minors and the Public Prosecutor's Office. These Centers are publicly owned by the regional government or private (often managed by NGOs) but in any case supervised and coordinated by the regional government.

If the foreigner is a minor, he will be admitted to an open center where the appropriate protection measures (maintenance, education) will be adopted, and may not be subject to expulsion or admission to a Foreigner Internment Center.

The Child Protection Centers, as institutions that temporarily assume the care and education of children who lack an environment that can satisfy their biological, emotional and social needs, have as their main objective to ensure that children recover their family environment or find them a suitable family environment.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Since the unaccompanied minor is placed under the protection of the Public Entity for the protection of minors, the conditions are the same as for Spanish children. It is a useful remedy since it looks for the integration of the child in a familiar environment.

The foster care can be provided by all couples or people who are willing and able to offer children and teenagers who cannot live with their families a family environment of coexistence in which to grow, which allows them to develop their capacities and provides them with respect and love they deserve, until they can return to their family of origin or a more suitable alternative is determined.

Article 172 ter CC states that the child custody will be carried out firstly through foster care and, not being possible or convenient for the minor's interest, through residential foster care. Foster care will be car-

ried out by the person or persons determined by the Public Entity. Residential foster care will be exercised by the Director or head of the center where the minor is housed, in accordance with the terms established in the legislation for the protection of minors. Those who cannot be tutors may not be fosterers. The resolution of the Public Entity in which the guardianship measure is formalized will be notified to the parents or guardians who were not deprived of parental authority or guardianship, as well as to the Public Prosecutor's Office.

The minor's best interests will always be sought and, when it is not contrary to that interests, it will be prioritized his reintegration into his own family and that the custody of the siblings be entrusted to the same institution or person so that they remain united. The minor's situation in relation to his family of origin, both with regard to his custody and the visitation regime and other forms of communication, will be reviewed at least every six months.

Article 173 CC states that foster care produces the full participation of the minor in family life and imposes on the recipient the obligations of looking after him, keeping him in his company, feeding him, educating him and providing him with comprehensive training in a loving environment. In the case of a minor with a disability, he shall have to continue with the specialized support that has been receiving or adopt others more appropriate to his needs.

Foster care will require the consent of the fosterers and of the foster child if he is sufficiently mature and, in any case, if he is over twelve years of age.

If serious problems of coexistence arise between the minor and the person or persons to whom the foster care has been entrusted, the former, the fosterer, the Public Prosecutor, the parents or guardian who were not deprived of parental authority or custody. the guardianship or any interested person may request to the Public Entity the removal of the guardian.

The foster care of the minor will cease:

a) by judicial resolution;
b) by resolution of the Public Entity, ex officio or at the proposal of the Public Prosecutor, of the parents, guardians, fosterers or the minor himself if he has sufficient maturity, when it is considered necessary

to safeguard his interests, after hearing the foster family, the minor, their parents or guardian;

c) due to the death or declaration of death of the minor's foster caregiver;

d) by the minor's reaching of his full age.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

Yes, the foreign minor can be adopted, like a Spanish minor. Adoption is a child protection measure that provides a definitive family to children and teenagers who, due to certain circumstances, cannot remain in their family of origin. In adoption, the child's best interests and respect for his rights must prevail, having to give up, in the event of conflict, the aspirations of the applicants for adoption, no matter how legitimate they may be.

In Spain, the regions (Autonomous Communities), within the framework established by the 1978 Constitution, have assumed with respect to their territory, among others, the competence related to the protection of minors, becoming the competent public entities in matters of adoption.

Article 175 CC: adoption requires that the adopter be over 25 years of age. If there are two adopters, it will be enough if one of them has reached that age. In any case, the age difference between the adopter and the adopted shall be at least sixteen years and may not exceed forty-five years, except in some cases. When there are two adopters, it will be enough that one of them does not have that maximum age difference with the adopter. If future adopters are in a position to adopt groups of siblings or minors with special needs, the maximum age difference may be greater. Those who cannot be tutors cannot be adopters.

Only non-emancipated minors may be adopted. Exceptionally, the adoption of an adult or an emancipated minor will be possible when, immediately prior to emancipation, there has been a foster care situation with the future adopters or of stable coexistence with them for at least one year.

It cannot be adopted a descendant, a relative in the second degree of the collateral line by consanguinity or affinity, or a ward by his tutor or guardian until the guardianship justified general account has been definitively approved. No one may be adopted by more than one person, un-

less the adoption is carried out jointly or successively by both spouses or by a couple united by an analogous relationship of affection to the conjugal one. The marriage celebrated after the adoption will allow the spouse the adoption of his consort's children. This provision will also be applicable to couples that are formed later. In the event of the adopter's death, or when the adopter suffers an exclusion of custody, a new adoption of the adoptee will be possible.

In case that the adoptee is in permanent foster care or custody for the purpose of adoption of two spouses or of a couple united by an analogous relationship of affection to the conjugal one, the legal separation or divorce or rupture of the relationship of them established prior to the adoption proposal will not prevent joint adoption from being promoted as long as the effective coexistence of the adopter with both spouses or with the couple united by a similar relationship of a marital nature for at least two previous years is proven.

Article 176 CC states that the adoption will be constituted by a judicial resolution, which will always take into account the adopted person's best interests and the suitability of the adopter or adopters for the exercise of parental authority. In order to start the adoption file, it will be necessary the previous proposal of the Public Entity in favor of the adopter or adopters that it has declared suitable for the exercise of parental authority. The declaration of suitability must be prior to the proposal. However, such a proposal will not be required when any of the following circumstances concur in the adopting party:

1. being an orphan and relative of the adopter up to the third degree of blood of family relationship;
2. being the child of the spouse or of the person united to the adopter through a similar relationship of affection to the spouse;
3. to have been in custody for more than one year for adoption purposes or to have been under the guardianship of the adopter for the same time;
4. being an adult or an emancipated minor;
5. Article 176 bis CC establishes that it is possible to constitute a pre-adoptive foster care. The Public Entity may delegate the custody of a minor declared to be in a situation of helplessness to persons who, meeting the requirements of capacity to adopt and having given their

consent, have been prepared, declared suitable and assigned for adoption. In this sense, the Public Entity, prior to the presentation of the adoption proposal, will delegate the custody for the purposes of adoption until the judicial resolution of adoption is issued, by means of a duly motivated administrative resolution, after hearing the parties and the minor, if he is of sufficient maturity and, in any case, if he is over twelve years of age, the parents or guardians not deprived of parental authority or guardianship will be notified. Guardians for adoption purposes will have the same rights and obligations as foster families.

Unless the minor's best interests were otherwise convenient, the Public Entity will proceed to suspend the visitation and relations with the family of origin when the pre-adoption period of coexistence begins.

The adoption proposal to the judge will have to be made in the shortest possible time and, in any case, before three months have elapsed from the day on which the guardianship delegation was agreed for adoption purposes. However, when the Public Entity deems it necessary, depending on the minor's age and circumstances, to establish a period for the minor to adapt to the family, the period of three months may be extended up to a maximum of one year.

In case the Judge does not consider such adoption appropriate, the Public Entity must determine the most appropriate protective measure for the minor.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

There is not a special involvement of the judicial system. The supervision on the procedures is from the Public Prosecutor's Office. Notwithstanding, the administrative decisions are subject to appeal, and If from the statements of the adult accompanying the minor or any other indicator or news, a situation of imminent risk is appreciated in the person of the minor, the Public Prosecutor can urge a judicial resolution that prevents the minor from leaving the center in the company of the adult, while the risk situation is being evaluated, without judicial authorization.

In general, the protection of minors (foreign or Spanish) is a matter of administrative competencies, under the superior supervision of the Public Prosecutor's Office.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

Yes, the procedure provides that the minor's residence authorization will be requested when it will not be suitable his repatriation. The Protocol states that the Public Entity will ask for the residence permit in a time of three months since the minor was made available to the Center for the Protection of Minors. If, for unjustified reasons, the resolution proposal has not been raised by the Public Entity, the Government Delegation or Sub-delegation corresponding to the minor's domicile will initiate, ex officio, the procedure relating to the residence authorization. The processing and resolution of the file must be carried out with the greatest speed – in any case, after a maximum period of nine months from the availability of the minor, whatever the processing status, the Government Delegation or Sub-delegation will grant the residence authorization. The duration of the residence permit is one year, from the date of the resolution of the Public Prosecutor's Office by which it was determined the availability of the minor to the minors protection service (Article 196.4 REX), and it shall be renewed for successive annual periods (unless a long-term residence permit is applicable) being requested during the sixty calendar days prior to the expiration date of its validity (Article 196.5 REX).

Within a month from the date of notification of the resolution granting the authorization, it shall be requested for the minor, before the Foreigners Office or Police Station, the Foreigner Identity Card.

In any case, the granting of a residence permit shall not be an obstacle to subsequent repatriation when it favors the minor's best interests.

The advantages for the minor from having the residence permit granted are the regularization of his situation (therefore the request of this permit is compulsory), and the subsequent possibility of asking for a work permit for the minor.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

The unaccompanied foreign minors, as foreigners with a legal residence, can exercise rights recognized to them in conditions of equality with Spaniards, being interpreted in accordance with the Universal Declaration of Human Rights and with international treaties and agreements (Article 3 LOEX). Foreigners with a legal residence will have the following rights, to the extent that their age allows it (Articles 4-14 LOEX): documentation, freedom of movement, suffrage in municipal elections, meeting and demonstration, association, education (in accordance with the provisions of educational legislation), working and Social Security, unionization and strike, health care, access to public aid systems in housing and access to social services.

Moreover, as minors, they have some rights, contemplated in the Organic Law 1/1996, of January 15th, on the Legal Protection of Minors (hereinafter, LOPJM): foreign minors who are in Spain have the right to education, health care and basic social services and benefits, under the same conditions as Spanish minors, and specifically Public Administrations will ensure especially vulnerable groups such as unaccompanied foreign minors and others, guaranteeing compliance with the rights provided by law (Article 10.3).

All minors have the right to have their best interests valued and considered paramount in all actions and decisions that concern them, both in the public and private spheres, prevailing their superior interest over any other interest that could attend (Article 2.1); every measure in the minor's best interests must be adopted respecting the minor's rights to be informed and heard, and to participate in the process in accordance with current regulations (Article 2.5.a); and in that sense the minor has the right to be heard in any procedure in which he is affected and that leads to a decision that affects his personal, family or social sphere, duly taking into account his opinions, depending on his age and maturity (to do this, the minor must receive the information that allows him to exercise this right in understandable language, in accessible formats and adapted to his circumstances), being guaranteed that the minor, when he is sufficiently

mature, can exercise this right by himself or through the person he designates to represent him, being considered, in any case, that he has sufficient maturity when is twelve years old (Article 9). Minors have also rights to honor, privacy and self-image, information, ideological freedom, participation, association and assembly and freedom of expression (Articles 4-8).

For this purpose, when the Public Entity assumes the guardianship of a foreign minor who is in Spain, the General State Administration will provide, if it does not have it, as soon as possible, and together with the presentation of the guardianship certificate issued by the Public Entity, the documentation proving his situation and the residence permit, once the impossibility of returning with his family or to his country of origin has been proven, and in accordance with the provisions of current regulations on immigration (Article 10.4).

There are also regional laws about guarantee of child and teenager rights.

Specifically about education and health care, the LOEX states the following rules.:

- Foreigners under the age of sixteen have the right and duty to education, which includes access to basic, free and compulsory education. Foreigners under the age of eighteen also have the right to post-compulsory education. This right includes obtaining the corresponding academic qualification and access to the public system of scholarships and aid under the same conditions as Spaniards. In case of reaching the age of eighteen during the school year, they will retain that right until its completion. Therefore, the unaccompanied foreign minors will receive a proper education at the center for the protection of minors where they are assigned, or will be registered in an educational center.
- Foreigners have the right to health care under the terms provided in current legislation on health matters. The Law 14/1986, of April 25th, on General Health, states in its Article 1.2 that holders of the right to health protection and healthcare are all Spanish and foreign citizens who have established their residence in the Spanish national territory. To that purpose, the unaccompanied foreign minors will be provided with a Health care card: regarding minors protected or kept by Public Entities, the recognition of their insured status in relation to health care will be carried out ex officio, upon presentation of the certifica-

tion of their guardianship or custody issued by the Public Entity, during its duration (Article 10.5 LOPJM).

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

The integration of these minors is encouraged in their educational process, through the methodological design of the educational project. There are intervention and prevention plans developed by social services in order to promote a suitable social and labor growth of minors on social risk.

The danger of maladjustment is manifested in deprived environments and in processes of destructuring, and if protective and corrective social instances are not mediated, minors may enter into processes of socialization and undesirable lifestyles.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

In accordance with the Protocol (Section I.3.2), the policy on these minors will be aimed at family reunification in their country of origin or where their family resides or, where appropriate, upon return to their country (recommending to the attention of the child protection services) when this is in their best interests, bearing in mind that the United Nations Declaration of the Rights of the Child and the United Nations Convention on the Rights of the Child establish the priority that must be occur to the minors' development within their family or in an environment in which the traditions and cultural values of their own have an important presence, all without prejudice that all these factors may very well not concur, in which case the return would not be in the interests of the minors.

The Public Entity for the protection of minors that receives the minors must make inquiries about the circumstances of them in order to verify if there is a real situation of distress, if it is possible to regroup them with their family in their country of origin or where they reside and, eventually, if there is a need for international protection that had not been previously detected (Section VII.1.2 of the Protocol).

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Unaccompanied foreign minors' legal guardianship is developed by the Public Entity for the protection of minors.

Under Article 172 CC, when the Public Entity finds that a minor is in a situation of helplessness, it has the minor's guardianship by operation of law and must adopt the necessary protection measures to his custody, telling it to the Public Prosecutor's Office and, where appropriate, the judge who agreed to the ordinary guardianship. The administrative resolution that declares the situation of helplessness and the measures adopted will be notified in legal form to the parents or guardians and to the affected minor if he is sufficiently mature and, in any case, if is over twelve years of age, immediately without that exceeds the maximum period of forty-eight hours. The information will be clear, understandable and in an accessible format, including the causes that gave rise to the intervention of the Administration and the effects of the decision adopted, and in the case of the minor, adapted to his degree of maturity. Whenever possible, and especially in the case of the minor, this information will be provided personally.

A situation of helplessness is considered to occur due to non-compliance or the impossible or inadequate exercise of the protection duties established by the laws for the care of minors, when they are deprived of the necessary moral or material assistance.

The assumption of guardianship attributed to the Public Entity entails the suspension of parental authority or ordinary guardianship. The Public Entity and the Public Prosecutor's Office may promote, if applicable, the deprivation of parental authority and the removal of guardianship.

As we have seen under § 8, Article 172 ter CC states that the minor custody will be carried out firstly through foster care and, not being possible or convenient for the minor's interest, through residential foster care. Foster care will be carried out by the person or persons determined by the Public Entity. Residential foster care will be exercised by the Director or head of the center where the minor is housed, in accordance with the terms established in the legislation for the protection of minors.

However, art. 35.11 LOEX states that the General State Administration and the regional authorities may establish agreements with non-gov-

ernmental organizations, foundations and entities dedicated to the protection of minors, in order to assign them the ordinary guardianship of unaccompanied foreign minors. The agreement will specify the number of minors whose guardianship the entity undertakes to assume, the place of residence and the material means that will be used to care for them. The regional Administration which held the minor's custody shall be entitled to promote the constitution of guardianship, before the court of the place where the minor will reside, attaching the corresponding agreement and the agreement of the entity that will assume the guardianship. This guardianship regime will be the ordinary (provided for in the Civil Code and in the Civil Procedure Law).

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

When MENAs arrive in Spain, they usually do not have the documentation that identifies them or it is false. Therefore, If the foreigner is considered a minor, he will be placed at the disposal of the competent protection services, but if he has reached the age of majority, then will receive the treatment as an irregular adult immigrant.

According to art. 35.3-4 LOEX, when the Police locates an undocumented foreigner whose minority cannot be established with security, he will be given, by the competent services for the protection of minors, the immediate attention that he needs, in accordance with the provisions of the protection legislation for the minor, making the fact immediately known to the Public Prosecutor's Office, which will determine his age, for which the appropriate health institutions will collaborate, as a priority, carrying out the necessary tests; this procedure is unique throughout the Spanish national territory. Once the age has been determined, if he is a minor, the Public Prosecutor will make him available to the competent services for the protection of minors of the territory where he has been located.

The Protocol states that the decision to perform medical tests for the age determination corresponds to the Public Prosecutor. Medical tests

will not be authorized when they repeat other ones already carried out or when, in view of the repetition with which the previous tests have been carried out and the radiation doses to which the subject has been subjected, there may be a risk for the health of the minor according to a previous report from the doctor or forensic doctor.

Medical tests ordered by the Public Prosecutor's Office will be governed by the principle of speed, requiring the prior consent of the affected person and a specialized medical-sanitary control and will be carried out with respect for the dignity of the person. The Public Prosecutor will authorize the practice of medical tests only if the affected party gives his consent, after having been reliably informed, in the official form for it. In the event of refusal before the acting police officers to consent to the practice of the medical tests, the foreigner will be brought into the presence of the Public Prosecutor, who after receiving his statement and taking into account all the circumstances in the file, may determine that he is an adult. The supposed minor may withdraw his consent at any time before the medical tests are performed, in which case they will cease or be rendered ineffective, being valued in the same way as if it were a previous refusal. However, if among the concurrent circumstances there are indicators that the foreigner could be a victim of trafficking in human beings, the presumption of minority will prevail, and immediate protection measures must be adopted.

According to their science rules, it is up to the medical practitioners to determine the adequate and sufficient evidence to eliminate the insecurity regarding the minority of the affected foreigner. Whatever the tests performed to determine the degree of bone or dental maturation (radiological test of the left carpus of the wrist, examination of the dentition, particularly of the third molar, by means of an orthopantomography, and X-ray scan of the clavicle for quantification of ossification changes), the prior physical and personal examination of the supposed minor will be mandatory.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

When the minor reaches the age of 18, the Public Entity for the protection of minors shall issue a resolution establishing his consequent

withdrawal from the center for the protection of minors. Social services usually have programs for their social integration.

According to Articles 35.9 LOEX and 197 REX, foreign minors under guardianship who have a residence permit and reach the age of majority may renew their authorization or access a residence and work authorization, taking into account, where appropriate, the positive reports that, for this purpose, may be submitted by the competent Public Entities referring to their integration effort, the continuity of the training or studies that were being carried out, as well as their incorporation, effective or potential, into the labor market. The regional authorities will develop the necessary policies to enable minors to enter the labor market when they reach the age of majority.

The former minor will be able to request the renewal of the residence permit, during the sixty calendar days prior to the expiration date of its validity. The authorization will be renewed taking into account the existence of financial means for his support, the positive reports that, where appropriate and for these purposes, may present the competent Public Entities and the insertion of the applicant in the Spanish society. The validity of the renewed permit will be two years, unless a long-term residence authorization corresponds, and the applicant will have to ask for a Foreigner Identity Card.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

The Spanish regulation on MENAs follows the guidelines established internationally, based on documents already issued by international organizations: UNICEF, UN Committee on the Rights of the Child, European Union… In this sense, the current Spanish regulation is up-to-date and benefits from the accumulated experience of years of international regulation and national case-law (Constitutional Court, Supreme Court…) on unaccompanied foreign minors. Moreover, many specifically designed programs and services have been created for these teenagers which have favored their training and integration in the host context.

Notwithstanding, it presents some deficiencies derived from the fact that in practice the radiological tests to determine the presumed minor's

age continue to be abused when they are not necessary, and some aspects of this regulation are also defective, such as that the legal consequences that the subject's refusal to submit to these tests may entail, could be a violation of recognized rights to minors by national and international regulations.

Besides, it presents certain deficiencies derived from the distribution of competences in this area between the State National Administration and regional governments, which that should be corrected and improved: as foreigners, there is an exclusive jurisdiction of the State on foreigners, added to that there is a common (national) unitary framework in civil regulations on the protection of these minors (CC, general regulations…), and it is also national the competence on minors' fundamental rights as well as the basic regulations regarding the application of protection procedures; on the other hand, there are the regional protection regulations in relation to social services for these minors, and the location of each Public Protection Entity within the regional jurisdiction, determining the respective administrative protection procedures in its region. As a consequence of this distribution of competence, we find a different service model in each region, carrying out the creation of different resources and specific services, even though several protocols have been established to agree on basic practices. Thus, for example, the differences in the provision of programs to support the transition to adult life for this group are very notable in the different regions.

It is also worth mentioning as an aspect to be improved that sometimes there is a lack of resources and reception centers; and the slowness of the process to acquire the residence permit in Spain.

Sweden

Daniel Hedlund[*]

1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrives in your country without an adult who takes care for him?*

There are two more specific regulations defining unaccompanied children in Swedish law. The first is Section 1 B of the 'Act (1994/137) about reception of asylum seekers and others', which defines unaccompanied children as '[…] *children below the age of 18 who at the arrival in the country are separated from both their parents or another adult person who could be considered as having entered into the place of parents, or after arrival are without such a guardian (unaccompanied children)*'. Section 1 B further refers to sections 2, 3 and 3 paragraph a) of the same act, which gives the municipalities the rights to arrange asylum housing for unaccompanied children (paragraph 2), and gives the Migration Agency the right to resettle children in municipalities and that this resettlement makes the Social Services Act (2001/453) applicable, and thereby the local Social Services becomes responsible for the overall care of the unaccompanied child (paragraph 3). Section 3 paragraph a) describes that all unaccompanied children are to be registered at asylum housing by the Migration Agency.

The second definition is found in the Act (2005/429) about a guardian [*god man* in Swedish which literally translates to 'good man'] for unaccompanied children, which is a law specifically designed for unaccompanied children and regulates the guardianship institute primarily relevant during the asylum procedural stage. It is, however, not necessary for an unaccompanied child to seek asylum in order to have a guardian appointed, as the 2005 Act's definition of an unaccompanied child does not

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require an asylum application as a prerequisite. Section 2 of this act defines unaccompanied children as:

'*If the child upon arrival in Sweden is separated from both parents or another adult who can be seen as entering into the place of parents, the local Guardianship Board is to appoint a guardian that in place of custodian and trustee can be responsible for the child's personal affairs and take care of its affairs*'.

The 2005 Act is also applicable if parents or another equivalent person dies after arrival in Sweden and the child does not yet have a residence permit and thereby stands without a guardian, or if a (single) parent or the equivalent person is too sick to exercise his or her functions as custodian and trustee. In that case, a foreign child is also seen as falling within the definition of becoming unaccompanied.

It should be pointed out that parenthood in Sweden is legally apportioned into two parts: custodian (*vårdnadshavare*) which includes a wide range of responsibilities in caring for the well-being and rights of the child, while trustee (*förmyndare*) means being able to represent the child in the economic sense and enter into contracts on behalf of the child, thus a more administrative function, which leads to the mentioning of the two concepts custodian and trustee together in the excerpt from the 2005 Act above.

A guardian for unaccompanied children appointed according to the 2005 Act represents the child in a legal capacity in the place of parents but is not supposed to support the child financially or provide for the child's daily care, which mean that the guardians do not live with the children. With regards to financial support, the child is provided with a smaller subsidy based on a day-rate by the Migration Agency following an application from the guardian. This subsidy is to be used for everyday expenses. The daily rate depends on the accommodation type of where the child is living, if all food is provided in-house, the amount is reduced. The day-rate is calculated to cover, e.g., hygiene products, a bus or metro card and clothes. Extra expenses, such as buying a winter jacket, which is more expensive, can be applied for from the Migration Agency following an application from the guardian.

The Guardianship Board is a municipal, administrative authority under the municipal Chief Guardian [*överförmyndare*] or a Board of Supervisors [*överförmyndarnämnd*], which is a function appointed by the municipal council. The Guardianship Board is responsible for the recruitment, supervision, dismissal and enumeration of guardians. The guardians for unaccompanied children are laymen, and the competences required are not detailed, consequently giving the Guardianship Board relatively wide discretion in the recruitment and appointment of guardians. The 2005 Act about guardians for unaccompanied children only states that a guardian should be appointed as soon as possible without any further specification of time frames (section 3) and that the Guardianship Board should appoint a 'suitable person' when making this assessment, taking into special consideration the vulnerable position of the child (section 4), and that the child should be asked about his or her opinion of the suggested appointment if it is possible (section 3). Even though the administrative procedure for appointing a guardian for unaccompanied children can be different from municipality to municipality due to the relatively high independence of Swedish municipalities to organise their internal affairs, the recruitment process usually seems to consist of an adult individual displaying interest to become a guardian via a phone call or an electronic form on the Guardianship Board's website, after which he or she is interviewed in person or via telephone, and relevant checks, e.g., in the police register, social service register and bankruptcy register are done. If the interested person is approved by the Guardianship Board caseworker, he or she can be appointed as guardian. The supervision of guardians mainly appear to be done via forms where the guardian reports how often meetings take place with the child and for what reason. The guardians are remunerated, this can be either a standard remuneration [*schablon*], which seem to be most common, or per hour, depending on the municipality.

Section 3 of the 2005 Act further specifies that an application to have a guardian appointed can be made by the Migration Agency, the Social Services or by the Guardianship Board's own initiative. This type of application would be made immediately after one of these authorities receives knowledge that an unaccompanied child is present in the country, and within a specific municipality.

If a child is granted a residence permit before turning 18 and continues not to have parents or the equivalent in the country, a 'Specially appointed custodian' [*särskilt förordnad vårdnadshavare*] is to be appointed based on the regulations in the Parental Code (1949/381) relevant to all children that need other representatives than their parents (including, e.g., children with Swedish citizenship that, e.g., have parents that cannot function as custodians for different reasons or parents that pass away). The need for a specially appointed custodian and a suggestion for a suitable alternative is assessed by the local Social Services office, who presents an application for a specially appointed custodian to a District Court, which makes a decision on the matter. This means that the investigation concerning a specially appointed custodian is more in-depth and forward-looking than the appointment of guardians according to the 2005 Act about guardians for unaccompanied children, which has a comparatively temporary focus (during migration procedure without residency). In addition, the investigation made by the municipal Guardianship Board is a relatively brief assessment compared to the investigation made by the Social Services to assess the need for a specially appointed custodian. It can also be added that the main rule is that the specially appointed custodian is correspondingly appointed specially appointed trustee for the child, which means that both aspects of the legal parenthood in Swedish law (custodian and trustee as mentioned above) are included.

Both guardianships for unaccompanied children according to the 2005 Act and the 'specially appointed custodian' following the Parental Code ceases when a child turns 18 and becomes an adult in the legal sense.

Other regulations become relevant via referral from the 1994 Act about reception of asylum seekers and others. This is the case when a child is defined as an unaccompanied child according to Section 1b of the 1994 Act, and section 3 concerning placement directs the focus to Chapter 2 a section 1 of the Social Services Act, which states that the municipality where the child is staying is responsible for support and help. This essentially means that the same regulations prescribed to other children covered by the Social Services Act in a municipality are also applicable to unaccompanied children.

In addition, the 2005 Act about guardians for unaccompanied children refers to regulations in the Parental Code concerning the responsibilities for trustees of children (however notably not custodians). E.g., the regulation in section 4 of the 2005 Act about guardians for unaccompanied children, concerning who can be appointed to a guardian, refers to Chapter 11 sections 12 and 13 of the Parental Code, which provide general rules about trustees. In brief, the sections do not provide more clarification about the competences of a trustee than the 2005 Act, the mentioned provisions in the Parental Code states that a trustee must have integrity [*rättrådighet*], experience and in other ways be suited to be a trustee.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

The only national regulation that in its entirety is designed for unaccompanied children is the 2005 Act about guardians for unaccompanied children mentioned above in question 1.

Indirectly there are several laws that apply to children's rights more generally, i.e. apply in full to minors in the country, and thereby at least arguably make no difference between their legal statuses of residence or citizenship (including, e.g., children that are *sans papiers*). The European Convention of Human Rights is incorporated into the constitutional Instruction of Government 1974/152 (Chapter 2, Section 19) since 1995. The Instruction of Government also emphasise human equality and the individual's freedom and dignity (Chapter 1 Section 2 paragraph 1) and everyone's equality before the law (Chapter 1, section 9) (implicitly at any age) and specifically that public institutions [*det allmänna*] (state, region and municipals) shall work for respecting children's rights (Chapter 1, Section 2, paragraph 5).

In addition, Sweden ratified the Convention on the Rights of the Child (CRC) in 1990 and incorporated the CRC as law via the Act (2018:1197) about the UN Convention on the Rights of the Child in 2018, effective from 1 January 2020. For unaccompanied children, as for

all children, the CRC in its entirety is relevant, although Articles 2, 3, 6 and 12 may be particularly significant as well as Articles 9, 10 and 22. Even so, it remains to be seen how this reform will add to legislative development and practice.

The Swedish parliament, the *Riksdag*, is the only legislative body that can make national law [*lag*]. In relation to the welfare state, municipalities have the operational responsibility for the care of inhabitants, which means that they also have the main responsibility for unaccompanied children according to the Social Services Act after they are have received a municipal placement by the Migration Agency. However, there may be several regional and local regulations [*föreskrifter]*, guidelines and administrative routines in place since all of Sweden's 21 regions and 290 municipalities have relatively extensive independence according to the constitution, although local regulations cannot contradict laws of higher status, such as national legislation (e.g. Social Services Act 2001/453). In relation to unaccompanied children, this potential divergence is most likely relevant in relation to local/municipal routines about guardians (e.g. routines for recruitment, supervision, enumeration or change of guardians) and how the local social service office is organised (e.g. if there are social workers working with all types of cases, or if one person or a team of caseworkers have particular responsibility for unaccompanied children, this might follow, e.g., from the size of the municipality and its needs).

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

In relation to migration procedure, three provisions in the Aliens Act (2005/716) can be specifically mentioned, and they are relevant to both accompanied and unaccompanied children.

Chapter 1 section 2 defines a child as a person below 18 years old.

Chapter 1 section 10 of the Aliens Act stipulates that 'In a case concerning a child, particular consideration shall be given to what the attention to the child's health, development, and what the child's best interest otherwise requires.'

Chapter 1 section 11 of the Aliens Act states that 'When issues about residence permits following from this law are to be assessed and a child is effected by a decision in the case shall, if it is not inappropriate, the child

be heard. Due consideration is to be taken to the what the child has said in relation to what the child's age and maturity motivates."

In addition, according to Chapter 12 section 3 a, a decision about deportation of an unaccompanied child cannot be made effective unless the authority responsible for the deportation has made sure that the child will be received by a family member, an appointed guardian or a reception unit well suited to care for children.

A reception unit can, e.g., be a residential centre or group home for children without parents organised by the official social authorities.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

An unaccompanied child cannot be refused at the border if asylum is claimed. If asylum is not claimed, the main rule is that same regulations apply as for other non-EU third-nationals wanting to enter Sweden. This means that a passport and a Schengen visa or national visa is required when entering or staying in the country, which is prescribed in Chapter 2, sections 1 and 3 respectively of the Aliens Act.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

Not in relation to entering if they seek asylum. Children that have sought asylum are considered as having legalised their stay in the country. Children that do not seek asylum are a diverse group. Some seek different types of family-migration related residence if they have relatives in the country according to the Aliens Act, and in that way legalise their stay during the application procedure. Others live 'under the radar' and appear to avoid authorities. Even so, the Aliens Act have strict requirements for coercive measures against foreigners in general (Chapter 1 section 8), such as detention, and even stricter requirements for placing an alone child in detention, and it should only be considered as a last resort, e.g., if the child has not complied with supervision in preparing for a deportation based on a decision which has been finally decided and thereby has gained legal force. Chapter 10 section 3 of the Aliens Act states that a child cannot be separated from both placing both parents or the child in

detention and further specifies that a child without guardians in the country can only be placed in detention under extraordinary circumstances. In addition, according to Chapter 10 section 5 of the Aliens Act, a child can be kept in detention for a maximum of 72 hours and only under extraordinary circumstances can another 72 hours be added. This means that children living 'under the radar' will most likely not be placed in detention even if coming into contact with law enforcement. In brief, the placement of unaccompanied children in detention is relatively rare. The 2018 report 'Children in Detention' [*Barn i förvar*] by the Swedish Red Cross indicated that 16 unaccompanied children were taken into detention in 2017.

If an application for asylum or other type of residence permit is rejected there is the possibility of appeal to a migration court, and lastly the Migration Court of Appeal (if a review permit is granted). When a rejection decision gains legal effect, it can still only be executed if there is an organised reception in the country of origin or citizenship (see question 3 above). Children that cannnot be deported risk to end up in legal uncertainty – they are not deported but do not get residency unless particular circumstances makes the Migration Agency grant a residence permit because of impediments to enforcement [*verkställighetshinder*]. The Act (2016/752) about Temporary Limitations on the Possibility to be Granted Residence Permit in Sweden (The Temporary Aliens Act), which exist parallel with the 2005 Aliens Act has also provided some possibility to grant temporary residency for youth (ages 17-25). This temporary residency focuses mainly on vocational high school studies leading to work. The regulation has been referred to as 'the High School Act' although it consists of the sections 16 a – 16 I (see also question no. 11 and 18 below) in the Temporary Aliens Act. This legislation received critique when it was introduced and has been described as 'rushed' legislative work and complex with a lack of legal certainty.

After four years the decision for deportation is prescribed. In practice, several of the children having received a final rejection might 'dissapear' or 'go under the radar, to which can be referred to the report by the Swedish Red Cross above[1]. Please also see questions 10 and 11 below.

[1] There is also a suggestion for further reading: T. Elsrud, "Resisting social death with dignity. The strategy of re-escaping among young asylum-seekers in the wake of

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

State. The Swedish Migration Agency is the central agency for processing all types of migration cases and citizenship applications. The Migration Agency is also responsible for placing an arriving unaccompanied child in a municipality. The Migration Agency also appoints and pays for a Public Council (usually an attorney at law) to assist the child and the child's guardian with the asylum case. The Migration Agency can help the child to locate family members during the asylum case procedure, however, it is not certain how often the Migration Agency actually make any in-depth research for relatives abroad. If the case is assessed not to reach the requirements for protection status (refugee status following the 1951 Refugee Convention and Protocol or subsidiary protection according to EU Law), family-tied migration or particularly distressing circumstances (humanitarian considerations) following from national legislation (applied only if it would violate international treaty commitments according to the Temporary (2016/752) Aliens Act), the case is rejected. This decision becomes final and valid after appeals to migration courts, or the Migration Court of Appeal have been rejected (if granted review permit) or in the case of the review permit being denied (see also question 10 below). After a final rejection in all procedural instances, the Migration Agency becomes responsible for the deportation case and its completion.

Regions. The 21 regions have the overall responsibility for health- and hospital care in Sweden, and this responsibility includes even those that are staying in the region without necessary permits. For adults without necessary permits (*sans papiers*), the right to care is in general limited to care that cannot wait and emergency care. For children, however, there is no difference in relation to other children, their rights to hospital care, dental care, vaccination programs etc. are the same as for children with residence permits or citizenship. E.g, the Act (2013/407) about health- and hospital care for certain foreigners staying in Sweden without neces-

Sweden's sharpened asylum laws", in *European Journal of Social Work*, 2020, 23, 3, pp. 500-513.

sary permits' prescribes in section 5 that it applies to foreigners staying in Sweden without support by an authority's decision or by law, and its section 6 further specifies that a region shall provide such foreigners below the age of 18 care to the same degree as for those that have (legal) domicile in the region.

Local. The Social Services, working according to the Social Services Act, is a local administrative body working under the municipal Council for Social Affairs [*socialnämnd*] or the equivalent (they might have different names) and has the responsibility for everyone staying in the municipality. Primarily, the Social Services work with elderly-care decisions, care for people with addictions, support for people with disabilities and children/youth in need of special care. In regard to unaccompanied children, the local Social Services has the central/overall responsibility for the child after the child has been placed in the municipality by the Migration Agency. This responsibility includes, e.g., placing the child in appropriate housing and having a social worker conduct regular follow-up meetings with the child about his/her general situation. If the child is granted a residence permit, the Social Service can provide help with locating family members with the help of Swedish authorities abroad or NGOs such as the Red Cross.

Every municipality shall have a Chief Guardian according to the Parental Code although the organisation of a guardianship administration might differ between municipalities, and municipalities can also chose to have a mutual/shared guardianship authority. Primarily, the Parental Code (1949/381) guides Guardianship Boards and their casework and they recruit and appoint guardians for unaccompanied children, and also supervise and dismiss guardians according to the 2005 Act about a guardian for unaccompanied children (see also question 1). The guardian is a layman and assumes the legal place of a parent and thereby may ask for example the Social Services or the schools critical questions and look after the rights and interests of the child vis-à-vis the other actors in the formal network established around the child.

Schools are primarily operationalised by the municipalities, which are subsidised by the state for unaccompanied children. When unaccompanied children attend school the School Act 2010/800 and the School Or-

dinance are two main regulations applicable. It grants the possibility to mother-tongue education and education in Swedish as a Secondary language. Unaccompanied children also have access to school-based health service. Some schools conduct direct-integration of unaccompanied pupils and other have special classes for non-Swedish speaking pupils with a specific focus on Swedish until they can be gradually transferred into the regular classroom situation with Swedish-speaking students, this arrangement can vary greatly between schools and municipalities.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centers, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

When a child arrives to Sweden or encounters authorities and qualifies the definition of an unaccompanied child according to the 1994 'Act about reception of asylum seekers and others' mentioned in question no 1, the municipality where the child is encountered or make his or herself known to authorities is considered the 'Municipality of Arrival' [*ankomstkommun*]. This means that this municipality's social work office is responsible for transferring the to a temporary residence with staff, until the Migration Agency can place the child in a municipality more long-term, and the local social services in that municipality will become responsible for the overall coordination, planning and care concerning the child (see above question 1) according to the Social Services Act.

There are five forms of housing for unaccompanied children placed in a municipality and under the responsibility of the local social service[2].

The social services proposes a housing option and suggests it to the child's guardian. In practice, most guardians accept this suggestion, but it is legally the guardian who has the last say as the representative of the child in place of parents.

[2] Information about the five housing alternatives that are offered to unaccompanied children can be found here: https://www.informationsverige.se/en/jag-har-kommit-utan-mina-foraldrar/boende.

The most common form of residence for unaccompanied children is the HVB (homes for care or residence), which is a form of group home with staff, which can be run both by municipalities and private companies, and thereby organised in many different ways and be placed in various settings (rural, urban, semi-urban etc.). The staff can have different educational backgrounds, usually a minimum of completed high school training, however, the director of a HVB needs to have the relevant university degree, work experience and personal suitability, as required by the Health and Social Care Inspectorate (*IVO*). Even when private firms conduct care of this type, public responsibility is to some extent 'transferred' to their operations, e.g., the need to book interpreters for meetings with guardians or social workers when they visit the HVB, which is required by public administrative requirements, such as section 13 of the Public Administration Act, which states that authorities should use interpreters and make translations so that the individual can protect their rights when authorities are in contact with someone who does not speak Swedish[3].

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Placement is done following an assessment and decision by the local Social Services according to the Social Services Act. As mentioned above in question no. 7, most unaccompanied children live in housing centres called HVB (Home for Care and Residence), which are organised in the same way as the equivalent institutional homes for Swedish children that cannot live at home with their parents. A relatively smaller share of the unaccompanied children lives with foster families compared to HVB, it seems more likely that younger children and unaccompanied girls may be placed in families. In the Swedish context, foster care usually means family placement (Family homes). Family homes are screened and supervised by Social Services in the same way as they would be for 'Swed-

3 Suggested literature: A. Lundberg, L. Dahlquist, "Unaccompanied children seeking asylum in Sweden: Living conditions from a child-centred perspective", in *Refugee Survey Quarterly*, 2012, 31, 2, pp. 54-75.

ish children' being placed in family homes in accordance with the Social Services Act.

This means that social workers make house visits, interviews and controls in registers (i.e. the police register) before approving a family home. As a main rule, a family home is responsible for the care of the unaccompanied child only, i.e., food, room and social activities. Unaccompanied children do not live with guardians that have been appointed according to the 2005 Act about guardians for unaccompanied children, since this person is only responsible for representing the child's interest in the place of parents and not the daily care. Consequently, if a child is placed in a family home, the guardian visits there regularly to meet the child and check-up with the family home 'parent(s)'. The family home parent(s) might be a single individual or a couple, with or without children of their own. During the placement in a family home, the child's social worker will address how the child is settling in and getting along in the family home when he or she meets the child for regular meetings about the overall situation, since the Social Services has a coordinating role among the formal actors around the child (others being e.g., the guardian, the Migration Agency, the school and housing – such as a family home or HVB).

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

The Parental Code is the main legal framework in place for adoption taking place within Sweden (as opposed to international adoption via, e.g., adoption agencies).

According to Chapter 4 section 1 of the Parental Code, the best interests of the child should be given the most weight, and section 2 prescribes that a child can only be adopted if when considering all the circumstances it is deemed as appropriate, and in this aspect the child's need to be adopted and the applicant's suitability shall be considered. A person can adopt from age 18 (Chapter 4, section 5). Consent to be adopted is needed from a child that has turned 12. Moreover, the child's parents are to be given the opportunity to state their position on the adoption within a certain timeframe (decided by the court), unless it is clearly uneces-

sary, the parent cannot make a statement because of a psychological illness or the equivalent, or the parent is residing in an unknown place, or there are otherwise particular reasons.

A person wanting to adopt a child applies for adoption to the district court of the municipality where he or she resides. The court is responsible for having the adoption case investigated as deemed necessary, which when the person that is to be adopted is a child, entails having the social services to make an adoption assessment. This assignment is as a main rule given by the court to the municipality where the child is staying. The court will decide a time frame for the assessment, and may allow extensions. The social services' investigator then presents the assessment to the court together with a recommendation for what decision the court should make.

Relevant to the situation where a person or two persons would like to adopt an unaccompanied child is Chapter 4, section 17. This provision prescribes that if the child is not a citizen of Sweden or a permanent resident, the court shall ask the Migration Agency to make a statement about the adoption, unless it is deemed unnecessary.

Each adoption case will be assessed individually, which makes it uncertain to generalise the likelihood of an unaccompanied child without permanent residency being adopted. In addition, the Parental Code's regulations about adoption where updated to a large extent in 2018 and to my knowledge there is no precedent covering this situation yet.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

Mainly in relation to asylum procedure. A decision from the Migration Agency can be appealed to one of four regional Migration Courts (Stockholm, Gothenburg, Malmö and Luleå), and if it is rejected at this court level (instance) an appeal can be made to the Migration Court of Appeal which is a section by the Administrative Court of Appeal in Stockholm, however, the Migration Court of Appeal needs to grant a review permit. The Migration Court of Appeal only grants review permits for

cases it deems legally interesting (to elucidate principles and provide guidance for practice in complex issues). In the case a review permit is denied the decision of the migration court will remain and become effective.

With regards to other situations, the child will mainly have the same type of contact with the judicial system as other children would, e.g., districts courts if the child is suspected of having committed a crime and is above the age of 15, or an administrative court if there is a need for procedure concerning compulsory psychiatric care.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

There is no automatic right to a residence permit for unaccompanied children, all cases are assessed according to the 2005 Aliens Act and the Temporary Aliens Act. The latter will be in place until 19 July 2021, and the future framework is currently being politically negotiated. In this assessment, particular attention to children's rights is to be taken, see question no. 3 above.

Most unaccompanied children that come to Sweden seek asylum. However, the Temporary Aliens Act, which came into force on the 20 July 2016, restricts the possibility of obtaining residency in Sweden to those granted refugee status (Chapter 4 section 1 of the Aliens Act) or alternative protection (Chapter 4 section 2) of the Aliens Act), the provision about alternative protection draws on the regulations about subsidiary protection following EU Law (the Asylum Qualification Directive). If none of these grounds for protection status are found applicable, there is an assessment made if there are any family tie possibilities to grant a residence permit. Lastly, particularly distressing circumstances (Chapter 5, section 6 of the Aliens Act), which is a form of humanitarian ground, which is to be applied restrictively, is the final possibility of being granted asylum under the current migration framework in place. In addition, according to the Temporary Aliens Act (section 11), this provision is only to be applied if not applying it would be in contradiction with Sweden's international treaty obligations. If none of these grounds are applicable following an asylum application, the application is rejected.

Those children that express that they want to seek another type of residence permit, such as for connections to extended family who already

hold residency in Sweden can do so. However, Chapter 5 section 18 of the Aliens Act prescribes that the main rule for all applications for non EU-citizens (i.e., third-nationals) are to be initiated from outside of Sweden (i.e., the country where the child is a citizen or have the right to reside). This means that it is likely that the application would be rejected. Therefore, almost all unaccompanied children (according to the definition) seek asylum even if they have extended family in the country. Those that do not seek any residency permits at all and do not come in contact with the Migration Agency or other public agencies 'live under the radar'. A report called 'They will always find me' published by The Country Administrative Board [*Länsstyrelsen*] Stockholm includes some assessments of the conditions of this vulnerable group, that e.g., risk to be trafficked. With relation to unaccompanied children, they could 'disappear under the radar' mainly after being rejected having sought asylum and having a final valid decision for deportation: *Länsstyrelsen Stockholm Report* 2019/18. 'They will always find me' – A study of trafficking and the living conditions of vulnerable children[4]. If a residence permit is granted, the main rule is (following from the Temporary Aliens Act which takes precedence over the Aliens Act) that asylum applicants granted full refugee status are granted a temporary residence permit for 3 years, and alternative protection status (subsidiary protection) for 13 months (Sections 5 and 12 Temporary Aliens Act) with the first granting of residency.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

All children in Sweden, including unaccompanied children and undocumented (*sans papiers*) children have rights to education, health services including dental care and vaccination programs, if their stay in the country is not deemed to be brief and temporary (such as a tourist visit). The right to schooling includes elementary school and secondary/high

[4] Available at https://www.lansstyrelsen.se/stockholm/tjanster/publikationer/2018/de-kan-alltid-hitta-mig---studie-om-manniskohandel-och-utsatta-barngruppers-livsvillkor.html.

school education, and even after the child turns 18 he or she has the right to finish studies.

It is recommended that asylum-seeking children be placed in a school within one month after arrival. The school system is primarily operationalised via the municipalities and the state compensates them for the cost of asylum seeking pupils.

In contact with authorities all foreigners that do not speak Swedish, including children, have the right to an interpreter according to section 13 of the Public Administration Act (2017/900). This provision also demands that documents be translated if necessary for the (foreign) person to safeguard his or her rights.

Children in migration proceedings, such as asylum procedure, have the right to a legal aid (public counsel for the asylum case, see also question no. 6).

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

As mentioned in the previous questions 6 and 12 above, all children have the right to go to school, health care and dental care as if they were children with residence permits or citizenship.

The concept of integration in relation to children is mainly understood as language education in Sweden. This is provided by the regular school system, since 'Swedish as a second language' and mother-tongue language educations are available, even though their current implementation can differ between municipalities, as schooling is a municipal responsibility although the overall framework is steered nationally primarily via the 2010 School Act, the School Ordinance (2011/185) and other ordinances about curriculums [*läroplaner*]. For mother-tongue language instruction to be offered, however, there needs to at least five children sharing the specific language locally for the municipality to have the responsibility to arrange such education.

If a residence permit is granted, the person granted (including if it is a child) is awarded a unique personal civic number (date of birth, e.g., 040303 + a combination of four digits) by the (state) Tax Authority and

entered into the Civic Registry following the Population Registration Act (1991:481). This is a key event, since the personal civic number is frequently used in Swedish society, which is also highly digitalised. The personal civic number number can be required to, e.g., register customer memberships or use digital services provided by authorities in general, and it is required in order to apply for a Swedish identification card.

Children that do not seek residence permits live 'under the radar' and are considered to be part of a vulnerable population for this reason, as they do not come into contact with the authorities that can provide the protection and care of the welfare-state system that children in the country should be able to experience. There are also a number of NGOs working with directly with vulnerable populations (e.g., homeless), such as *Stockholms Stadsmission*: https://www.stadsmissionen.se/

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

Yes, please see point 6 above, the Swedish Migration Agency might help (during the asylum application procedure) and the Social Services if a residence permit is granted. However, during the migration procedure, in practice, the guardian is usually the actor assisting the child with locating family. If a child is granted a residence permit, he or she can be a reference person for (nuclear) family reunification.

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

Please also see question 1 above, but some this information will also be repeated here. To be appointed as a guardian is a layman assignment and no special requirements exist other than that Act about Guardians for unaccompanied children specifies in section four that 'a guardian should be a suitable person', and that the local Guardianship Board that appoints the guardian should put 'emphasis on the child's vulnerable position' when making the assessment of who to appoint (also section four, same law). The municipal Guardianship Board thereby has plenty of discretion to develop own routines about recruitment and training of guard-

ians. For more information about the roles of municipalities, please see question number 2.

An application to have a guardian appointed can be made by the SMA, the Social Services or by the Guardianship Boards own initiative, according to section 3 of the act, and an appointment should be made 'as soon as possible' according to the same section's second paragraph. In addition, according to the 2005 Act, the child is to be consulted about the appointment, but when the child is new in the country it is in practice unusual that the child has views about the appointment of a specific person as guardian. However, if a child would later complain about his or her guardian to the Guardianship Board or to the Social Services, the Guardianship Board shall investigate the complaint and can remove and replace a guardian seen as unsuitable. A guardian can also be replaced by his or her own request. These decisions are made at the local level and caseworkers have significant discretion.

In this context it can be necessary to repeat information provided in question no 1. If a child is granted a residence permit before turning 18 and continues to not have parents or the equivalent in the country, a 'specially appointed custodian' [*särskilt förordnad vårdnadshavare*] is to be appointed based on the regulations in the Parental Code (1949/381) relevant to all children that need other guardians than their parents (including, e.g., children with Swedish citizenship that, e.g., have parents that cannot function as guardians for different reasons or pass away). The need for a specially appointed custodian and a suggestion for a suitable alternative is assessed and initiated by the Social Services, who presents an application for a special guardian to a District Court, which makes a formal decision on the matter. This means that the investigation concerning a specially appointed custodian is more in-depth and forward-looking than the appointment of guardians according to the 2005 Act about guardians for unaccompanied children, which has a temporary focus (during migration procedure without residency). Moreover, the main rule is that the specially appointed custodian is also appointed specially appointed trustee for the child, which means that both aspects of the legal parenthood are included. Even so, the specially appointed custodian/trustee will also be a layman and not a guardian conducting this assignment as an employed professional. It appears to be quite common that

it is the former guardian according to the 2005 Act about guardians for unaccompanied children that becomes the specially appointed custodian/trustee, if the relationship with the child has developed in a good direction – in both parties' view – as a child's view about the appointment is to be heard and respected as well.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

When the child arrives and come in contact with the Migration Agency and states that he or she is a child, the main rule is that the Migration Agency will register the child and the asylum application as an unaccompanied minor if, unless it can be established without doubt or need of interpretation that the person is an adult. If that is the case, officers representing the Migration Agency will have a discussion with the applicant and register the application as that made of an adult.

Please also see question no. 11. The information is repeated here. Almost all unaccompanied children (according to the definition) appear to seek asylum even if they have extended family in the country. Those that do not seek any residency permits at all and do not come in contact with the Migration Agency or other public agencies 'live under the radar'. A report called 'They will always find me' published by The Country Administrative Board [*Länsstyrelsen*] Stockholm includes some assessments of the conditions of this vulnerable group, that e.g., risk to be trafficked. With relation to unaccompanied children, they could 'disappear under the radar' mainly after being rejected having sought asylum and having a final valid decision for deportation: *Länsstyrelsen Stockholm Report* 2019/18 mentioned above. An unaccompanied child is to contribute to making his or her identity probable. Identity is considered to be name, date of birth and citizenship. If there are passports or other documents of identification that can be seen as valid, that will serve as a starting point. If this documentation does not exist (which is common), the Migration Agency will ask in-depth interview questions in order to attempt to es-

tablish when the child was born and thus how old he or she is. The Migration Agency can update the age in the computer system if new information arise.

Medical age assessments are not mandatory, however, if a child cannot make identity probable, the Migration Agency will inform (and 'offer') the child about the possibility of doing an age assessment. The National Board of Forensic Medicine is responsible for conducting age assessments following a request by the Migration Agency. Age assessment is a medical procedure, and as such it is voluntary and require consent from the child and the guardian. It is the guardian and/or the child that makes the appointment for a medical age assessment, and the guardian must accompany the child for the medical examination.

The medical age assessment is made from two components; x-ray of wisdom teeths and an MRI of the knee joints. The medical age assessment constitutes only one part of an overall assessment of the applicant's age, which also means that if the results of a medical age assessment is undecisive this should be taken into account. However, there have been indiciations and reports that case officers use age examination reports in a faulty mannner at times by misinterpreting results or using them incorrectly.

Medical age assessment be can refused by the applicant or guardian. In that case, the Migration Agency will make an assessment of age based on the other information available in the case. A decision on age is effective immediately even if it is appealed.

The medical age assessment is in principle organised in the same way in the entire country.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

There are no specific programs in place for the social integration of unaccompanied children, however local initiatives might be available, such as specific study and internship 'packages' created by high schools or local adult-education offices. Local associations can be active with 'study-help' and language cafés (at least before the covid-19 pandemic) but these activities are mainly social and voluntary, and therefore largely unregulated. In addition, there are two organisations founded and run by for-

mer and present unaccompanied children themselves, that provide advise, social activities and community-building, The Unaccompanied Association [*Ensamkommandes förbund*] with the online website <https://ensamkommandesforbund.se/> and SEF Swedish Unaccompanied Association [*SEF Sveriges ensamkommandes förening*] with a Facebook page <https://www.facebook.com/SEFRiks/>.

The length of a residence permit is by itself independent of age. Please see question no. 11 above.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

The strong points are related to the overall construction of the Swedish welfare state, which is overall organised, well-financed and provide asylum seeking children (and *sans papiers*) the same rights as children with citizenship with regards to schooling and health care as mentioned previously. The social services are generally well-trained to coordinate work for placement and follow up of unaccompanied children, although at times (such as in 2015) they have had insufficient staff resources which might have impacted on quality of performance[5].

The Swedish welfare state has been categorised as a 'Nordic welfare state' in the seminal book *The three worlds of welfare capitalism* (Cambridge, Polity, 1990) by G. Esping-Andersen. This categorisation includes, e.g., some redistributive aims together with a relative extensive social safety system, in order to reach a relatively high social cohesion while safeguarding individualism. In the Swedish case, this means, e.g., that the municipalities are (legally) responsible for *all* the persons staying within their jurisdiction, and not exclusively concerned with policies aiming to care for 'vulnerable' or 'poor' groups with a 'minimum-net' such as welfare state models that tolerate inequity to a higher degree according to

[5] Suggested reading regarding these challenges are, e.g., F.A. Seidel, S. James, "Unaccompanied refugee minors in Sweden: Challenges in residential care and the role of professional social work", in *Residential Treatment for Children & Youth*, 2019, 36, 2, pp. 83-101; A. Elikaksoy, E. Wadensj, "Policies, practices and prospects: the unaccompanied minors in Sweden", in *Social Work & Society*, 2017, 15, 1.

Esping-Andersen's categorisation (he refers to the other two 'worlds' as 'Anglo-Saxon' and 'German').

However, the relatively strong independence of municipalities make administrative routines diverge and for that reason it can be difficult to get an overview of local routines, guidelines and practices, this is particularly clear regarding the guardian function, and can be considered an aspect to be improved, but there also seem to be different approaches to language education in different municipalities and schools. However, the regulation concerning guardianship is relatively clear by itself[6].

Since before, there are uncertainties in asylum procedure concerning unaccompanied children with regards to credibility assessments. Age assessment was mentioned above, but another form of 'test' that has received less attention is language analysis (LADO)[7]. In addition, there are LGBTI-children seeking asylum alone which has also received limitied attention[8].

The critical aspects concerns the unclear situation with regards to the overall migration law framework which is currently being re-negotiated, and a new legislation will come into place in the summer of 2021. This is conducted in a highly politicised debate climate where the 'category' of unaccompanied children is one aspect of the debate. For example, it is unclear how extensive the national-law possibility for humanitarian considerations will be, which has previously been a relatively common ground for granting residence permits to unaccompanied children and others that do not reach refugee status or subsidiary protection.

After the high numbers of asylum seekers in 2015, the Temporary Aliens Act was introduced in 2016 with several general limitations to

[6] D. Hedlund, L. Salmonsson, "Challenges in the guardianship of unaccompanied minors seeking asylum", in *The International Journal of Children's Rights*, 2018, 26, 3, pp. 489-509.

[7] D. Hedlund, A. Ahlund, "Language has a home: how case officers make use of language analysis in asylum decisions", in J*ournal of Ethnic and Migration Studies*, 2020. available at https://www.tandfonline.com/doi/full/10.1080/1369183X.2020.1762552.

[8] D. Hedlund, T. Wimark, "Unaccompanied children claiming Asylum on the basis of sexual orientation and gender identity", in *Journal of Refugee Studies*, 2019, 32, 2, pp. 257-277.

granting residence permits, i.e., permanent residency stopped being the main rule when asylum seekers where granted residency, instead refugees were awarded 3 year residency and subsidiary protection 13 months, with the possibility of applying for extension. The national provision allowing for granting residence permits for humanitarian reasons (particularly distressing circumstances, Chapter 5 section 6 of the Aliens Act) was suspended for use unless it would go against a Swedish international treaty obligation to not apply it. As an effect, several unaccompanied children received rejection decisions but could not be deported. For this reason, parliament (after much debate and criticism) added provisions in the Temporary Act that provided possibility to grant temporary residency for youth (ages 17-25) for mainly vocational high school studies leading to work (see also question no 5 above). This regulation was rushed and amended already in 2017 to expand the possibility for other youth to seek high school permits. It has many exceptions and is a complex framework (and therefore criticised) but it has pushed the challenges of what will happen with these young people into the future. Most of these are, however, above 18 at the time of prolongation and therefore, technically not unaccompanied children anymore following the definition provided in question no 1.

United Kingdom

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1. *Does your national legal system devote specific discipline to unaccompanied foreign minors (without an adult who takes care for him)? What is the legal definition of a foreigner minor who arrive in your country without an adult who takes care for him?*

According to the Government's own Statutory guidance for local authorities in England entitled *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery* of November 2017[1], a number of distinctions are made between different categories of 'unaccompanied child'. Referred to as a child from outside the UK, they may fall into one of the categories listed below.

- Unaccompanied asylum-seeking child: in immigration law, an 'Unaccompanied Asylum Seeking Child' is a person under 18 years of age when the asylum application is submitted, applying for asylum in their own right and 'separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so' (para. 352ZD Immigration Rules). While some do not qualify for asylum others may require 'humanitarian protection' or 'limited leave to remain' under the Immigration Rules. However, the latter status is only awarded to an unaccompanied asylum-seeking child refused refugee protection or humanitarian protection until they are 17 ½ years old. Their status is to be determined by the Secretary of State for the

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[1] Department of Education, *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery - Statutory Guidance for Local Authorities*, November 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656429/UASC_Statutory_Guidance_2017.pdf.

Home Department through UK Visas and Immigration (previously the UK Border Agency), a Home Office Agency.

- Asylum seeking child: such a child may have been transferred to the UK under the Dublin III Regulation to join a close family member(s) residing in the UK and have their claim for asylum processed in the UK (until 31 December 2020);
- Unaccompanied migrant child not seeking asylum: a child who may be separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so, and who is not seeking asylum either because there are not seeking protection, or they are undocumented (i.e. unable to show any identity documents or immigration status documents proving their right to remain in the UK), or they have not been advised of the need to do so;
- Unaccompanied EEA national child: a child who is a national of a European Economic Area Member State and who entered the UK either independently or with a family member before being separated from them. They have a right to reside in the UK for an initial period of three months after which time they only keep this right if they are exercising their free movement rights or they are the family of an EEA national exercising free movement rights in the UK. It goes without saying that this no longer applies to EU or EEA national children entering the UK after 1 January 2021.

2. *Are there national (Constitution, State Law, Regional law, regulations, circulars, guidelines, practices, case law, etc.), international or European laws concerning unaccompanied children? Please, give a brief description of the regulated aspects.*

On the international and European level, the relevant legal framework includes the 1951 Refugee Convention, the 1989 Convention on the Rights of the Child and the European Convention on Human Rights (see also the Human Rights Act 1998[2]). Although the UK left the EU and the transitionary period ended on 31 December 2020, the legislative

[2] Human Rights Act 1998, available at https://www.legislation.gov.uk/ukpga/1998/42/contents.

provisions of the Common European Asylum System[3] currently have the status of retained EU law. However, these could be amended or repealed at any time.

On the national level, the most relevant legal framework include:

- Section 55 of the Borders, Citizenship and Immigration Act 2009[4] places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK. There is guidance on the key arrangements for safeguarding and promoting the welfare of children as they apply both generally to public bodies who deal with children (Part 1) and specifically to the UK Border Agency (Part 2) is available in Every Child Matters-Change for Children (November 2009)[5];
- the Immigration Rules[6] ;
- the Children Act 1989[7] in England and Wales;

[3] Of particular refelevance for children, Recitals (12), (20) and Articles 9(2)(f), 20(5) and 30 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Recital (14) and Articles 2(h)-(i), 6(4), 12(1), 17 and 35(2)(f) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

[4] Borders, Citizenship and Immigration Act 2009, available at https://www.legislation.gov.uk/ukpga/2009/11/section/55.

[5] Home Office and Department of Children, Schools and Families, *Every Child Matters. Change for Children. Statutory Guidance to the UK Border Agecy on Making Arrangements to Safeguard and Promote the Welfare of Children*. Issued under Section 55 of the Borders, Citizenship and Immigration Act 2009, November 2009, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf.

[6] Home Office, *Immigration Rules, part 11: Asylum*, published 25 February 2016 and updated 29 January 2021, available at https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum.

[7] Children Act 1989, available at http://www.legislation.gov.uk/ukpga/1989/41/contents.

- Part 5 to the Immigration Act 2016[8] that relates to the transfer of responsibility for unaccompanied asylum-seeking children and other migrant children from one local authority to another;
- Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005[9] that places a duty upon the Secretary of State for the Home Department to endeavour to trace the families of unaccompanied asylum-seeking children as soon as an asylum claim has been made.

This report focuses on the law in England and Wales.

3. *Are there any specific rules in the case in which the child is a refugee or has applied for international protection?*

'Unaccompanied children' are covered in para. 350-352ZF of the Immigration Rules. It provides for the child to apply for asylum in the same manner and according to the same provisions as adults. However, it does include some particular provisions including taking into account the child's maturity, giving more weight to objective rather than subjective factors, attention to the child's welfare, expectation of interview if child over age of 12 in the presence of a guardian or an appropriate adult by a specially trained official and having regard to the need to accommodate the child, and the decision should also be made by an official trained to deal with asylum claims made by children. The Home Office has also issued guidance on Children's Asylum Claims that provides detailed information on the process and the various authorities involved[10]. It pays particular attention to the needs and interests of the child. For example, upon arrival, the Home Office can only ask questions that are essential for a meaningful booking-in process, identifying welfare concerns and identifying trafficking concernsx[11]. Furthermore, the Home Office must

[8] Immigration Act 2016, available at https://www.legislation.gov.uk/ukpga/2016/19/part/5.

[9] Asylum Seekers (Reception Conditions) Regulations 2005, available at http://www.legislation.gov.uk/uksi/2005/7/contents/made.

[10] Home Office, *Children's Asylum Claims*, Version 4.0, 31 December 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947812/children_s-asylum-claims-v4.0ext.pdf.

[11] *The Queen (on the Application of AN (a Child) and FA (a Child) v Secretay of State for the Home Department*, [2012] EWCA Civ 1636, paras 181-183, available at https://www.bailii.org/ew/cases/EWCA/Civ/2012/1636.html.

notify the relevant local authority children's services of the arrival of the unaccompanied asylum-seeking minor, and the first interview is one relating to the welfare of the child.

An unaccompanied minor who fulfils the Refugee Convention criteria is granted refugee status under paragraph 334 of the Immigration Rules. If the minor does not qualify for refugee status, s/he might be granted humanitarian protection (on the basis that return to the country of origin would place the child at risk of serious harm)[12]. Where the child has been refused asylum or humanitarian protection, the Secretary of State for the Home Department can grant limited leave to remain (for 30 months or until the child is 17 ½ years of age whichever is shorter) but only if and as long as the child is under 17 ½ years of age, there are no adequate reception arrangements, the child is not excluded from international protection, a danger to the security of the UK, convicted by a final judgment of a particularly serious crime or subject of a deportation order. This is possible under paragraph 352ZC to F of the Immigration Rules and is known as Unaccompanied Asylum-Seeking Child (UASC) Leave. However, as soon as an assessment is made that there are adequate reception arrangements in the home country, the child ceases to be eligible for UASC Leave. Limited leave can be revoked if any of the conditions are no longer met or if the Secretary of State for the Home Department considers there has been misrepresentation or omission of facts, including the use of false documents. The child can thus be liable to removal under Section 10 of the Immigration and Asylum Act 1999[13] although there is a right of appeal against the decision to refuse or revoke leave[14].

Section 67 of the Immigration Act 2016 provides for the relocation and support of 'unaccompanied refugee children from other countries in Europe'. This was called the Dubs amendment after the name of the Member of Parliament who introduced the provision into the Immigration Act 2016. The Immigration Rules para. 352ZG-352ZS provides

[12] Para 339C-339D of the Immigration Rules (implementing the subsidiary protection provisions of the Qualification Directive 2004, Articles 2 and 15).

[13] Immigration and Asylum Act 1999, available at http://www.legislation.gov.uk/ukpga/1999/33/section/10.

[14] Section 82 Nationality, Immigration and Asylum Act 2002 as amended by Section 15 of the Immigration Act 2014, available at https://www.legislation.gov.uk/ukpga/2014/22/section/15/enacted.

for the grant of limited leave to remain (5 years with recourse to public funds) and indefinite leave to remain (after 5 years with limited leave to remain) for individuals transferred to the United Kingdom under Section 67 of the Immigration Act 2016 subject to the relevant exclusions. The child can still choose to apply for asylum. In February 2020, the Government announced the number of children transferred under s. 67 would be 480 (including those already transferred) and the transfers would now be made from Italy, Greece and France[15].

There is also the resettlement of Syrian children under the Vulnerable Persons Relocation Scheme identified by UNHCR (pledge to resettle 20,000) and the Vulnerable Children's Resettlement Scheme, which helps at-risk children and their families in the Middle East and North Africa region (pledge to resettle 3,000).

There is a collection of asylum policy guidance for asylum applications involving unaccompanied children[16], including:

◊ Age Assessments,
◊ Family Tracing in Bangladesh and Albania,
◊ Kent Intake Unit social worker guidance,
◊ Processing children's asylum claims,
◊ Section 67 of the Immigration Act 2016 leave and
◊ Tracing family members of unaccompanied asylum seeking children.

4. *Can the unaccompanied foreign minor be refused at the external border? If so, for what reasons? Are there any exceptions?*

The asylum procedure does not differentiate on the basis of age and the following rules are the same for adults and children. Every person has the right to make an application for asylum on their own behalf – including children (para. 327A Immigration Rules). However, asylum claims in the UK need to be made at 'a designated place of asylum claim', these places include '(i) an asylum intake unit; (ii) an immigration removal centre; (iii) a port or airport; (iv) a location to which the person has been directed by the Secretary of State to make a claim for asylum; or (v) any

[15] *Policy Statement: Section 67 of the Immigration Act 2016*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866242/Dubs_policy_statement___Feb_2020.pdf.

[16] https://www.gov.uk/government/collections/children-asylum-instructions.

other location where an officer authorised to accept an asylum application is present and capable of receiving the claim' (para. 327B Immigration Rules). So, asylum applications can be made at the external border (port or airport) and if so, the asylum claim will 'be referred by the Immigration Officer for determination by the Secretary of State' (para. 328 Immigration Rules). If an application has been made, the Secretary of State for the Home Department cannot remove an asylum applicant from the territory until a decision on the claim has been made.

Decisions on asylum are not generally made 'at the external border' in the UK. Asylum applicants will be interviewed at a later date (if child above 12 years of age) and there are in general very long delays in decision-making. Accordingly, refusals 'at the external border' do not happen in practice.

See also the policy above that if a child under 17 ½ years is unaccompanied, the policy of the Secretary of State for the Home Department is to grant the child limited leave to remain even if they are refused asylum or humanitarian protection.

5. *Can an unaccompanied foreign minor be expelled if traced in the national territory? If so, for what reasons? Are there any exceptions?*

The procedure for claiming asylum with be the same as set out above. If an unaccompanied asylum-seeking child did not claim asylum on arrival at the port or airport but is later encountered by the authorities in the national territory, they have the opportunity to make a request to be recognised as a refugee. This will in most cases involve having to attend the Asylum Screening Unit in Croydon, South London to lodge the asylum claim as this is only location in the entire national territory that claims can be made. As above, if a request is made the unaccompanied asylum-seeking child cannot be expelled until the claim is examined by the Secretary of State for the Home Department.

See also the policy above that if a child under 17 ½ years is unaccompanied, the policy of the Secretary of State for the Home Department is to grant the child limited leave to remain even if they are refused asylum or humanitarian protection.

6. *What are the state, regional or local bodies involved in the management of the unaccompanied foreign minor (i.e. police bodies, social services, local or central authorities, etc.)? Please, give some details on the respective functions and competences.*

As explained above, Section 55 of the Borders, Citizenship and Immigration Act 2009[17] places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK.

Section 17 of the Children Act 1989[18] places a duty on every local authority to safeguard and promote the welfare of children in need within their area. As there is no provision for the appointment of a legal guardian for unaccompanied minors, their welfare and safety is the responsibility of the local authority in the same way as any British child who is in the care of the local authority (see Part III of the Children Act 1989). A Children's Services social worker is allocated to each unaccompanied minor.

7. *Please, describe the reception system for unaccompanied foreign minors (i.e.: reception centres, shelters, accommodation in apartments, communities, foster care, etc.). Indicate which are the reference standards and describe the procedure for the accommodation including the involvement of cultural, linguistic mediators, tutors, etc.*

Depending on where the child is located, different laws are applicable. In England, Wales and Northern Ireland the Children Act 1989[19] and 2004 and the Children (Leaving Care) Act 2000 apply whilst in Scotland the Children (Scotland) Act 1995 Regulations and Guidance Volume 1 Support and Protection for Children and Their Families the Children (Leaving Care) Act 2000 are the relevant legislation. The focus of the following presentation is on England and Wales.

[17] Borders, Citizenship and Immigration Act 2009, available at https://www.legislation.gov.uk/ukpga/2009/11/section/55.

[18] Children Act 1989, available at https://www.legislation.gov.uk/ukpga/1989/41/contents.

[19] Children Act 1989, available at http://www.legislation.gov.uk/ukpga/1989/41/contents.

Reception of unaccompanied minors is regulated in the same way as children who are in need of protection or assistance. All unaccompanied foreign minors (whether or not applying for asylum) after coming in contact with a national agency or body are referred to a local authority Children's Services at the earliest possible opportunity.

The local authority Children's Services will assess whether the person is a child and if so whether the child is in need and whether a duty is owed under Section 20 of the 1989 Children Act to provide the child with accommodation. If a child is deemed to require accommodation, they will be deemed to be 'accommodated'. After 24 hours of a child being placed in local authority accommodation under Section 20, the child becomes 'looked after' and the local authority (via the Children's Services) is obliged to provide certain services as specified under Sections 22-23 of the Children Act. Since the *R (Behre) v Hillingdon* judgment in 2003, all unaccompanied asylum-seeking children are deemed to be 'accommodated', i.e. 'looked after children'. Assessment and care provisions must start immediately irrespective of whether an application for e.g. an asylum claim has been made to the Home Office.

According to Section 22A of the Children Act the Children's Services are under a duty to provide the child with accommodation. The child must be placed in 'the most appropriate placement available', i.e. a place that is considered to best promote and safeguard the child's welfare and interests (Section 22C(5) of the Children Act). An unaccompanied foreign minor can thus be placed with a local authority foster carer, in long-term foster placement or in a local authority-commissioned children's home. These types of arrangements are regulated and inspected by the Office for Standards in Education, Children's Services and Skills (Ofsted). For older unaccompanied foreign minors (aged 16 and above), Children's Services can also offer other types of placements which may include independent accommodation, residential employment and supported lodgings/hostels. Such arrangements are not inspected by the Office for Standards in Education, Children's Services and Skills in the same way as foster carers and children's homes though they can be as part of an inspection of the local authority Children's Services. Such placements are however supported by visiting social workers. There is no one size fits all placement. In deciding where to place a 'looked after' child, the Children's Services

must take into account a number of considerations including the fact that s/he is disabled and that s/he might have siblings (Section 22C(8) Children Act) as well as ascertain his/her wishes regarding the provision of accommodation and give due consideration to such wishes (Section 20(6) Children Act). The Care Planning, Placement and Case Review (England) Regulations 2010[20] provide further details as to the duties of local authorities with regard to providing for 'looked after' children. The majority of unaccompanied foreign minors under the age of 16 years go into foster care. Those aged 16 years and over tend to live in semi-independent accommodation arranged by the Children's Services.

8. *Is the foster care a useful remedy for unaccompanied minors? In which cases? Are there any differences between a national child as opposed to a migrant child? Describe the foster care procedure and indicate the legal discipline.*

Most of the legal provisions pertaining to the welfare of 'looked after' children are to be found in the Children Act 1989[21], the Children Act 1989 Guidance and Regulations Volume 4 Fostering Services[22], the Care Standards Act 2000[23], the Adoption and Children Act 2002[24], the Children Act 2004[25] and the Children and Young Persons Act 2008[26]. The Children Act 1989 Guidance and Regulations Vol 2, care planning, placement and case review[27] contain also specific requirements relating

[20] Care Planning, Placement and Case Review (England) Regulations 2010, available at https://www.legislation.gov.uk/uksi/2010/959/contents/made.

[21] Children Act 1989, available at https://www.legislation.gov.uk/ukpga/1989/41/contents.

[22] Care Planning, Placement and Case Review (England) Regulations 2010, available at https://www.legislation.gov.uk/uksi/2010/959/contents/made.

[23] Care Standards Act, available at https://www.legislation.gov.uk/ukpga/2000/14/contents.

[24] Adoption and Children Act 2002, available at https://www.legislation.gov.uk/ukpga/2002/38/contents.

[25] Children Act 2004, available at https://www.legislation.gov.uk/ukpga/2004/31/contents.

[26] Children and Young Persons Act 2008, available at https://www.legislation.gov.uk/ukpga/2008/23/contents.

[27] Department of Education, *The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review*, June 2015, available at

to placement planning for 'looked after' children. Guidance on the delivery of fostering services, the assessment of foster carers and the support they can expect to receive are provided for in the Fostering Services Regulations 2011[28] and National Minimum Standards set out in the Care Standards Act 2000[29].

The Children Act 1989 is the primary legislation on work with children and their families. It sets three key principles:

- the welfare principle whereby the child's welfare should be the 'paramount' consideration of anybody dealing with a child; it is aimed at safeguarding and promoting the welfare of children, including protecting the child from harm or abuse.
- the partnership working principle whereby all professionals supporting and working on behalf of children and young people should work in partnership with families, including foster carers. Partnership working prevails over compulsory powers which should only be used when this is better for the child. This means that, whenever possible, promoting and maintaining contact between children and their families should be a priority wherever possible.
- The principle that the wishes of the child and/or their parents are taken into account in the decision-making process regarding the child's future. Important considerations in such decision-making are the key aspects of the child's background i.e. the child's religious persuasion, racial origin, cultural and linguistic background, and a child's particular needs as a result of any disability.

Whether placed in local authority foster care or with an independent fostering provider, all children in foster care are the responsibility of the local authority in the area where they first came into contact with a government agency.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/441643/Children_Act_Guidance_2015.pdf.

[28] Fostering Services Regulations 2011, available at https://www.legislation.gov.uk/uksi/2011/581/contents.

[29] Care Standards Act 2000, available at https://www.legislation.gov.uk/ukpga/2016/19/part/5.

According to a 2012 research on *Fostering Unaccompanied Asylum-Seeking Young People*[30], '*there is no doubt that good foster care can make a positive difference to the lives of many unaccompanied young people. At its best, it provides for warm family-like relationships that can be transformative for young people and foster families alike*' (at 9). The 2015 study *Reception and Living in Families – Overview of Family-Based Reception for Unaccompanied Minors in the EU Member States* also supports the view that '*placement of unaccompanied minors in a foster care family is recognized as the best environment for a child to develop and be supported in a family setting*'[31]. Yet, the 2012 research points out that 'only a minority of unaccompanied young people get to experience foster care or only do so for a very short period of time' and that '*most move to private shared housing which we know is variable in quality*' as local authorities face increasing financial pressure, thus restricting the range of supported accommodation that currently exists for this group of unaccompanied children.

By extrapolation, this would suggest that good foster care could make a difference to the lives of all categories of unaccompanied children provided local authorities have the necessary resources.

9. *Can the unaccompanied foreign minor be adopted? In which cases? Describe the adoption process and indicate the legal discipline.*

According to the Government's own Statutory guidance for local authorities entitled *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery* of November 2017[32], '*(t)he local authority's duties to looked after children under the Children Act 1989 apply equally to unaccompanied children and child victims of modern slavery who are looked*

[30] Jim Wade et al, *Fostering Unaccompanied Asylum-Seeking Young People: Creating a Family Life across a 'World of Difference'*, BAAF, July 2012; available at https://www.york.ac.uk/inst/spru/research/pdf/FosterUAS.pdf.

[31] Nidos, SALAR and CHRB, *Reception and Living in Families – Overview of Family-Based Reception for Unaccompanied Minors in the EU Member States*, February 2015, available at https://nidosineurope.eu/wp-content/plugins/download-attachments/includes/download.php?id=595, p. 94.

[32] Department of Education, *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery - Statutory Guidance for Local Authorities*, November 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656429/UASC_Statutory_Guidance_2017.pdf.

after as they do to any other looked after child. This includes the duties to return a looked after child to their family where possible and to endeavour to promote contact between the child and their parents or other family members who may have parental responsibility if this is reasonably practicable and consistent with their welfare' (para. 54). They also provide that '*(i)n order to protect an unaccompanied child's best interests, Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 places a positive duty on the Secretary of State for the Home Department to endeavour to trace the members of a child's family as soon as possible after they make their claim for asylum, whilst ensuring that those enquiries are conducted in a way that does not jeopardise the safety of the child or their family*' (para. 55).

This clearly suggests that family reunification takes priority over adoption. It is likely that the child's absence of leave to remain (whilst waiting for a decision on their claim or pending an appeal) or limited leave to remain until they reach 17 ½ years of age for example, impacts on the decision of placing the child up for adoption.

10. *Is the involvement of the judicial system (juvenile court, tutelary judge, ordinary judge, specialized judge, etc.) envisaged in the management of unaccompanied foreign minors? If so, please indicate which court/tribunal is competent and its functions.*

Depending on the nature of the legal case and the type of application, the family judge, the immigration or even the criminal law one will be competent.

11. *Is the unaccompanied foreign minor entitled to a residence permit? How long? What are the advantages of granting a residence permit?*

Whether an unaccompanied foreign minor applying for asylum is entitled to a 'residence permit' depends on the outcome of the asylum process. There are four main possible outcomes. First, if the child meets the refugee definition, s/he will be granted a five years residence permit as a refugee after which time s/he will be able to apply for indefinite leave to remain (i.e. settlement)[33]. Second, if the child is not recognised as a refu-

[33] Paras 339R and 339S Immigration Rules, available at https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum.

gee but granted humanitarian protection (a form of subsidiary protection on the basis of a risk of serious harm) the residence permit is also 5 years long. Again, the child can apply for indefinite leave to remain[34]. Third, the child is not granted asylum but unaccompanied asylum-seeking child (UASC) Leave. This is usually granted when it is not safe to return the child to his/her home country because adequate and safe reception arrangements are not in place in that country. The length of the residence permit acquired for limited leave to remain under the UASC Policy will depend on the age of the child (duration of 30 months or until the child turns 17 ½, whichever is the shortest). Fourth, the minor is refused asylum and granted no leave to remain. In this case it is expected that s/he returns to his/her home country and that the care plan explains relevant actions to be undertaken and support required. However, it is the policy of the Home Office to not return children to their home country if there are no safe and adequate reception arrangements. In fact, Section 55 of the Borders, Citizenship and Immigration Act 2009 obliges the Home Office to take into consideration the need to safeguard and promote the welfare of the child, including that their best interests are taken into account in the decision[35]. In some instances, a child might be granted discretionary leave, leave as a stateless person, limited or discretionary leave for compassionate reasons or limited leave on the basis of family or private life.

Leave to remain as a refugee, a beneficiary of humanitarian protection or an unaccompanied child, evidenced through the residence permit, enables the person to have recourse to public funds, meaning access to all the welfare support, health/medical treatment and tertiary education on the same basis as UK nationals.

However, children (minors) without a residence permit/leave to remain are still entitled to attend primary and secondary schooling and primary/emergency healthcare (see below). Unaccompanied asylum-seeking children in the care of the local authority are also entitled to secondary healthcare. Without leave to remain however there may be difficulties in registering the child with the General Practitioner and may be charged for access to healthcare. The residence permit also starts the lawful resi-

[34] *Ibid.*

[35] Borders, Citizenship and Immigration Act 2009, available at https://www.legislation.gov.uk/ukpga/2009/11/section/55.

dence period for the purpose of allowing children/young adults access to Higher Education student support.

12. *What are the rights recognized to the unaccompanied foreign minors (i.e. access to education, access to health services, judicial protection, right to be heard, legal aid, cultural mediator assistance, access to public services, etc.)? Please, specify how to access education and health care.*

Under the Children Act 1989[36], a local authority must take reasonable steps to identify the extent to which there are children in need in its area (Schedule 13, para. 11 and Schedule 2, paras 1 and 3).

Whereas primary health care (General Practitioners) is available to all, access to secondary healthcare (hospital treatment) is limited. In the United Kingdom, individuals must register with a General Practitioner who acts as a gatekeeper for referrals to secondary healthcare. Registration is done based on the person's address. The rights available depend on a person's residence status. There are a number of limited health services which are available irrespective of status, such as accident and emergencies, diagnosis and treatment of certain communicable diseases or sexually transmitted infections, family planning, palliative care, treatment for victims of torture, domestic violence, female genital mutilation or sexual violence.

Only refugees, beneficiaries of humanitarian protection, asylum seekers with outstanding claims, including appeals, are exempt from National Health Services (NHS) charges for other health services. Thus, refused asylum seekers are not exempt (unless they are still receiving asylum support). Individual National Health Services Trusts may still exercise discretion and treat refused asylum seekers without charge.

Children in the care of the local authority are entitled to all health services irrespective of residence status. Social workers of 'looked after' children are required to register them with health practices. According to the Care Planning, Placement and Case Review (England) Regulations 2010 a health assessment of the child (including the child's emotional, mental and physical health needs) must be undertaken before a child is placed (Regulation 7) and the overall care plan of a 'looked after' child must in-

[36] Children Act 1989, available at https://www.legislation.gov.uk/ukpga/1989/41/contents.

clude a health plan (Regulation 5)[37]. If the assessment of an unaccompanied minor shows that s/he needs psychological and medical care, then Children's Services will provide him/her with access to the relevant services. There is no discrimination between such children and other children under the care of Children's Services. Besides health care such child will also have access to trained and independent interpreters.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) determines access for legal aid in the UK. Any asylum matter is within the scope of legal aid, but the grant of legal aid remains means tested. Most other immigration matters were removed from the scope of legal aid by LASPO 2012. For immigration matters not covered by legal aid, funding may still be available via the Exceptional Case Funding scheme, if the relevant eligibility criteria are met and there is a breach or risk of a breach of ECHR rights or enforceable EU law. However, it is notoriously difficult to obtain Exceptional Case Funding. Although immigration matters for unaccompanied and separated children was originally excluded from the scope of legal aid by LASPO 2012, litigation by The Children's Society in 2018 resulted in an amendment to the legislation and immigration matters for under 18s who are not in the care of a parent, guardian or legal authority are now within the scope of legal aid again[38].

Access to state education for children between the ages of four and 16 is not subject to any restriction in the immigration legislation. Unaccompanied asylum-seeking children and children who have been granted asylum, humanitarian protection or discretionary or exceptional leave to remain are also entitled to free education in maintained schools. Local authorities have a duty to provide school places to any child residing, temporarily or permanently, in their area, where that child forms part of the population of that area[39]. The social worker of a 'looked after' child is required to register him/her for school. Statutory Guidance for local au-

[37] Care Planning, Placement and Case Review (England) Regulations 2010, available at https://www.legislation.gov.uk/uksi/2010/959/contents/made.

[38] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019, available at https://www.legislation.gov.uk/uksi/2019/1396/contents/made.

[39] Education Act 1996, s 13, available at https://www.legislation.gov.uk/ukpga/1996/56/contents.

thorities was issued in February 2018 in relation to education of 'looked after' children[40]. All 'looked after' children must have a Personal Education Plan which is part of a child's overall care plan that has to be put in place by the local authority according to the Care Planning, Placement and Case Review (England) Regulations 2010 (Regulation 5)[41]. The broad areas of information that must be covered in the Personal Education Plan are specified in Schedule 1 (para. 2) of the Care Planning, Placement and Case Review (England) Regulations 2010. In particular, the Local Authority must ensure that the Personal Education Plan reflects the educational needs and aspirations of the child. It should be noted that the quality of the Personal Education Plan is the responsibility of both the local authority and the school which must involve the child at all stages of the process.

13. *Are there legal instruments that facilitate the integration of the child into the national system? If so, please indicate them and provide a brief description.*

As such there is no specific legal instrument intended to facilitate the integration of the unaccompanied foreign child into the national system.

14. *Does an unaccompanied foreign minor have the right to trace his family of origin? Is family reunification foreseen?*

The Secretary of State for the Home Department has a duty to try to trace the unaccompanied asylum-seeking child's family at every stage of the process under regulation 6 of The Asylum Seekers (Reception Conditions) Regulations 2005[42]. These Regulations form part of the provisions necessary for the implementation of Council Directive 2003/9/EC

[40] See *Promoting the Education of Looked-After Children and Previously Looked-After Children. Statutory Guidance of Local Authorities*, February 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683556/Promoting_the_education_of_looked-after_children_and_previously_looked-after_children.pdf.

[41] Care Planning, Placement and Case Review (England) Regulations 2010, available at https://www.legislation.gov.uk/uksi/2010/959/contents/made.

[42] Asylum Seekers (Reception Conditions) Regulations 2005, available at http://www.legislation.gov.uk/uksi/2005/7/contents/made.

of 27 January 2003 laying down minimum standards for the reception of asylum seekers[43]. The Home Office has guidance on Family Tracing[44]. Family tracing is viewed as a preliminary stage in determining the potential reunification of a child with his/her family, if in the best interests of the child. In assessing the family tracing action, the Home Office will seek the view of the local authority looking after the child. In case where a child has applied for asylum and making contact might compromise the safety of his/her relatives, social workers must discuss the matter with the child's immigration legal representative. If it is safe to trace the family, the social worker will notify the child of the British Red Cross' family tracing services. Requests for assistance from the British Red Cross must come from the child and decision-makers cannot insist that she contacts the British Red Cross. The British Red Cross will only disclose the findings (which are confidential) to the child. If a child wishes to trace his/her family independently of the Home Office, then the child must ensure that the Home Office is kept informed of the outcome of the enquiries.

The asylum claim will be determined irrespective of whether the duty has been discharged (although the Home Office can decide to delay an asylum decision pending the outcome of the tracing efforts). However, in asylum decisions, the lack of evidence of the child's own efforts to re-establish contact with their family in the home country (for example by contacting the Red Cross) may be used as a basis for negative credibility assessments. The Supreme Court has concluded that any breach of duty by the Home Office to take steps to trace the child's family is not determinative for the assessment of whether there is a risk on return to the country of origin (although it will inevitably affect the evidence available regarding the child's contact with the family and its whereabouts). The Supreme Court also found that there is no obligation on the Secretary of State for the Home

[43] Still in force after the end of the transitionary period on 31 December 2020, although the Regulations could be repealed or amended accordingly at any time.

[44] Home Office, *Family Tracing, Version 3.0, Guidance on Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005*, 31 December 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947898/family-tracing-v3.0ext.pdf.

Department to grant discretionary leave to remain (limited leave to remain) to children for whom the duty had been breached[45].

15. *Is the appointment of a legal guardian foreseen? Please, describe the appointment procedure, his functions and the requirements to be appointed.*

There is no procedure for appointing a legal guardian for unaccompanied foreign minors. A Children's Services social worker is allocated to each minor. S/he works with schools, the health department, UK immigration services, foster carers, the child's legal representative and other agencies involved in the child's life.

16. *Is there a procedure for ascertaining the minor age? What happens if it is not possible to have a reliable judgment on age? Are medical examinations mandatory? In this case, can the minor or his guardian refuse invasive examinations? What are the rules governing this aspect? Please, describe the age assessment procedure, specifying whether it is unique throughout the national territory.*

Decisions on age will be made by the Home Office caseworker for the purpose of the asylum claim but an assessment by the Local Authority may be sought. Local Authorities are in any event required to undertake their own assessment for the purpose of determining whether the individual has a need to be met by the local authority. There is an Asylum Policy Instruction on Assessing Age for Asylum Applicants[46]. There is also guidance on joint working between local authorities and the Home Office in age assessment cases[47]. However, each Local Authority will undertake its own age assessments, and where asylum seekers are relocated

[45] *TN and MA and AA (Afghanistan) v Secretary of State for the Home Department* [2015] UKSC 40 (24 June 2015), available at https://www.bailii.org/uk/cases/UKSC/2015/40.html.

[46] Home Office, *Assessing Age – Version 4.0*, published 17 June 2011 and last updated 31 December 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947800/assessing-age-asylum-instruction-v4.0ext.pdf.

[47] Home Office and ADCS, *Age Assessment Joint Working Guidance,* June 2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/432724/Age_Assessment_Joint_Working_Guidance__April_2015__Final_agreed_v2_EXT.pdf.

they may have more than one, sometimes conflicting, age assessments by different local authorities. The procedure therefore is not uniform across the national territory. Although an individual cannot be forced to undertake an assessment, a refusal to take part in the assessment is likely to result in the local authority concluding the person is not a child and refuse support, subsequently the Home Office may rely on the report to justify treating the person as an adult in the asylum procedure.

A decision on age can be subject to judicial review if the individual concerned wants to challenge that decision. However, judicial review as a process is not automatic and the individual must obtain permission from the court to bring the challenge and the decision is only subject to public law grounds of review (rather than a substantive appeal).

Age assessments have been controversial in the UK and have resulted in extensive litigation challenging the process and accuracy of the assessments. Age assessments should be 'Merton-compliant', meaning that they were conducted in accordance with the guidance to local authorities provided by the High Court in the case of *B v London Borough of Merton*[48].

The purpose of an age assessment is to establish chronological age. The Merton guidelines seek to provide guidance on how a local authority may achieve this. The guidelines demand a holistic approach to the assessment of age, conducted by two qualified and experienced social workers. Neither physical appearance nor demeanour can or should be determinative of age. The Court of Appeal's judgment in *R (on the application of FZ acting by his litigation friend Parivash Ghanipour) v Croydon London Borough Council*[49] affirmed the Merton guidelines and went further to demand a scrupulous standard of fairness which requires the assessing social workers to properly put adverse inferences relied upon to dispute a young person's age to him or her so that s/he can have an opportunity to clarify and/or rebut these inferences before a final conclusion is arrived at by the local authority assessors.

[48] *B v London Borough of Merton* [2003] EWHC 1689 (Admin), available at https://www.bailii.org/ew/cases/EWHC/Admin/2003/1689.html.

[49] *R (on the application of FZ acting by his litigation friend Parivash Ghanipour) v Croydon London Borough Council* [2011] EWCA Civ 59, available at https://www.bailii.org/ew/cases/EWCA/Civ/2011/59.html.

The use of dental x-rays to determine the age of unaccompanied children became widespread and the local authorities applied to the court to strike out judicial review applications challenging the age assessment if the child refused to take part in the dental assessment. However, more recently, the use by local authorities of dental assessments in age assessments has been undermined by the Upper Tribunal's decision in *R (on the application of AS (by his litigation friend Francesco Jeff) v Kent County Council (age assessment; dental evidence)*[50], in which the Tribunal noted they were unreliable. The decision also set out that where there is doubt the person is over 18 years of age, they should be given the benefit of the doubt and treated as a child. Litigation on the issue of the reasonableness of age assessments however continues[51].

Litigation may also involve disputes between local authorities as to the responsible body for undertaking the age assessment or for responsibility of the child.

17. *Upon reaching the age of majority, is there a program for the social integration of the migrant in the national territory? Does he keep his residence permit?*

Whether an unaccompanied foreign child is supported by the local authorities will depend upon its status. If a former unaccompanied foreign child qualifies as a care leaver and has been granted leave to remain or has an outstanding asylum or other human rights claim or appeal, s/he will be entitled to the same level of care and support from the local authority as

[50] *R (on the application of AS (by his litigation friend Francesco Jeff) v Kent County Council (age assessment; dental evidence)* [2017] UKUT 446, available at https://tribunals-decisions.service.gov.uk/utiac/2017-ukut-446.

[51] See for example *F, R (On the Application Of) v Manchester City Council* [2019] EWHC 2998 (Admin) (07 November 2019- available at https://www.bailii.org/ew/cases/EWHC/Admin/2019/2998.html) where a local authority had not acted irrationally in refusing to re-assess the age of an unaccompanied asylum seeker from Guinea to determine whether he was under 18 and entitled to support and accommodation. Although he had produced fresh evidence in the form of a court document from Guinea purporting to show that he was 17 and not 20 as assessed by the local authority, that document could not be relied on, as the circumstances in which it was obtained, by whom, and on what basis were uncertain and were contradicted by other evidence.

any other child leaving care (see *R (Behre) v Hillingdon* judgment)[52]. Such unaccompanied minors are eligible for 'leaving care support' which means that the local authority will support them until the age of 21 years at least and 24 years for those who remain in full time education. A personal adviser assists the former unaccompanied minor in developing a pathway plan to support the child transition into adulthood. In the case of a former unaccompanied foreign minor, pathway planning includes taking into account the young person's needs arising from his/her immigration status such as considering that s/he might be required to make further applications for leave to remain. Pathway plans must also seek to identify a durable solution which does include the young person's integration into the community and s/he successful transition to adulthood. There is however no programme for social integration as such.

In contrast, in the case where a former unaccompanied minor has turned 18, exhausted his/her appeal rights, failed to establish a lawful basis to remain in the UK and should thus be returned to his/her home country, the young person is to be treated as eligible for funding for a period of three months from the date when his/her appeals rights were exhausted. Whether funding is indeed granted will depend on the results of a Human Rights Assessment carried out by the local authority. The aim is to verify that support is required to avoid a breach of a person's human rights as required by schedule 3 of the Nationality, Immigration and Asylum Act 2002[53]. Most former unaccompanied asylum-seeking children are deemed ineligible persons at the point when their appeals rights are exhausted[54].

[52] *Behr & Ors, R v Hillingdon London Borough Council* [2003] EWHC 2075 (Admin) (HC), available at https://www.bailii.org/ew/cases/EWHC/Admin/2003/2075.html.

[53] Nationality, Immigration and Asylum Act 2002, available at https://www.legislation.gov.uk/ukpga/2002/41/schedule/3.

[54] See footnote 1 of Home Office, *Funding to Local Authorities Financial Year 2020/21 Home Office Funding: Leaving Care (Former Unaccompanied Asylum-Seeking Children, post 18 Years age)*, 10 June 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891483/Leaving_care_funding_instructions_to_local_authorities_2020_to_2021.pdf.

18. *Please, share some considerations on the protection of unaccompanied foreign minors in your national system (critical aspects, strong points, aspects to be improved, etc.).*

As unaccompanied minor children are primarily the responsibility of local authorities, the main problem is the lack or the shrinking of their financial resources especially in the aftermath of the 2008 financial crisis which triggered a severe Government policy of austerity and whose consequences can still be felt nowadays. Those effects are now further compounded by those of Covid-19.

Another problem has been that the overwhelming majority of children have come in contact with government agencies in the South East of the UK (e.g. at ports and airports) and so the local authorities of this region have had to cater for the needs of unaccompanied foreign minors. As a consequence, some local authorities have declared that they were no longer able to accept unaccompanied asylum-seeking children into their care[55] and this despite the introduction in July 2016 of the National Transfer Scheme Protocol[56] that allows unaccompanied asylum-seeking children to be transferred from one local authority to another.

[55] See e.g. 'Kent Leader announces "*we cannot safely meet our statutory duty*" as council reaches capacity for the care of unaccompanied asylum-seeking children' available at https://kccmediahub.net/kent-leader-announces-we-cannot-safely-meet-our-statutory-duty-as-council-reaches-capacity-for-the-care-of-unaccompanied-asylum-seeking-children745.

[56] Department for Education and Home Office, *National Transfer Scheme Protocol for Unaccompanied Asylum-Seeking Children – Version 2.0*, 15 March 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750913/NTS-Protocol-Final-October-2018.pdf.

Part II - Essayes

Il minorenne migrante: la protezione integrale della persona attraverso la tutela dei beni. Il ruolo della norma penale

Giorgio Pighi[1]

Sommario: 1. Alla radice delle regole giuridiche sui minori: l'oggetto della tutela. 2. La protezione dell'infanzia e della gioventù come criterio d'individuazione dell'interesse di fondo protetto. 3. Danno e pericolo nelle norme incriminatrici a tutela dei migranti. 4. Le singole fattispecie criminose di protezione del minore migrante. 5. I minori stranieri non accompagnati: una condizione che esige speciale tutela. 6 . La tutela extrapenale, con particolare riguardo ai minori stranieri non accompagnati.

1. *Alla radice delle regole giuridiche sui minori: l'oggetto della tutela*

Il convegno odierno indica un profilo particolarmente significativo dell'intero tema dei minori migranti. Sono state poste dalla legge significative regole da rispettare in presenza di minori stranieri nei flussi migratori regolari e irregolari, ma queste regole nascono dalla lettura politica del fenomeno migratorio e dunque risentono inevitabilmente della sintesi tra punti di vista diversi, della mediazione tra orizzonti strategici spesso contrastanti, e, a ben guardare di opposti giudizi di fondo sul fenomeno migratorio, che spaziano fra posizioni che li considerano espressione del sentimento positivo della spinta al miglioramento della propria condizione di vita, ovvero il portato di un fenomeno che considerano irrimediabilmente negativo, che si manifesta come una sorta di sindrome da invasione da parte di individui che inquinerebbero le culture e i valori di nazioni che primeggiano negli *standard* del progresso e della qualità di vita.

Grande è stato lo sforzo, a livello internazionale, per incentrare dette regole sul principio del superiore interesse del minore che è emerso più

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volte, per la sua importanza, nei riferimenti dei relatori e che rappresenta il principale *trait d'union* tra le prospettive politiche tese ad affrontare i molteplici profili che il tema presenta: dalla sottrazione di minori all'esercizio delle funzioni genitoriali nel quadro delle vicende familiari problematiche, ai minori stranieri non accompagnati, all'inserimento scolastico, ecc. Un'enunciazione somma, ma ancora generica, con caratteristiche che denotano quanto sia complicato porre punti fermi su di un tema che suscita tante contrapposizioni.

In questo quadro numerose norme del nostro sistema, prima fra tutte quella che vieta comunque l'espulsione del minorenne si muovano in un contesto che sopravanza quello della tutela dei diritti, per rappresentare qualcosa di più complessivo: la tutela della persona umana nel suo insieme. D'altronde l'art. 31/2 Cost. che impone la protezione dell'infanzia e della gioventù attraverso la predisposizione di istituti destinati a tale scopo si muove in questa direzione: non solo l'elencazione di singoli diritti, ma la tutela di una condizione propria della persona umana e portatrice di specifiche peculiarità.

Quale dunque il ruolo della norma penale in questo contesto ?

La tutela penale del minore migrante è un'articolazione del più ampio bene giuridico tutela del minore e porta a rendere tipiche modalità lesive o di messa in pericolo, riguardanti situazioni o condizioni specificamente nocive per la persona e per la vita sociale, ai danni di questa particolare tipologia di soggetto passivo del reato. Una fattispecie «dedicata», in questi casi, si rende necessaria quando quelle più generali, pur affiancate dagli altri strumenti di tutela, compresi quelli extrapenali, non riescano a raggiungere adeguatamente lo scopo. La tutela delle articolazioni dei beni giuridici, ancorché prossime ai diritti fondamentali della persona umana, al pari di ogni altra tutela, deve rispettare il limite dell'ultima *ratio,* evitando che la norma penale ecceda la sua funzione e intervenga strumentalmente come «cifra» di invadenti esigenze politiche, più che per l'effettivo bisogno della prevenzione generale propria del reato. Quando la tutela penale seleziona segmenti del bene giuridico di grande impatto, ovvero legati a diritti fondamentali o a situazioni di primaria importanza, oppure quando persegue disvalori particolarmente odiosi, è fondamentale la capacità del legislatore di fornire tutela con esclusivo riguardo al

carattere appropriato degli strumenti, non all'impatto sul consenso, che guarda ai contenuti simbolici delle fattispecie.

Un particolare profilo di tutela dei minori migranti[2], quello rivolto ai minori stranieri non accompagnati[3], è stato banco di prova molto impegnativo e affrontato in maniera proficua, nel quale il legislatore si è mostrato attento a non lasciarsi lusingare dalle sirene di questa particolare insidia. Mi riferisco, in particolare, alla l. n. 47/2017[4] che appresta un sistema preventivo articolato, puntuale e appropriato, costruito esclusivamente con norme extrapenali.

[2] Il d. lgs 18 agosto 2015, n. 142, *"Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale"*, all'art. 18 «Disposizioni sui minori», individua compiutamente i nodi problematici della tutela del minore migrante, disponendo che «Nell'applicazione *delle misure di accoglienza… assume carattere di priorità il superiore interesse del minore in modo da assicurare condizioni di vita adeguate alla minore età, con riguardo alla protezione, al benessere ed allo sviluppo anche sociale del minore, conformemente a quanto previsto dall'articolo 3 della Convenzione sui diritti del fanciullo del 20 novembre 1989, ratificata dalla legge 27 maggio 1991, n. 176*». La norma, in attuazione dell'art. 31 co. 2 Cost individua conseguentemente gli strumenti, affermando che «per la valutazione dell'interesse superiore del *minore occorre procedere all'ascolto del minore, tenendo conto della sua età, del suo grado di maturità e di sviluppo personale, anche al fine di conoscere le esperienze pregresse e valutare il rischio che il minore sia vittima di tratta di esseri umani, nonché a verificare la possibilità di ricongiungimento familiare… purché corrisponda all'interesse superiore del minore*». La norma prevede inoltre che i figli minori dei richiedenti e i richiedenti minori siano alloggiati rispettando i vincoli parentali, che siano assicurati i servizi destinati alle esigenze della minore età, comprese quelle ricreative e che gli operatori abbiano qualifiche e formazione adeguate e siano tenuti alla riservatezza.

[3] Il d.lgs n. 142/2015, citato alla nota precedente, detta all'art. 19 particolari disposizioni per i minori stranieri non accompagnati, precisando che questi ultimi «sono *accolti in strutture governative di prima accoglienza, istituite con decreto del Ministro dell'interno, sentita la Conferenza unificata…, per il tempo strettamente necessario, comunque non superiore a sessanta giorni, alla identificazione e all'eventuale accertamento dell'età, nonché a ricevere, con modalità adeguate alla loro età, ogni informazione sui diritti riconosciuti al minore e sulle modalità di esercizio di tali diritti, compreso quello di chiedere la protezione internazionale*». La norma, dopo avere disciplinato le caratteristiche dell'accoglienza e la particolare attenzione da prestare all'assistenza psicologica, precisa che si applicano a questi minori le medesime condizioni previste per i richiedenti asilo dal servizio Sprar.

[4] Si veda: B. Triestina, *I minori stranieri non accompagnati. Analisi ragionata della L. 7 aprile 2017, n. 47,* Piacenza, La tribuna, 2017; J. Marzetti, *Tutori volontari per minori stranieri non accompagnati,* Rimini, Maggioli, 2019.

Le tutela penale dei minori e quella particolare dei minori migranti sono il frutto d'importanti impegni internazionali assunti dall'Italia sottoscrivendo trattati che fronteggiano il tragico dato d'esperienza del gran numero di situazioni in cui strumenti extrapenali non trovano spazio perché di fatto inesistenti, neppure configurabili ovvero perché concretamente non realizzati. Là dove questi strumenti sono efficacemente attuabili, le norme penali rappresentano invece l'argine imprescindibile per consentire agli interventi proattivi di protezione di produrre i loro effetti positivi.

In alcune situazioni la tutela penale è indispensabile, perché unico rimedio disponibile per contrastare aggressioni intollerabili a chi, assommando le due condizioni, di minore e di migrante, sia doppiamente debole e quindi talmente vulnerabile da rendere inadeguate le due tutele generali – come minore e come migrante – se siano le sole a fronteggiare il gravissimo problema, senza coniugarle fra loro nella tutela complessiva del minore migrante.

La tutela penale dei minori migranti, possiamo dire, è assieme «duplice» e «rafforzata» in quanto raggiunge l'effetto olistico della maggiore efficacia della somma delle due tutele singole, nel perseguire la lesione o la messa in pericolo di una serie di beni giuridici primari (vita, incolumità personale, libertà, autodeterminazione, diritto all'educazione e alla protezione, ecc.) che, ai danni di questi destinatari, assumono spesso connotazioni estreme e odiose o determinano pregiudizi irreversibili nella crescita e nella vita futura.

La tecnica legislativa utilizzata consiste nell'apprestare tutela penale ai minori migranti specializzando o aggravando altre fattispecie, integrando i medesimi reati che tutelano i beni giuridici, della cui offesa il migrante può restare vittima in ogni fase della vita ma che, quando non abbia raggiunto la maggiore età, assumono particolare gravità in ogni caso, ovvero quando la stessa età minore configuri particolari profili di rischio e di disvalore. Quando, invece, la particolare valenza lesiva del fatto, quando commesso nei confronti del minore, non comporti la necessità di rimodellare il fatto tipico, assumerà rilievo nella quantificazione della pena, in termini di gravità del reato, ai sensi dell'art. 133 c.p.

In ogni caso, per dare effettività alla maggiore tutela, va messa in evidenza la particolare cura che il sistema deve avere per presidiare la sicurez-

za pubblica, attraverso il contrasto efficace del numero oscuro e dell'impunità e rafforzando la capacità di disinnescare le insidie e le situazioni critiche ai danni dei minori migranti, mettendo in campo una forte azione internazionale, per non porre a carico delle politiche sociali e di polizia dei singoli Stati l'intero peso della prevenzione che, così frammentata, non riesce ad avere presa ed incidere sulle caratteristiche criminali dell'intero fenomeno. Le leggi nazionali, soprattutto nelle emergenze e in presenza di opinioni pubbliche impaurite dai luoghi comuni securitari, sfuggono, spesso per mero opportunismo, alla dimensione transnazionale dei problemi, per non farsi carico della quota-parte del problema, come dimostrano platealmente le difficoltà insorte per accogliere proporzionalmente i profughi e per contrapporsi globalmente alla criminalità transnazionale, al cui interno maturano le situazioni più lesive e più impunite della nostra articolazione del bene giuridico.

2. *La protezione dell'infanzia e della gioventù come criterio d'individuazione dell'interesse di fondo protetto*

In premessa ho sottolineato che numerose norme del nostro sistema si muovano in un contesto che sopravanza quello della tutela dei diritti, per rappresentare qualcosa di più complessivo: la tutela della persona umana del bambino e del giovane nel suo insieme.

Tutto questo contribuisce a individuare l'interesse protetto, ma non può esaurire gli elementi da prendere in considerazione per costruire la fattispecie penale, la cui struttura non può prescindere da una forte precisione della fattispecie.

Per realizzare la tutela penale del minore intervengono fattispecie che necessariamente tutelano questo bene giuridico in modo frammentario e, per così dire, specializzano la prevenzione generale affiancandolo ad altri beni giuridici fondamentali, come la vita, l'integrità fisica, la dignità, la libertà, in attuazione del precetto costituzionale dell'art. 31 co. 2 che, come detto, impone di articolare la doverosa protezione dei giovani «favorendo gli istituti necessari a tale scopo».

La Carta fondamentale, per scongiurare che il principio viva nell'ordinamento come semplice esortazione programmatica, dalle ricadute non verificabili, coniuga l'obiettivo con l'obbligo della legge di farsi strumen-

to per realizzarlo con istituti specifici, chiamati a fronteggiare i rischi ai quali le persone giovani e l'infanzia sono esposte in maniera particolare, nelle diverse situazioni di volta in volta disciplinate. La Corte costituzionale non esita a dichiarare illegittime numerose norme di legge che contraddicono la doverosa tutela differenziata dei minorenni, ravvisando irragionevole ogni trattamento non differenziato delle situazioni, ben diverse, dei minori e degli adulti. Fondamentale fu, come è noto, la decisione sull'attenuante della minore età (art. 98 co. 2 c.p.) che deve inderogabilmente produrre effetti concreti sulla pena per qualsiasi condanna, e mai può soccombere a fronte di aggravanti, impedendo, fra l'altro, l'applicazione ai minorenni della pena dell'ergastolo[5].

La tutela della gioventù e dell'infanzia, sempre doverosa in ogni situazione disciplinata dal diritto, deve essere attuata anche quando carenze, limiti e ritardi complessivi del sistema non le diano concreta attuazione e conseguentemente l'obbligo costituzionale di favorire gli istituti necessari a tale scopo, rafforzato dalla regola internazionalistica del superiore interesse del minore, vive oramai nell'ordinamento come criterio ermeneutico e norma di diretta applicazione.

Rilevante, a questo proposito, è il divario del nostro diritto penale per i minori di sviluppare insufficientemente la loro tutela penale come potenziali vittime, a fronte di una ben più incisiva determinazione per la loro condizione di rei[6], pur fondamentale per specializzare, nei loro confronti, le garanzie e il rilievo imprescindibile che deve essere dato all'ancor incompleta esperienza che spesso intreccia il ruolo di reo e di vittima, e all'esigenza di non fare gravare sulla futura vita adulta le conseguenza di tale fragilità.

Anche la tutela penale dei minori vittime di reati deve raggiungere altrettanta adeguatezza di risposte, comparabili con quelle che sono assicurate, grazie anche ai numerosi interventi della Corte costituzionale, nel trattamento penale differenziato, che consentono di affrontare le peculiarità della delinquenza giovanile senza limitarsi agli accertamenti sulla capacità d'intendere e di volere come presupposto della responsabilità col-

[5] Corte Cost. 28 aprile 1994, n. 168.

[6] Si veda: L. Picotti, *La tutela penale del minore vittima di reato: profili sistematici e spunti critici,* disponibile in http://www.aiafrivista.it/tutela_penale_minore_vittima_di_reato.

pevole, per spiegare protezione in funzione del recupero sociale e della prevenzione, rivolti all'intera platea giovanile, con trattamenti puntuali per le diverse tipologie comportamentali.

La legislazione sovranazionale e nazionale, da almeno un trentennio, tende a colmare questo ritardo, rimarcando che la tutela penale dei minori deve apprestare protezione coniugando tale salvaguardia col sistema punitivo differenziato nei confronti del minore che *agisce criminosamente,* per realizzare un sistema complessivo coerente di protezione quando la condizione giovanile espone al rischio di *subire* lesione o messa in pericolo di beni giuridici significativi[7].

In alcuni casi il minorenne è soggetto passivo esclusivo di reati che perseguono comportamenti a suo danno che, altrimenti, sarebbero privi di rilievo penale, come nel caso di chi fruisca della prostituzione minorile. In altri casi il reato subito dal minorenne viene punito più severamente, attraverso la specializzazione delle fattispecie o il suo aggravamento. Pensiamo ai fenomeni allarmanti dei bambini abusati, maltrattati e violati che prevedono sanzioni più severe, limitazioni alle misure alternative, forme particolari di tutela giudiziaria della dignità, libertà e vulnerabilità delle giovani vittime, assieme alla modulazione delle attività processuali nei confronti di chi compie simili abusi, tese ad assicurare, con particolari norme, l'assunzione della prova e la sua genuinità senza ricadute negative sulle giovani vittime[8].

La tutela penale dei minori che specializza le differenti offese ai loro danni, incalzata, come detto, dalla normativa sovranazionale, ha portato a nuove incriminazioni o ad articolazioni di quelle generali, per meglio assicurare la tutela della piena dignità umana al giovane, per definizione particolarmente vulnerabile per ragioni legate alla crescita, all'evoluzione e alla maturazione, e quando non sia ancora in grado di difendere autonomamente i propri diritti e, anche per questo, sia maggiormente esposto

[7] F. Nicodemi, "Le vittime della tratta di persone nel contesto della procedura di riconoscimento della protezione internazionale: quali misure per un efficace coordinamento tra i sistemi di protezione e di assistenza?", *Diritto, immigrazione e cittadinanza*, 2017, 1, pp. 30 ss.

[8] E. Antonini, *La tutela penale dei minori nel Testo Unico sull'immigrazione,* in *Diritti umani degli immigrati. Tutela della famiglia e dei minori,* a cura di R. Pisillo Mazzeschi, P. Pustorno, A. Viviani, Napoli, 2010.

ad attività criminose, ad aggressioni individuali, a vedere forzato il consenso e l'autodeterminazione[9].

Alcune fattispecie o disposizioni particolari del nostro codice sono risalenti, mentre altre sono state modellate negli ultimi decenni. Fra le prime rilevano: l'abbandono di persone minori o incapaci (art. 591 c.p.), l'omissione di soccorso (art. 593 c.p.), l'irrilevanza del consenso prestato dal minore degli anni diciotto alla quale consegue la responsabilità per omicidio e non per l'ipotesi più lieve nell'omicidio del consenziente (art. 579 c.p.), l'applicazione delle pene per l'omicidio in caso di istigazione o aiuto al suicidio nei confronti di persona minore degli anni quattordici e una specifica ipotesi aggravata se quest'ultima condotta criminosa sia rivolta a chi abbia meno di diciotto anni art. 580, co. 2 c.p.).

Quanto alle norme di più recente introduzione, vanno evidenziate l'aggravante speciale dell'omicidio doloso, che comporta la pena dell'ergastolo quando il fatto sia commesso (art. 575 co. 1 n. 5) in occasione del delitto di atti sessuali con minorenne[10], e le aggressioni alla libertà di movimento, all'autodeterminazione, alla dignità personale, che si concretizzano in modalità di sfruttamento che integrano i delitti di prostituzione minorile (art. 600-*bis* c.p.), pornografia minorile (artt. 600-*ter,* 600-*quater* e 600-*quater.1* c.p.), e che perseguono il turismo teso a fruire della prostituzione minorile (art. 600-*quinquies* c.p.), al fine di combattere lo sfruttamento dei minori a scopo sessuale anche oltre i limiti della territorialità.

Assume importanza significativa, per tutti i reati che vedono il minore rivestire il ruolo di persona offesa dal reato, la disposizione dell'art. 602-*quater* c.p.[11] in forza della quale «quando i delitti previsti dalla presente sezione sono commessi in danno di un minore degli anni diciotto, il colpevole non può invocare a propria scusa l'ignoranza dell'età della persona offesa, salvo che si tratti di ignoranza inevitabile». La portata dell'inevitabilità dell'errore sul fatto prevista da questa fattispecie, legata alla lettura data che la Corte costituzionale ha fatto propria sull'*error iuris* con la sent. n. 364/1988, è stata puntualizzata dalla giurisprudenza di

[9] Si veda, in particolare, D. Melossi, M. Giovannetti, *I nuovi sciuscià: minori stranieri in Italia,* Roma, Donzelli, 2002

[10] La modifica è stata inserita dal d.l. 23 febbraio 2009, n. 11, conv. in l. 23 aprile 2009, n. 38.

[11] Introdotta dalla l. 1 ottobre 2012, n. 172.

legittimità[12], secondo la quale «il fatto tipico scusante previsto dall'art. 602-*quater* cod. pen. in relazione all'ignoranza inevitabile circa l'età della persona offesa, è configurabile solo se emerga che nessun rimprovero, neppure di semplice leggerezza, possa essere rivolto all'agente, per avere egli fatto tutto il possibile al fine di uniformarsi ai suoi doveri di attenzione, di conoscenza, di informazione e di controllo, attenendosi a uno standard di diligenza direttamente proporzionale alla rilevanza dell'interesse per il libero sviluppo psicofisico dei minori».

La giurisprudenza non si limita a sottolineare che deve sussistere un grado di colpevolezza che renda l'errore rimproverabile, che potrà essere escluso «solo se l'agente, pur avendo diligentemente proceduto ai dovuti accertamenti, sia stato indotto a ritenere, sulla base di elementi univoci, che il minorenne fosse maggiorenne». La prima conseguenza che la giurisprudenza trae è che «non sono sufficienti, al fine di ritenere fondata la causa di non punibilità, elementi quali la presenza nel soggetto di tratti fisici di sviluppo tipici di maggiorenni o rassicurazioni verbali circa l'età, provenienti dal minore o da terzi, nemmeno se contemporaneamente sussistenti». La seconda conseguenza è che il reo «ha l'onere di provare non solo la non conoscenza dell'età della persona offesa, ma anche di aver fatto tutto il possibile al fine di uniformarsi ai suoi doveri di attenzione».

3. *Danno e pericolo nelle norme incriminatrici a tutela dei migranti*

I singoli interessi protetti in gioco nelle vicende, tragiche e ordinarie, riguardanti i migranti riguardano la vita, l'incolumità personale, l'autodeterminazione, la libertà sessuale, spesso assommate tra loro in un contesto di negazione o di umiliazione della dignità umana, che possono subire danno o essere esposti a pericolo di offesa.

Sono numerose le fattispecie che strutturano la tutela penale del migrante puntualizzandone la rilevanza in una pluralità di reati strumentali, rispetto alla lesioni di altri beni giuridici, tra i quali assumono particolare importanza quelli che possono più facilmente restare offesi o messi in pericolo nella particolare condizione di debolezza sociale. Danno e pericolo rappresentano due modalità di tutela che necessariamente devo-

[12] Corte di Cassazione, 24 luglio 2017, n. 36606.

no assommarsi tra loro. Il danno matura quando il bene giuridico è stato offeso è di più facile individuazione, come avviene nei casi in cui coincide con la realizzazione dell'evento del reato: il minore costretto a mendicare, che ha subito atti sessuali, ritratto nelle immagini della pornografia minorile, ecc. Il ruolo del pericolo per il bene giuridico si configura quando l'evento del reato è significativo di una potenziale violazione rispetto alla quale la condotta criminosa è prodromica, che può esprimersi nella condotta stessa o, con più incisività, in un fine dell'azione criminosa. Si pensi al favoreggiamento dell'immigrazione clandestina di minori, per farli mendicare.

Un primo gruppo di fattispecie rimodella e arricchisce di contenuto taluni reati del codice penale, per adeguarne la struttura alle caratteristiche attuali del fenomeno migratorio, che vede un gran numero di migranti esposti in maniera preoccupante a rischi, un tempo sconosciuti, di violazione dei diritti fondamentali della persona umana e di nuove forme di schiavitù, spesso con modalità subdole e insidiose[13].

Questa scelta ha portato a riformare profondamente i delitti contro la libertà individuale, previsti dal capo terzo dei delitti contro la persona, per adeguarli alla virulenza, al carattere subdolo e alle odiose peculiarità dei nuovi fenomeni. I delitti contro la personalità individuale della sezione prima (art. 600 e ss. c.p.) sono stati riformulati e arricchiti di fattispecie nuove[14], con l'aggiunta della sezione I.*bis* che persegue la propaganda e l'istigazione a delinquere per motivi di discriminazione razziale, etnica e religiosa (art. 604-*bis* e *ter*), riconducendo a sistema alcuni reati, fino ad allora contenuti nella legislazione speciale.

[13] E. Antonini, *La tutela penale dei minori nel Testo Unico sull'immigrazione,* cit.

[14] L'attuale disciplina è frutto di una lenta e tormentata evoluzione. La l. 3 agosto 1998, n. 269 introdusse i reati di prostituzione minorile (art. 600-*bis* c.p.), pornografia minorile (art. 600-*ter* c.p.), detenzione di materiale pornografico realizzato utilizzando minori degli anni diciotto (art. 600-*quater* c.p.), iniziative turistiche volte allo sfruttamento della prostituzione minorile (art. 600-*quinquies.* La l. 1 ottobre 2012, n. 172 ha modificato i richiamati artt. 600-*bis* e 600-*ter*. La l. 11 agosto 2003, n. 228 ha riformulato le fattispecie dei delitti di schiavitù, servitù e tratta (artt. 600, 601 e 602 c.p.) che sono state modificate dal d.lgs 4 marzo 2014 , n. 24. La l. 15 luglio 2009, n. 94 ha introdotto il nuovo delitto di «impiego di minori nell'accattonaggio» all'art. 600-*octies* c.p., successivamente modificato. Il reato di pornografia virtuale (art. 600-*quater.*1) è stato introdotto dalla l. 6 febbraio 2006, n. 38. Le circostanze aggravanti per i reati di cui agli artt. 600, 601 co. 1 e 2 e 602 previsti dall'art. 602-ter sono stati inseriti dalla l. 2 luglio 2010, n.108.

Un secondo gruppo di fattispecie, disciplinato dall'art. 12 d. lgs 25 luglio 1998, n. 286, il *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, detta *Disposizioni contro le immigrazioni clandestine* attraverso norme incentrate sulla tutela dei confini nazionali, che articolano il bene giuridico mettendo in valore anche le differenti condizioni di fragilità dello straniero che viene fatto entrare illegalmente in Italia.

La fattispecie base del co. 1 punisce con la reclusione da uno a cinque anni e con la multa di 15.000 euro per ogni persona «chiunque compie una serie di attività dirette a favorire l'ingresso degli stranieri nel territorio dello Stato «in violazione delle disposizioni del presente testo unico». La disposizione articola la tutela del bene comminando pene più elevate (reclusione da cinque a quindici anni e multa di euro 15.000 per ogni persona) in relazione al numero dei concorrenti nel reato, all'esposizione a pericolo per la vita, alla sottoposizione a trattamenti inumani o degradanti, al numero delle persone fatte entrare illegalmente, all'utilizzo di mezzi di trasporto internazionali, al ricorso a documenti contraffatti, alla disponibilità di armi ed esplosivi.

Il co. 3-*ter* aggrava da un terzo alla metà la pena della reclusione e porta la multa a euro 25.000 per ogni persona, qualora ricorrano alcune condizioni soggettive degli stranieri fatti entrare illegalmente, che danno vita al dolo specifico rappresentato dal fine di reclutamento di persone da destinare alla prostituzione o allo sfruttamento della prostituzione e rendono tipica la particolare condizione futura dei soggetti passivi quando si tratti di minori da impiegare in attività illecite al fine di favorirne lo sfruttamento. Va rilevato che la norma dispone che queste circostanze aggravanti non possano soccombere o essere ritenute equivalenti – e quindi perdere la traduzione del disvalore che esprimono- in presenza di attenuanti (commi 3-*quater* e 3-*quinquies).*

L'espressione «da impiegare», pur non particolarmente precisa, non consiste in un dolo specifico che rende tipico l'agire finalistico del soggetto attivo del favoreggiamento dell'immigrazione clandestina, ma nel movente della migrazione che portò il minore, o altri per lui, tra i quali può rientrare lo stesso favoreggiatore, a perseguire l'ingresso nel territorio dello Stato in violazione delle disposizioni del Tu, in vista dell'impiego illecito indicato. Trattandosi di circostanza aggravante, il reo ne risponderà se ne era

a conoscenza o se tale movente era conoscibile, ma fu ignorato per colpa o ritenuto inesistente per errore determinato da colpa (art. 59 co. 2 c.p.).

La condanna per favoreggiamento dell'immigrazione clandestina, nell'ipotesi semplice e in quelle aggravate, fra le quali rientra quella dei soggetti passivi minorenni da impiegare in attività illecite al fine di favorirne lo sfruttamento, comporta il regime carcerario dei reati di maggiore gravità e preclude, con la sola eccezione di chi collabora con la giustizia, l'assegnazione al lavoro all'esterno, i permessi premio, e le misure alternative alla detenzione, in conseguenza di specifica norma contenuta nell'art. 12 co. 3-*sexies* del Tu sull'immigrazione, che modifica l'art. 4-*bis* dell'Ordinamento penitenziario (l. n. 354/1975).

4. *Le singole fattispecie criminose di protezione del minore migrante*

Assumono particolare importanza le modalità adottate dalla legge per specializzare le norme a tutela dei migranti, al fine di uniformarle puntualmente all'interesse protetto, rappresentato dalla salvaguardia della condizione di minorenne.

Le fattispecie delittuose progressivamente entrate nel codice penale, profondamente rimaneggiate sotto la spinta della trasformazione dei fenomeni che crimini intendono perseguire, nelle forme che assumono nei fenomeni migratori[15] si caratterizzano come vera e propria tutela penale del minore migrante*,* sulla scia di quanto il legislatore aveva già fatto, come detto, per il reato di favoreggiamento dell'immigrazione clandestina.

Chiaro l'intento della legge di caratterizzare due fattispecie delittuose come condizione di fragilità nella quale si assommano le due tutele[16].

Il delitto di tratta di persone*,* previsto dall'art. 601 c.p.[17] punisce alcune condotte tipiche (reclutare, introdurre nel territorio dello Stato, ecc.) che integrano condizioni lesive di *soggezione continuativa,* indivi-

[15] Si veda: K. Summerer, *I delitti di schiavitù e tratta delle persone,* in "Trattato di diritto penale" a cura di A. Cadoppi, S. Canestrari, A. Manna, M. Papa, vol. VIII, Torino, 2010, pp. 213 ss.

[16] M. Gambini, "I diritti del minore vittima di tratta e gli strumenti di tutela della persona"*,* in *Costituzionalismo.it*, 2014, I.

[17] Si veda. A.G. Cannavale, C. Lazzari, *Tratta di persone (voce)* in Dig. Disc. Pen. terzo aggiornamento, Torino 2005, pp. 1721 ss.

duate nella sostanziale schiavitù descritta dall'art. 600 c.p.[18], o nel trovarsi prigionieri di tale soggezione perché rimasti vittime di inganno, violenza, minaccia e di altre modalità di prevaricazione specificamente indicate. Va sottolineato che le pronunce giurisprudenziali hanno rilevato situazioni, nello svolgersi dei processi, che fanno emergere un quadro di immensa gravità[19].

Il secondo comma dell'art. 601 c.p. dispone che «*alla stessa pena soggiace chiunque, anche al di fuori delle modalità di cui al primo comma, realizza le condotte ivi previste nei confronti di persona minore di età*». Il fatto tipico differenzia, ampliandola, la tutela penale del minore e prevede che integri reato la semplice esistenza della soggezione continuativa ai sensi dell'art. 600 c.p. o la mera realizzazione delle condotte tipiche (reclutare, introdurre nel territorio dello Stato, ecc.) ai danni di un minorenne, anche senza inganno, violenza, ecc.[20], senza che debbano ricorrere gli altri elementi descritti nella condotta tipica.

L'art. 602-*ter* articola disvalori particolari in alcune circostanze aggravanti speciali per i reati di cui agli artt. 600, 601 co. 1 e 2, e 602 c.p. che

[18] Secondo la giurisprudenza, «la condizione di integrale asservimento, necessaria per l'integrazione del delitto di riduzione in schiavitù, non è incompatibile con una certa libertà di movimento, che potrebbe, anzi, essere funzionale alla sua realizzazione – come nel caso in esame quanto all'attività di accattonaggio – ed è concetto diverso dalla totale privazione della libertà personale, che, invece, ad esso non risulta essenziale, essendo elemento tipico del delitto di sequestro di persona di cui all'articolo 605». La Corte, al riguardo, afferma la «non decisività, ai fini dell'integrazione del delitto, di una completa privazione della libertà personale, al ricorrere di specifiche condotte violente da parte dell'imputato, alla continuativa pratica di accattonaggio cui era costretta la persona offesa, alla evidente condizione di inferiorità fisica e psichica, essendo la stessa all'epoca dei fatti tredicenne e per di più incinta». Così: Cassazione, 7 giugno 2016 n. 23590.

[19] C. Bianchelli, "Il (dis)crimine della tratta. Un'indagine etnografica dei processi penali per riduzione in schiavitù e tratta di esseri umani", in *Problemi del socialismo* 2016, LV, p. 77 ss.

[20] La portata della norma, precisata in giurisprudenza, comporta che «la nuova formulazione dell'articolo 601 c.p., la cui *ratio* risiede nell'aggravamento del regime relativo alla tratta dei minori, non abbia provocato alcun assorbimento dell'aggravante di cui all'articolo 602-*ter* c.p. nella fattispecie semplice ma abbia soltanto chiarito la condotta di cui al primo comma, allorquando oggetto della tratta siano soggetti minori, nel senso che *la condotta della tratta è configurabile anche in assenza delle modalità esplicitate nel primo comma nell'ipotesi di minori quali soggetti passivi del contestato delitto*». Così: Cassazione, 1 ottobre 2015, n. 39797.

comportano aumento della pena da un terzi alla metà, assoggettandole, anche in questo caso, alla particolare disciplina che le esclude dal giudizio bilanciamento (art. 69 c.p.) in termini di equivalenza o soccombenza rispetto ad attenuanti che, conseguentemente, opereranno una più contenuta diminuzione, intervenendo sulla pena già aumentata in modo consistente per effetto delle aggravanti[21].

L'art. 602-*ter* co. 1 c.p., aggravante speciale ad effetto speciale, aumenta la pena da un terzo alla metà «se la persona offesa è minore degli anni diciotto», per i reati di riduzione o mantenimento in schiavitù (art. 600 c.p.), di tratta di persone (art. 601 c.p.) e di acquisto e alienazione di schiavi (art. 602 c.p.). Il co. 4 prevede eguale aumento di pena per i reati di induzione, favoreggiamento, sfruttamento della prostituzione minorile e assimilati (art. 600-*bis* co. 1 e 2 c.p.), pornografia minorile (art. 600-*ter* co. 1 e iniziative turistiche volte allo sfruttamento della prostituzione minorile (art. 600-*quinquies* c.p.), «se il fatto è commesso approfittando della situazione di necessità del minore». Il co. 5 prevede che, negli stessi casi indicati dai co. 1 e 4 e in alcune altre ipotesi, la pena sia aumentata dalla metà ai due terzi «se il fatto è commesso in danno di un minore degli anni sedici». Il co. 6 indica i casi in cui la pena è aggravata – e quindi nel caso di minorenni sarà ulteriormente aggravata – quando il fatto è commesso ai danni di persona legata da vincoli familiari o di convivenza

La disciplina complessiva della tutela penale del minore è sorretta da speciali norme processuali funzionali alla sua effettiva realizzazione. Mi ri-

[21] La Corte di Cassazione, con la sentenza citata alla nota precedente, afferma che «il delitto in questione si ravvisa anche se una persona libera sia condotta con inganno in Italia, al fine di porla nel nostro territorio in condizione analoga alla schiavitù; il reato di tratta può essere, infatti, commesso anche con induzione mediante inganno in alternativa alla costrizione con violenza o minaccia. A tal proposito la novella di cui al d.Lgs 4 marzo 2014, n. 24 lungi dal modificare sostanzialmente la disciplina della fattispecie delittuosa di cui all'articolo 601 c.p., ha semplicemente precisato in dettaglio le modalità attraverso le quali si realizza la tratta di esseri umani. Inoltre, ai fini della consumazione del reato di tratta di persone, con riguardo alla seconda delle ipotesi previste dall'art. 601, co. primo c. p., non è neppure necessario che venga consumato anche il reato di riduzione in schiavitù, quale previsto dalla richiamata norma, atteso che con tale richiamo si è inteso soltanto, da parte del legislatore, stabilire la necessità del dolo specifico da cui la condotta dell'agente dev'essere accompagnata, nulla rilevando, quindi, che la finalità da lui perseguita non si realizzi, ovvero si realizzi ad opera di soggetto diverso, non necessariamente concorrente con il primo».

ferisco, in particolare, alla partecipazione del minore al procedimento penale prevista nella Convenzione Onu sui diritti del fanciullo del 1989, con particolare riguardo al diritto del minore di essere ascoltato in ogni procedura giudiziaria, ribadito nella Carta dei diritti fondamentali dell'Unione europea, allegata al Trattato di Lisbona entrato in vigore il 1° dicembre 2009, nella quale si afferma che «in tutti gli atti relativi ai bambini, siano essi compiuti da autorità pubbliche o da istituzioni private, l'interesse superiore del bambino deve essere considerato preminente»[22].

Il Consiglio dell'Unione europea con una decisione quadro che rimarca con puntualità la tutela della vittima nel procedimento penale[23] prima, durante e dopo il procedimento penale, mette in luce profili che, pur dettati in via generale per tutte le tipologie di vittime, determinano ricadute molto forti sulla tutela penale dei minori migranti, in quanto vittime particolarmente vulnerabili, che devono beneficiare trattamenti specifici, che rispondano in modo ottimale alle esigenze legate alla loro situazione. La decisione, infatti, afferma che «ciascuno Stato membro assicura che le vittime particolarmente vulnerabili beneficino di un trattamento specifico che risponda in modo ottimale alla loro situazione». L'Unione europea, in generale, identifica come vittima la «persona fisica che ha subito un pregiudizio, anche fisico o mentale, sofferenze psichiche, danni materiali causati direttamente da atti o omissioni che costituiscono una violazione del diritto penale di uno Stato membro» e ne fa quindi questione di tutela effettiva, non di mera presenza nell'ordinamento di norme necessariamente specifiche sulle diverse situazioni.

5. *I minori stranieri non accompagnati: una condizione che esige speciale tutela*

L'oggetto dell'odierna giornata di studi che vuole approfondire la correlazione tra norme giuridiche e prospettive politiche in relazione ai profili problematici della condizione del minore migrante, impone di approfondire un profilo significativo anche in relazione alla scelta fra le diver-

[22] Si veda: Agenzia dell'Unione europea per i diritti fondamentali, *Manuale sul diritto europeo in materia di asilo, frontiere e immigrazione,* 2014 in https://fra.europa.eu.

[23] Trattasi della *Decisione quadro del Consiglio dell'Unione europea del 15 marzo 2001, relativa alla posizione della vittima nel procedimento penale,* n. 2001/220/GAI, in https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A32001F0220.

se norme giuridiche per individuare quelle più idonee a governare proficuamente la tutela.

Occorre quindi declinare questo profilo con il contenuto della relazione, che cerca di definire, in questo contesto, il ruolo della norma penale, tenendo presente che quest'ultima, in ossequio al principio di ultima *ratio,* per la sua gravosità e per i costi sociali che comporta, è chiamata a intervenire solamente quando norme, di altri settori dell'ordinamento, siano inadeguate, debbano essere sorrette in quanto da sole sarebbero inadeguate a realizzare una tutela effettiva, oppure quando abbiano fallito nel realizzarla.

Nel quadro della tutela penale dei minori, l'articolazione rappresentata dai minori migranti ha assunto un ruolo di primo piano a causa della profonda trasformazione dei fenomeni migratori e in conseguenza del moltiplicarsi di forme di sfruttamento un tempo sconosciute e del manifestarsi di lesioni dei diritti fondamentali e della dignità umana, allarmanti per gravità e intensità e neppure pensabili in società che hanno debellato, da secoli, le forme più bestiali di soggiogamento.

Il nodo della mancata protezione dei minori migranti, ai quali la legge cerca di porre argine, consiste nell'individuare, in primo luogo, adeguate misure proattive per contrastare rischi definiti, ai quali essi sono esposti, fronteggiando molteplici criticità col dovuto rigore, superando le situazioni di debolezza del sistema nel farsene carico e debellando le connivenze e tornaconto degli adulti che dovrebbero accudirli.

Emergono contorni di fenomeni nuovi, legati in maniera particolare ai flussi irregolari dei migranti, tra i quali spicca, per importanza, quello dei minori stranieri non accompagnati, categoria definita normativamente di destinatari della protezione, che delinea una situazione aperta a molteplici rischi, rispetto ai quali il legislatore si è interrogato per individuare le risposte più efficaci, non accontentandosi di dare visibilità ai nodi problematici attraverso l'ennesimo ritocco delle fattispecie penali, spesso autoassolutorio rispetto a ritardi e carenze imperdonabili.

Appare condivisibile, per alcune evidenti ragioni, la scelta di considerare sufficienti e adeguate le fattispecie penali già esistenti, peraltro rimodellate di recente, per concentrarsi, invece, su innovazioni di carattere organizzativo e sociale, per realizzare una effettiva protezione scandita puntualmente da procedimenti verificabili.

Per prevenire gravi fatti criminosi ai danni dei minori stranieri non accompagnati, accanto alla conoscenza approfondita delle drammatiche peculiarità dei fenomeni, va affrontato e risolto il delicato problema di una particolare condizione giuridica, che i legislatori hanno teso a definire, in rapporto a un fenomeno in precedenza sconosciuto, affrontando significative difficoltà. Basti pensare che il nostro ordinamento prendeva in considerazione la sola mancanza delle figure dei genitori e di chi potesse esercitare il ruolo parentale al loro venir meno, problema ben diverso, al quale, secondo una consolidata tradizione giuridica, si dà risposta con la responsabilizzazione della collettività e in particolare del Comune di residenza[24].

La disciplina richiamata affronta un problema *irrimediabilmente altro* rispetto alla condizione dei minori stranieri non accompagnati, persino sotto il fondamentale profilo di quale autorità debba occuparsene.

Oggi, finalmente, i destinatari della protezione, secondo la definizione che ne dà la l. n. 47/2017 (c.d. "Legge Zampa), sono le persone non ancora diciottenni, prive di cittadinanza italiana o dell'Ue, che si trovano nel territorio nazionale prive di assistenza e di rappresentanza dei genitori o di altri adulti legalmente responsabili.

Ovviamente la competenza comunale, espressione del territorio in cui il problema va gestito ha caratteristiche completamente diverse, trattan-

[24] Il già citato d.lgs 18 agosto 2015, n. 142, *"Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale",* (c.d. decreto accoglienza), dettò le prime disposizioni specifiche in tema di accoglienza dei minori non accompagnati, per superare l'incongrua applicazione delle norme per i minori in stato di abbandono, operando la distinzione tra prima accoglienza (per le esigenze di soccorso e di protezione immediata, in accordo col Comune nel cui territorio è situata la struttura, e gestite dal Ministero dell'interno anche in convenzione con i comuni) e di seconda accoglienza all'interno del sistema Sprar, con divieto di inserimento in Centri di permanenza per i rimpatri e in altri centri di prima accoglienza. Significativa, al riguardo, l'individuazione dei soggetti vulnerabili (art. 17) «Le misure di accoglienza previste dal presente decreto tengono conto della specifica situazione delle persone vulnerabili, quali i minori, i minori non accompagnati, i disabili, gli anziani, le donne in stato di gravidanza, i genitori singoli con figli minori, le vittime della tratta di esseri umani, le persone affette da gravi malattie o da disturbi mentali, le persone per le quali è stato accertato che hanno subito torture, stupri o altre forme gravi di violenza psicologica, fisica o sessuale o legata all'orientamento sessuale o all'identità di genere, le vittime di mutilazioni genitali».

dosi di bambini e ragazzi senza alcun legame preesistente, il cui numero e le cui condizioni individuali non sono né programmabili né prevedibili, che coinvolge ragazzi e bambini spesso reduci da esperienze subite, anche tragiche, che testimoniano un bagaglio di vita pesante alle spalle, nel quale ricorrono violenze, torture, schiavitù, privazioni. Queste situazioni traumatiche si assommano ad esperienze di viaggi durati mesi se non anni, senza adulti di riferimento, per raggiungere un futuro possibile in Europa.

Anche sul piano fenomenologico le caratteristiche di questa tipologia di minori è peculiare[25]. Grande rilievo hanno, infatti, gli ostacoli all'integrazione trattandosi di irregolari *(sans papier)* e, nello stesso tempo, non accompagnati e quindi soli, che diventeranno adulti in un Paese che non conoscono, chiamati ad affrontare le difficoltà di integrazione, che incideranno sul loro futuro, prime fra tutte il doveroso apprendimento della lingua e l'inserimento scolastico e lavorativo[26], in un quadro di opportunità d'integrazione difficili da ottimizzare, poiché gli affidi familiari, certamente lo strumento più idoneo, riescono solo in parte a farsi carico di loro[27].

Il problema è reso ancora più grave dal numero esorbitante di fughe di questi minori dai luoghi di accoglienza, derivanti dai singoli obiettivi di vita futura, rispetto ai quali il «passaggio» in Italia mira a sfuggire al «controproducente», per così dire, luogo di prima identificazione, disciplinato dagli accordi internazionali, rispetto al più agevole raggiungimento della «meta» che culminerà, passando da soli i confini, nel ricongiungimento con familiari o amici, che comporta la mancanza, per periodi anche lunghi, di alloggio, protezione e assistenza, a fronte di pesanti rischi di isolamento, abusi e lesione dei diritti fondamentali.

Un quadro umano e sociale così problematico ha portato il legislatore a tutelare questi minorenni, assecondando le particolari esigenze di salvaguardia, senza ricorrere agli specifici meccanismi generalpreventivi del sistema penale, ritenendo adeguati quelli già previsti per assolvere al com-

[25] V. Cianciolo, *La tutela del minore straniero non accompagnato,* Rimini, Maggioli, 2019.

[26] A. Di Nuzzo, *Minori migranti. Nuove identità transculturali,* Roma, Carocci, 2020.

[27] A. Anzaldi, T. Guarnier (a cura di), *Viaggio nel mondo degli stranieri non accompagnati: un'analisi giuridico-fattuale,* Vol. II, *In bilico fra il diritto al lavoro e lo sfruttamento,* https://www.fondazionebasso.it/2015/publications/viaggio-nel-mondo-dei-minori-stranieri-non-accompagnati-unanalisi-giuridico-fattuale/.

pito di contrastare chi favorisce tanta disumanità. Ha pertanto valorizzato gli strumenti proattivi, articolandoli secondo una pluralità di azioni atte a soddisfare l'esigenza di tenerli lontani dal complesso di situazioni che determinano elevata esposizione a fattori criminogeni e significativa vittimizzazione[28].

Il perseguimento reattivo dei reati ai danni dei minori stranieri non accompagnati è soddisfatto delle nuove fattispecie incriminatrici a tutela dei minori migranti, che appaiono spesso particolarmente calzanti. Non vi è necessità di modulare in modo specifico la vittimizzazione dei minori stranieri non accompagnati, quando siano accertati i delitti, approfonditi nel terzo paragrafo, di riduzione in schiavitù, prostituzione minorile, tratta di persone fattispecie che già apprestano tutela ai minori, con differenti modalità. Se la condizione di non accompagnati, fra l'altro, doves-

[28] I programmi di protezione dei minori stranieri non accompagnati furono avviati con la sperimentazione di un sistema in rete, finanziando i comuni per la presa in carico, giungendo a risultati rilevanti nello standard di accoglienza e nell'utilizzo efficiente delle risorse pubbliche. Va ricordato che la materia dell'immigrazione è di competenza statale nel quadro del coordinamento con le Regioni (art. 117 e 118 co. 3 Cost.) riservato alla legge statale. In materia trova applicazione il Tuel n. 267/2000 che prevede, qualora il Comuna assolva compiti nazionali, l'obbligo dello Stato di assicurare la copertura con adeguati trasferimenti. Il Fondo nazionale per i minori stranieri non accompagnati fu istituito per superare la forte disomogeneità di interventi che erano attuati nei diversi Comuni e Regioni a favore di questa particolare categoria di migranti. Già l'art. 37-*bis* della l. 184/1983 aveva affermato la competenza statale, stabilendo che «al minore straniero che si trova nello Stato in situazione di abbandono si applica la legge italiana in materia di adozione, di affidamento e di provvedimenti necessari in caso di urgenza», e le disposizioni furono rafforzate dalla Convenzione ONU del 1991 sui diritti dell'infanzia, che fu ratificata con l. 27 maggio 1991, n. 176, nella quale si afferma la specificità della condizione minorile e viene proclamato il principio che l'interesse superiore del minore va considerato preminente per ogni atto che lo concerne. Il divieto di espulsione del minore previsto dall'art. 19 del Tu n. 286/98 sull'immigrazione rappresenta una modalità di attuazione molto avanzata di questo principio, rispetto al quadro internazionale. Il richiamato coordinamento fra Stato ed Enti locali comporta la creazione di un sistema nazionale, frutto dell'intesa fra tutti gli attori istituzionali coinvolti, non solo per garantire interventi uniformi e di qualità su tutto il territorio nazionale, ma anche per favorire, grazie alla collaborazione con le Regioni, una più equa ripartizione dei destinatari. Il sistema, infatti, deve rispondere a un disegno omogeneo che coinvolga le politiche scolastiche, di formazione, lavorative, abitative e del sostegno sociale, capace di valorizzare le esperienze e le competenze già acquisite nei territori, per dare ad esse continuità, favorendo azioni sinergiche tra tutte le istituzioni coinvolte.

se incidere sul disvalore del fatto, il giudice ne terrà conto nella quantificazione della pena.

La tutela rafforzata del minore migrante che considera come *ultima ratio* la risorsa penale, con scelta ragionevole, è stata ritenuta sufficiente per soddisfare la situazione particolare, le cui peculiarità richiedono soprattutto interventi extrapenali per far fronte ad un fenomeno che si sviluppa in numerose direzioni, le cui criticità, impongono agli stati di liberarsi da una situazione di costante emergenza[29], e che possono essere così riassunte:

- dare effettiva applicazione al divieto assoluto di respingimento del minore non accompagnato alla frontiera e alla possibilità di disporre l'espulsione dello stesso solo a condizione, comunque, che il provvedimento non comporti rischi di danni gravi per il destinatario;
- realizzare strutture di prima accoglienza esclusivamente per tali minori, prevedendo un periodo molto breve di permanenza, al quale segue una collocazione più stabile e duratura;
- ricostruire, nel pieno riconoscimento del diritto all'identità, la storia personale e familiare, evidenziando gli elementi utili a predisporre la soluzione di lungo periodo, più rispondente al superiore interesse del minore[30];
- tutelare l'unità familiare attraverso indagini svolte nell'esclusivo interesse del minore[31], ad esito delle quali l'affidamento potrà avvenire esclusivamente se saranno individuati familiari idonei a prendersene cura, disponendo eccezionalmente, o in assenza di affidatari disponi-

[29] Si veda: Save the Children, *Piccoli schiavi invisibili 2019. Rapporto sui minori vittime di tratta e grave sfruttamento,* IX edizione, in https://www.savethechildren.it/cosa-facciamo/pubblicazioni/piccoli-schiavi-invisibili-2019 e, quanto all'incidenza dell'epidemia da Covid-19 sulla tratta dei minori, cfr.: Id., *Piccoli schiavi invisibili 2020. L'impatto del COVID-19 sulla tratta e lo sfruttamento: dalle strade all'online,* ivi.

[30] E. Lamarque, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale,* Milano, FrancoAngeli, 2016.

[31] R. Borello, *Il diritto all'unità familiare nel diritto dell'immigrazione: riflessioni generali di diritto costituzionale interno e comparato,* in R. Pisillo Mazzeschi, Pustorno P., Viviani A. (a cura di), *Diritti umani degli immigrati. Tutela della famiglia e dei minori,* Napoli, Editoriale Scientifica, 2010.

bili, il collocamento in comunità e garantendo il rimpatrio assistito e volontario[32];

- dare piena attuazione ai diritti a salute, istruzione e apprendistato, col rilascio di titoli conclusivi degli studi intrapresi anche se sia sopraggiunta la maggiore età[33].

6. *La tutela extrapenale, con particolare riguardo ai minori stranieri non accompagnati*

Il principio di ultima *ratio* che deve accompagnare la scelta di introdurre nuove tutele penali comporta una fondamentale premessa chiarificatrice.

Perché tale principio possa trovare effettiva applicazione occorre che gli strumenti extrapenali che si conviene essere i più adatti siano effettivamente posti in essere, che gli strumenti che si sono mostrati inadeguati siano stati migliorati fin dove possibile, che gli strumenti che hanno fallito siano stati applicati correttamente e dotati delle risorse necessarie per farli funzionare. Ricorrere alla norma penale declamando il principio di ultima ratio se tutto questo non è stato fatto è evidentemente il portato di un atteggiamento improntato alla falsa coscienza, che rinuncia alle risorse proattive per ragioni che, in realtà, corrispondono a un atteggiamento punitivista che, spesso per ragioni di consenso, trova più semplice e meno oneroso il ricorso alla sanzione penale.

La legge n. 47/2017 ha seguito responsabilmente, invece, la strada di rafforzare la tutela dei diritti dei minori stranieri non accompagnati uniformandosi ai suddetti obiettivi, da tempo indicati dagli organismi di protezione nazionale e internazionale[34], ricercando una più marcata efficacia generalpreventiva delle norme penali già esistenti, senza ricorrere a specifica e sostanzialmente inutile disciplina penalistica ulteriore, rite-

[32] L. Miazzi, “Il rimpatrio assistito del minore straniero: ancora un caso di diritto speciale?”, in *Diritto Immigrazione e Cittadinanza*, 2000.

[33] R. Bertozzi, *Le politiche sociali per i minori stranieri non accompagnati,* Milano, FrancoAngeli, 2005.

[34] R. Bichi (a cura di), *Separated children. I minori stranieri non accompagnati,* Milano, 2008; G. Tarzia, “Il minore straniero non accompagnato: quale tutela nel sistema legislativo italiano?”, in *Minori Giustizia*, 2008, 3.

nuta superflua in forza del già intervenuto aggiornamento delle fattispecie incriminatrici[35].

La tutela penale è stata opportunamente già ridisegnata più volte in funzione dei gravi rischi ai quali i fenomeni migratori espongono i minori e quindi va apprezzata la cura dimostrata nella scansione degli strumenti di prevenzione generale proattiva, tesi a realizzare un sistema protettivo non emergenziale – in vero molto ambizioso – che parte dall'affermazione di principio (art. 1) secondo la quale «i minori stranieri non accompagnati sono titolari dei diritti in materia di protezione dei minori a parità di trattamento con i minori di cittadinanza italiana o dell'Unione europea».

Il Parlamento ha approvato la legge in esame a seguito di indagine conoscitiva che ha coinvolto organizzazioni, istituzioni e qualificati esperti del settore, sancendo importanti principi, quali il divieto assoluto di respingimento alla frontiera dei minori stranieri non accompagnati e ha modificato la disciplina del divieto di espulsione aggiungendo all'unica ipotesi in cui è consentita (motivi di ordine pubblico e sicurezza dello Stato), la condizione che non ricorra rischio di danni gravi per il minore.

La procedura d'identificazione, rispetto alla quale appaiono elevati i rischi di invasività lesiva della dignità personale, deve ora svolgersi con unica modalità, accertando l'effettiva minore età in modo attento a salvaguardare i diritti fondamentali[36]. Molto incisiva è la disciplina dell'accoglienza, che rafforza con modalità appropriate, il ruolo dei Comuni in funzione delle già rimarcate esigenze, riconoscendo ai minori la fruizione dei servizi territoriali e disponendo che, al compimento della maggiore età, i richiedenti asilo rimangano nei centri di seconda accoglienza (Sprar) fino alla definizione della domanda di protezione internazionale.

Viene resa più celere l'indagine familiare dando preferenza, per legge, agli affidamenti familiari rispetto al collocamento in comunità, attraverso disposizioni specifiche[37]. La legge prevede inoltre la possibilità di rila-

[35] Si vedano: Ministero dell'Interno - Anci, *La tutela dei minori stranieri non accompagnati. Manuale operativo,* in www.siproimi.it; Unhcr, Unicef e altri, *Il sistema normativo a tutela dei minori stranieri non accompagnati,* in www.unhcr.it; Asgi, *La tutela dei minori stranieri non accompagnati. Manuale giuridico per l'operatore,* in www.asgi.it.

[36] ASGI, Norme sull'accertamento dell'età dei minori stranieri non accompagnati (23 gennaio 2017), in www.asgi.it.

[37] Si veda la scheda illustrativa e riepilogativa: Camera dei deputati, XVIII legislatura, Minori stranieri non accompagnati, in: https://temi.camera.it/leg18/temi/tl18_minori_stranieri_non_accompagnati.html.

sciare, due differenti titoli di legittimazione a rimanere nello Stato: il permesso di soggiorno per minore età ovvero quello per motivi familiari, disponendo che quest'ultimo sia ottenibile quando ricorra la presenza della tutela legale in capo a un cittadino italiano ovvero a un cittadino straniero regolarmente soggiornante e convivente con il tutore, ovvero quando il minore sia a lui affidato, oppure sia affidato di fatto a parente entro il quarto grado. L'originaria collocazione nel sistema *Sprar* (servizio protezione richiedenti asilo e rifugiati, smantellato dal Dl n. 113/2018 e sul quale il legislatore pare orientato a tornare sui propri passi), ha assunto la nuova denominazione *Siproimi (Sistema di protezione per titolari di protezione internazionale e minori non accompagnati).*

Viene inoltre prevista l'istituzione del Sistema informativo nazionale dei minori stranieri non accompagnati, presso il Ministero del lavoro e delle politiche sociali, nel quale confluiscono le singole cartelle sociali, compilate nella fase di prima accoglienza. Dai dati raccolti da tale sistema risulta che, nel 2019, sono stati censiti 6.054 minori stranieri non accompagnati, dei quali 5.737 maschi e 317 femmine[38].

Viene estesa l'assistenza sanitaria con l'iscrizione al Servizio sanitario nazionale, prima prevista solamente in presenza di permesso di soggiorno già rilasciato. Tale assistenza è comunque garantita sin dal momento del rintraccio sul territorio nazionale e sono incentivate misure delle istituzioni scolastiche e formative tese a garantire l'assolvimento dell'obbligo scolastico e formativo. Sul piano dei diritti personali, vengono rafforzate le garanzie sul piano della tutela della persona e della tutela legale, assicurando, nei diversi procedimenti, assistenza affettiva e psicologica, i diritti di: essere informato, nominare un legale di fiducia e fruire di gratuito patrocinio a spese dello Stato, con tutele rafforzate per le vittime di tratta (art. 17)[39].

[38] Si veda: Ministero del lavoro e delle politiche sociali, Direzione Generale dell'Immigrazione e delle Politiche di Integrazione, *Report mensile minori stranieri non accompagnati (msna) in Italia, Dati al 31 dicembre 2019,* in https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Pagine/Dati-minori-stranieri-non-accompagnati.aspx.

[39] Va rilevato che l'art. 16 della l. n. 17 luglio 2020, n. 77 che converte il Dl 19 maggio 2020, n. 34, il c.d. «Decreto rilancio» in materia di Covid-19, dispone che i posti disponibili nelle strutture del Sistema di protezione, per un termine non superiore ai sei mesi successivi alla cessazione dello stato di emergenza, possano essere utilizzati per l'accoglienza dei richiedenti protezione internazionale. Questo comporta la possibilità, secon-

In attuazione delle disposizioni della legge n. 47/2017 il Governo ha trasmesso alle Camere, per il prescritto parere, uno schema di regolamento che modifica quello attuativo del Tu sull'immigrazione in vigore[40].

Per il raggiungimento delle finalità di prevenzione generale dei reati ai danni dei minori stranieri non accompagnati, realizzata attraverso modalità significative di inserimento protetto nella società, le misure delle quali si propone l'introduzione nel regolamento sull'immigrazione, hanno portata decisiva. Incidono infatti sul rilascio dei permessi di soggiorno e sulla loro conversione in ordinario permesso di soggiorno al raggiungimento della maggiore età e, a questo proposito. Il regolamento sull'immigrazione, quindi, recepirà la semplificazione delle tipologie di permesso di soggiorno per i minori stranieri non accompagnati, disciplinando il permesso per minore età o per motivi familiari dei quali si è detto, regolando in termini attuativi la possibilità di svolgere attività lavorativa e formativa finalizzata all'accesso al lavoro, nel rispetto delle norme sul lavoro minorile, prevedendo in maniera specifica la conversione del titolo in vero e proprio permesso di soggiorno al compimento della maggiore età, anche nel caso di diniego della protezione internazionale.

L'effettiva attuazione del principio di *ultima ratio* richiede oramai in molti settori, primo fra tutti quello delle migrazioni, che mettono gravemente a repentaglio la tutela della persona umana e i diritti fondamentali, un approccio più saldamente orientato a valutare la loro tutela sostanziale, che non si appaga di essere riuscito, qualche volta, ad affermare la pur doverosa necessità di condannare i colpevoli, ma che richiede uno sforzo per intensificare l'azione proattiva volta a impedire che tali tutele siano quotidianamente calpestate.

do la prima e controversa interpretazione, che tutti i minori stranieri non accompagnati possano accedere anche ai servizi dei quali godono i titolari di protezione internazionale.

[40] Trattasi della proposta di *Regolamento recante modifiche al Dpr 31 agosto 1999, n. 394, in attuazione dell'articolo 22 della legge 7 aprile 2017, n. 47, recante misure di protezione dei minori stranieri non accompagnati.* Si veda: *Atti del governo sottoposti a parere,* n. 181, in https://www.camera.it/leg18/682?atto=181&tipoAtto=Atto&idLegislatura=18&tab=1.

Children on the move.
Criticità e prospettive europee[*]

CINZIA VALENTE[**]

SOMMARIO: 1. La protezione rafforzata per il minore straniero; 2. L'esempio italiano di tutela del minore straniero non accompagnato; 3. Le politiche europee; 4. Elementi di convergenza nei sistemi europei; 5. Tutela del minore straniero non accompagnato: *soft law* e cooperazione.

1. *La protezione rafforzata del minore straniero*

Negli ultimi decenni il fenomeno migratorio ha interessato il continente europeo coinvolgendo vari aspetti dell'organizzazione statale; Eurostat riporta che, nel 2018, 2,4 milioni di immigrati proveninenti da paesi extraeuropei hanno avuto accesso al nostro continente. Se consideriamo che nel 2019, 21,8 milioni di stranieri risultano vivere in Europa e rappresentano il 4,9% della popolazione, dobbiamo concludere che il fenomeno migratorio è ancora significativo[1].

Il massiccio arrivo di migranti stranieri sui territori nazionali ha imposto nuove scelte politiche, economiche e legislative. Accanto a quella di alcuni Paesi di contingentare i flussi migratori in entrata, altri hanno do-

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[1] Dati disponibili in https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migration_flows:_Immigration_to_the_EU-27_from_non-member_countries_was_2.4_million_in_2018.

vuto affrontare l'emergenza per gestire l'ingresso incontrollato di un numero consistente di migranti.

In entrambi i casi è stato necessario predisporre nuove strategie per adattare l'apparato istituzionale e normativo alla realtà di fatto. Pensiamo soprattutto alla necessità di predisporre strumenti di inclusione dei migranti e rimedi a tutela dei loro diritti fondamentali.

La presenza di minori tra i migranti ha amplificato le esigenze di protezione e ha richiesto azioni più specifiche.

È l'area del diritto che impone l'adozione di c.d. "tutele rafforzate"[2].

In questi casi, la vulnerabilità che caratterizza la minore età si aggiunge alla condizione di straniero nel territorio ospitante, con le questioni legate alla conoscenza della lingua, alle diverse tradizioni giuridiche e religiose, ai problemi di integrazione.

Il minore migrante richiede una protezione "aggiuntiva" quando arriva sul territorio straniero senza un adulto che possa prendersi cura di lui; si tratta di minori stranieri non accompagnati che partono sempre più spesso da soli alla ricerca di migliori condizioni di vita o arrivano nel territorio ospitante avendo perso il genitore o i parenti durante il viaggio. Oppure sono vittime di tratta, o chiedono asilo o protezione internazionale.

In tutti i casi, i minori sono segnati da una storia di sofferenza[3] che esige una protezione particolare. La mancanza di un adulto che si occupi del loro mantenimento, della loro educazione, crescita e che preservi il loro benessere rende necessaria la predisposizione di appositi strumenti che tengano conto della loro condizione di stranieri e quindi della fragilità che accompagna queste situazioni, compreso l'aspetto psicologico.

Proteggere il benessere dei bambini è un'esigenza riconosciuta a livello internazionale, ma i rimedi non sono sempre efficaci, soprattutto in un ambito, come quello dei minori stranieri, in cui mancano regole uniformi.

[2] M. Crock, L. B. Benson, *Protecting migrant children. In search of best practice*, Cheltenham, Elgar, 2018.

[3] F. Zambri, F. Marchetti, S. Colaceci, E. Benelli, D. Serra, M. Canevelli, N. Vanacore, A. Giusti, "Taking care of minor migrants health: the professionals perception and training needs", in *Ann Ist Super Sanità*, 2020, 56, 4, pp. 470-477.

Oggetto di questo contributo è l'analisi delle norme che disciplinano la condizione dei minori stranieri non accompagnati. Si procederà con lo studio del sistema italiano (e delle novità introdotte dalla riforma del 2017) nonché della normativa europea ed internazionale di riferimento; l'analisi dei sistemi giuridici europei[4] precederà alcune riflessioni conclusive sullo stato attuale della legislazione europea.

2. *L'esempio italiano di tutela del minore straniero non accompagnato*

L'evoluzione della legislazione italiana[5] in materia di minori stranieri non accompagnati è strettamente collegata alla storia della politica migratoria di questo paese; ciò è probabilmente dovuto al fatto che l'Italia è stata a lungo ed è, tuttora, destinazione di un numero considerevole di sbarchi[6] anche in ragione della posizione geografica e della sua struttura peninsulare.

Si tratta di fenomeno relativamente recente dal momento che il nostro ordinamento fino alla seconda guerra mondiale è stato caratterizzato da flussi migratori in uscita, mentre solo successivamente è divenuto destinazione di flussi in entrata di crescente entità, fino ai nostri giorni[7].

[4] Si noti che lo studio, avviato nel 2017, include anche l'ordinamento inglese e tiene conto delle conseguenze della Brexit.

[5] Sia consentito il rinvio per una più approfondita analisi del sistema italiano a: C. Valente, "L'accoglienza dei minori stranieri non accompagnati: un obiettivo raggiunto o raggiungibile", in *dirittifondamentali.it*, 2020, 2, pp. 1439 ss. (reperibile al seguente indirizzo http://dirittifondamentali.it/wp-content/uploads/2020/08/Valente-L'accoglienza-dei-minori-stranieri-non-accompagnati.pdf).

[6] I dati registrati nei primi giorni del 2021, indicano la presenza di 2.231 nuovi arrivi; si veda https://www.interno.gov.it/it/stampa-e-comunicazione/dati-e-statistiche/sbarchi-e-accoglienza-dei-migranti-tutti-i-dati.

[7] Si possono individuare quattro fasi migratorie: la prima dal dopoguerra agli anni 70 quando si passa da paese di emigrazione a paese di immigrazione in cui in generale il flusso migratorio si sposta dalle ex colonie verso il continente europeo; la seconda a partire dagli anni settanta, spinta dall'idea di benessere del boom economico, fino alla caduta del muro di Berlino; la terza dal 1989 alla crisi economica del 2008 ed infine quella successiva fino ad oggi. Sul tema la bibliografia è ampia si vedano in particolare: M. Colucci, *Storia dell'immigrazione straniera in Italia. Dal 1945 ai giorni nostri*, Roma, Carocci, 2018; C. Mantovan, *Immigrazione e cittadinanza. Auto-organizzazione e partecipazione dei migranti in Italia*, Milano, FrancoAngeli, 2007; P. Bevilacqua, A. De Clementi, E.

Abbiamo assistito al susseguirsi di atti legislativi finalizzati anzitutto a regolamentare l'immigrazione[8] e poi a garantire i diritti dei migranti; i minori in questi testi hanno avuto una posizione marginale, in parte, perché tale materia "assorbita" da quella dedicata agli adulti (che si doveva combinare con i principi dell'area minorile) ed in parte perché il fenomeno dei minori migranti (soprattutto di quelli "soli") è diventato imponente solo negli ultimi decenni. Ai minori dunque sono state a lungo norme di dettaglio, laddove era indispensabile intervenire per specifiche esigenze (si pensi ad esempio all'accertamento dell'età).

Franzina, *Storia dell'emigrazione italiana. I. Partenze*, Roma, Donzelli, 2001; S. Baldi, R. Cagiano de Azevedo, *La popolazione italiana verso il 2000. Storia demografica dal dopoguerra ad oggi*, Bologna, il Mulino,1999; M.E. Tonizzi, *Le grandi correnti migratorie del 900*, Torino, Paravia, 1999.

[8] È interessante notare come tra le prime norme in tema di migranti vi era la legge 30 dicembre 1986 n. 943 (c.d. Legge Foschi) integralmente dedicata alla disciplina dell'aspetto lavorativo dei migranti che affermava la parità di pari diritti tra i lavoratori extracomunitari rispetto a quelli legalmente residenti sul territorio nazionale (art. 1). I testi che si succedono nel tempo aprono timidamente la strada alla affermazione dei diritti sociali e di quelli fondamentali in generale; la legge Martelli, prima, (nel 1990) e la Turco Napolitano (nel 1998), poi, sono caratterizzate dalla necessità di scoraggiare l'ingresso in clandestinità ma anche di migliorare la condizione giuridica dei migranti regolari; accanto a questo, anche la necessità di combattere la discriminazione e gli atti di xenofobia portano alla promulgazione della Legge Mancino (decreto-legge 26 aprile 1993, n. 122, coordinato con la legge di conversione 25 giugno 1993, n. 205, recante: "Misure urgenti in materia di discriminazione razziale, etnica e religiosa") e del decreto Dini, in realtà decaduto in quanto mai convertito in legge. L'adozione del Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulle condizioni dello straniero nel 1998 segna il primo momento di riorganizzazione della legislazione in materia di immigrazione e consente di fissare alcuni principi essenziali tra i quali anche il diritto al ricongiungimento familiare. Gli atti successivi (c.d. Legge Bossi-Fini del 2002) sono influenzati dalla intensità dei flussi in entrata e dunque dalla volontà di contingentare gli ingressi e di "costringere" alla regolarizzazione i clandestini (si introducono nuove figure di reato e si inaspriscono le pene come conferma anche la successiva L. 15 luglio 2009 n. 94 denominata appunto "Disposizioni in materia di pubblica sicurezza, preceduta dalla legge 24 luglio 2008 n. 125"; sulla regolamentazione anche dell'accoglienza si veda Decreto Legge 30 ottobre 1995 n. 541 convertito nella Legge 29 dicembre 1995 n. 563. Più recente il decreto-legge 4 ottobre 2018, n. 113, coordinato con la legge di conversione 1° dicembre 2018, n. 132, recante, tra l'altro, disposizioni urgenti in materia di protezione internazionale e immigrazione e sicurezza pubblica; ed ancora L. 8 agosto 2019, n. 77 (di conversione del Decreto-Legge 14 giugno 2019, n. 53).

La conseguenza è stata una disciplina frammentata e di difficile "gestione" nella soluzione delle singole problematiche, soprattutto in quegli ambiti in cui la legislazione di livello statale si è dovuta integrare con quella locale (di competenza regionale o degli enti locali, ad esempio in ambito di accoglienza).

Ciò ha fatto registrare prassi differenti a scapito, talvolta, del principio di uguaglianza.

Le regole relative al diritto dei migranti (che riguardavano, si ripete, essenzialmente gli adulti) sono state spesso combinate con quelle internazionali e quelle nazionali in tema di minori (e famiglia).

Non si ignori la difficoltà di integrare le disposizioni sopra menzionate con quelle di carattere "amministrativo" e locale che riguardano gli aspetti più pratici; si pensi ai rapporti tra i minori e le istituzioni coinvolte nella gestione della loro accoglienza, all'inserimento scolastico, alla tutela della salute.

Ne sono derivate una profonda incertezza nell'individuazione degli standard di riferimento e una diversa applicazione delle disposizioni, con il rischio di un differente trattamento di casi simili.

La stessa definizione di minore straniero non accompagnato è stata, a lungo, limitata da specifici atti legislativi e dettata per particolari esigenze; così che in alcuni casi solo il minore straniero non accompagnato richiedente asilo poteva accedere a determinate tutele, mentre la mancata richiesta di protezione escludeva il minore stesso da altre garanzie.

La presenza di una carta costituzionale e l'adesione del nostro ordinamento alle convenzioni internazionali, nonché la partecipazione all'Unione europea, hanno ovviamente assicurato la tutela dei diritti fondamentali.

È rimasto, per lungo tempo, invece, il problema del coordinamento di fonti normative di diversa natura, che ha rischiato di annullare di fatto la tutela del minore; per fare un esempio, bisogna considerare che, sebbene la salute sia un diritto essenziale, la sua tutela poteva essere vanificata dalla mancanza del permesso di soggiorno. In altre parole, il ritardo nell'emissione di questo documento (che a volte dipendeva dalla mancata identificazione del soggetto) ha talvolta impedito l'accesso ai servizi sanitari pubblici; le procedure amministrative o la loro tempistica pure hanno costituito un ostacolo per usufruire di un diritto di natura costituzionale.

Questa situazione e molte altre hanno ritardato l'attuazione dei diritti fondamentali e creato problemi di bilanciamento nella soluzione di singoli casi in cui il benessere del minore rischiava di soccombere.

Le disposizioni rilevanti relative ai minori stranieri non accompagnati sono state "disperse" a livello nazionale in diversi atti (che si aggiungono alle fonti di livello internazionale ed europeo): la Costituzione[9], il codice civile[10], la legge in tema di affidamento familiare ed adozione[11], leggi sulla migrazione[12], diritto internazionale privato[13], leggi regionali (in parti-

[9] Si pensi all'art. 2 (principio di non discriminazione), all'art. 3 (principio di uguaglianza), all'art. 29 (diritti della famiglia), art. 30 (tutela dei figli), art. 32 (diritto alla salute), artt. 33 e 34 (diritto all'istruzione). Si veda sul punto A. Patroni Griffi, *Lineamenti della tutela costituzionale dei minori stranieri*, in R. Pisillo Mazzeschi, P. Pustorino, A. Viviani (a cura di), *Diritti umani degli immigrati: tutela della famiglia e dei minori*, Napoli, 2010, Editoriale Scientifica, p. 257 ss.

[10] Si veda, in particolare, il titolo IX (Della responsabilità genitoriale e dei diritti e doveri del figlio), il titolo X (della tutela e della emancipazione), il titolo XI (dell'affiliazione e dell'affidamento).

[11] Legge 4 maggio 1983 n. 184 come modificata dalla legge 28 marzo 2001, n. 149.

[12] Questa categoria include atti di diversa natura e si sono succeduti nel tempo; ci riferiamo ad esempio a testi già anche citati e di cui si forniscono i dettagli di riferimento: legge 28 febbraio 1990 n. 39 (c.d. Legge Martelli); legge 6 marzo 1998 n. 40 (c.d. Legge Turco-Napolitano), Decreto legislativo 25 luglio 1998 n. 286 (Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero il cui articolo 2 riconosce espressamente i di ritti fondamentali degli stranieri ed il pari trattamento quanto alla tutela amministrativa e giurisdizionale); Decreto del Presidente della Repubblica 31 agosto 1999 n. 394; Decreto del Presidente del Consiglio dei Ministri 9 dicembre 1999 n. 535; Legge 30 luglio 2002 n. 189 (c.d. Legge Bossi – Fini emendata dalla legge 15 luglio 2009 n. 94); Decreto legislativo 30 maggio 2005 n. 140 (di attuazione della direttiva 2003/9/CE); Decreto legislativo 19 novembre 2007 n. 251 (c.d. "Decreto Qualifiche"); Decreto Legislativo 28 gennaio 2008 n. 25 (di attuazione della direttiva 2005/85/CE); Decreto legislativo 3 ottobre 2008 n. 160 (di attuazione della Direttiva 2003/86/CE); Decreto Legge 23 febbraio 2009 n. 11 convertito in Legge 23 aprile 2009 n. 38 (di attuazione della Direttiva 2008/115/CE); Decreto legislativo 18 agosto 2015 n. 142. Questo ultimo in particolare di attuazione delle direttive europee (2013/33/UE e 2013/32 /UE); Decreto legge 17 febbraio 2017 n. 13 convertito in Legge 13 aprile 2017 n. 46.

[13] Legge 31 maggio 1995 n. 215.

colare per regolare i servizi offerti a livello locale), decreti ministeriali[14], circolari ministeriali [15] e protocolli.

La difficoltà di orientarsi è stata aggravata dalla necessità di individuare le norme che potevano meglio adattarsi alle esigenze dei minori stranieri non accompagnati. Questa precisazione vale soprattutto con riferimento all'area del diritto dell'immigrazione che si presenta a sua volta molto eterogenea[16].

Un primo serio tentativo di riorganizzazione della materia è la legge 7 aprile 2017 n. 47 (c.d. Legge Zampa "Disposizioni in materia di protezione dei minori stranieri non accompagnati"[17]) sulla quale concentreremo la nostra attenzione per descrivere lo stato attuale della tutela dei minori in Italia.

Si precisa che l'adozione di questa legge non ha escluso completamente il ricorso ad altre fonti normative, ma fissa i principi-base e funge da "legge quadro" nella interpretazione anche delle altre disposizioni.

[14] Per esempio, si veda il Decreto del Ministro degli Interni 1 settembre 2016 "Istituzione di centri governativi di prima accoglienza dedicati ai minori stranieri non accompagnati" (disponibile in https://www.gazzettaufficiale.it/eli/id/2016/09/08/16A06605/sg).

[15] Ad esempio: Circolare del Ministero dell'Interno 27 novembre 2002 n. 3154 (relativo alla regolamentazione dei centri di accoglienza); Decreto interministeriale del 16 febbraio 2006 per l'accoglienza temporanea.

[16] Sullo stato della disciplina precedente la riforma si veda: L. Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in *Minorigiustizia*, 2010, 2, p. 8; R. Conti, "Diritti fondamentali, soggetti vulnerabili e obiettivi di un "articolato" cammino interno", in *questionegiustizia*, 8 febbraio 2014; P. Morozzo della Rocca, "La condizione giuridica del minore straniero: norme, giurisdizione e prassi amministrative", in *Minoriegiustizia*, 2002, 3, p. 29; A. Martone, "Il trattamento dei minori stranieri non accompagnati", in G. Caggiano, *I percorsi giuridici per l'integrazione: migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, Giappichelli, 2014.

[17] Sul tema si veda P. Morozzo Della Rocca, *Immigrazione, Asilo e Cittadinanza. Discipline e orientamenti giurisprudenziali*, Rimini, Maggioli, 2018 p. 166 ss.; C. Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati): luci ed ombre", in *Diritto, Immigrazione e Cittadinanza*, 2017, 2, pp. 2 ss.; P. Morozzo della Rocca, "Luci e ombre della nuova disciplina sui minori stranieri non accompagnati", in *Politica del diritto*, 2017, 4, p. 581 ss.; C.I. Martini, "La protezione del minore straniero non accompagnato tra accoglienza e misure di integrazione", in *Le Nuove leggi civili commentate,* 2018, pp. 385 ss.

Tra i meriti di questa legge c'è quello di avere preso atto della assenza di una regolamentazione uniforme ed avere posto tra i suoi obiettivi quello di rappresentare una disciplina "stabile" e non anche solo emergenziale.

È finalmente individuata una unica definizione[18] di minore straniero non accompagnato nella quale rientrano i soggetti, di età inferiore a 18 anni, che non hanno cittadinanza italiana o europea[19] e si presentano privi di un adulto di riferimento. È escluso[20] qualsiasi riferimento alla protezione internazionale o richiesta di asilo[21] o allo stato di apolide[22] conformemente alla risoluzione del Consiglio d'Europa n. 97/C211/03 del 26 giugno 1997. Rimane tuttavia garantita una più specifica tutela anche per i minori vittima di tratta[23] e richiedenti asilo[24].

[18] Art. 2, L. 7 aprile 2017 n. 47: *"Ai fini di cui alla presente legge, per minore straniero non accompagnato presente nel territorio dello Stato si intende il minorenne non avente cittadinanza italiana o dell'Unione europea che si trova per qualsiasi causa nel territorio dello Stato o che è altrimenti sottoposto alla giurisdizione italiana, privo di assistenza e di rappresentanza da parte dei genitori o di altri adulti per lui legalmente responsabili in base alle leggi vigenti nell'ordinamento italiano"*.

[19] Questa specificazione non era invece prevista in alcuni atti precedenti come il d.lgs. 30 maggio 2005 n. 140.

[20] Diversamente la distinzione compariva nel decreto del Ministero degli Interni del 1 settembre 2016 già citato.

[21] Requisito questo richiesto dall'art. 1 del d.p.c.m. 9 dicembre 1999 n. 535.

[22] Elemento questo richiesto ai sensi dell'art. 2 del d.lgs. 7 aprile 2003 n. 85.

[23] Il minore vittima di tratta è quello che è stato reclutato e trasferito con l'uso di minaccia o della forza o soggetto a qualsiasi forma di coercizione o rapimento o inganno ai fini dello sfruttamento per prostituzione o sessuale, lavoro forzato, schiavitù, accattonaggio, prelievo di organi o adozione illegale o matrimonio. Per questa tipologia di situazioni la Legge Zampa ha introdotto misure addizionali alla legge 11 agosto 2003 n. 228, prevedendo un programma specifico di assistenza psico-sociale, ma anche sanitaria e legale e che assicuri forme adeguate di accoglienza (si deciderà, caso per caso, se inserirli nei contesti dedicati ai minori stranieri non accompagnati o a quelli vittime di tratta ma non esclusivamente dedicati ai minori); non solo, è prevista la possibilità di usufruire di assistenza legale ai fini della richiesta di risarcimento del danno subito.

[24] La disciplina del minore richiedente protezione internazionale è contenuta nel d.lgs. 18 agosto 205 n. 142, d.lgs. 28 gennaio 2005 n. 25 e d.lgs. 19 novembre 2007 n. 251, d.l. 17 febbraio 2017 n. 13. Si tratta del minore che manifesta il fondato timore che il rientro nel proprio paese possa essere perseguitato; l'istanza per la protezione internazionale potrà essere avanzata dal minore in presenza del tutore o del responsabile della struttura di accoglienza. Si apre a questo punto una procedura per valutare la sussistenza dei requisiti per accedere alla protezione innanzi alla Commissione Territoriale per il Riconoscimento della Protezione Internazionale che prevede anche il colloquio con il minore.

Il principio guida di questa legge è contenuto nell'art. 1 nel quale, non solo, si riconosce la parità di diritti ai minori stranieri ma si riconosce espressamente la loro particolare vulnerabilità[25].

Questo ultimo criterio non potrà che costituire criterio anche di interpretazione sistematica in questa materia. Se la vulnerabilità è la caratteristica essenziale del minore che ne ha imposto, in generale, una tutela rafforzata, la sua esplicitazione deve essere considerata un *quid pluris* all'attuazione della sua tutela. Si potrebbe allora immaginare che simile concetto sia stato introdotto per essere utilizzato ai fini della migliore garanzia del *welfare principle*[26] per attuare tutele "speciali" (si pensi al rim-

La Commissione potrà concedere lo *status* di rifugiato (se c'è il rischio di persecuzione per motivi di razza, religione, nazionalità, idee politiche), protezione sussidiaria (se sussiste il rischio di subire un grave danno quale morte, tortura, trattamento inumano o minaccia grave alla persona) o protezione speciale (quando esistono fondati motivi per ritenere che al rientro nel paese di origine il minore possa essere perseguitato o sottoposto a tortura) e da ultimo casi speciali (protezione da violenza o sfruttamento o necessità di cure mediche, calamità naturali, ecc.). Premesso che l'accoglienza dei minori richiedenti protezione internazionale è la medesima dei minori stranieri non accompagnati, avendo esteso a questi ultimi i centri destinati ai primi, le misure aggiuntive previste richiedono che il colloquio personale avvenga alla presenza del tutore o del genitore o di chi esercita i poteri tutelari, la legittimazione attiva alla richiesta appartiene anche al responsabile della struttura di accoglienza e legittimati a ricevere la domanda sono le questure o gli uffici di polizia di frontiera; è prevista l'assistenza legale. Quando la domanda viene avanzata da minore straniero non accompagnato si dovrà procedere contestualmente alla nomina del tutore. Sul tema si veda F. Lenzerini, *Asilo e diritti umani. L'evoluzione del diritto d'asilo nel diritto internazionale*, Milano, Giuffrè, 2009; B.M. Bilotta, F.A. Cappelletti (a cura di), *Il diritto d'asilo*, Padova, Cedam, 2006; M. Sedmak, B. Sauer, B: Gornik, *Unaccompanied Children in European Migration and Asylum Practices In Whose Best Interests?*, New York, Routledge, 2018; S. Peer, M. Garlik, V. Moreno Lax, E. Guild, *EU Immigration and Asylum Law: A Commentary*, Bill Nijhoff, 2015.

[25] Si veda sul concetto di vulnerabilità R. Conti, "Diritti fondamentali, soggetti vulnerabili: tappe e obiettivi di in articolato "cammino" interno", in *questionegiustizia*, 8 febbraio 2014.

[26] È principio questo nel nostro ordinamento di valenza costituzionale; il minore viene garantito sia come individuo in "divenire" sia come persona all'interno della comunità sociale che richiede protezione anche contro le stesse formazioni sociali cui appartiene (si pensi in primis alla famiglia); in tal senso si veda E. Lamarque, P*rima i bambini. Il principio del* best interest of the child *nella prospettiva costituzionale*, Milano, FrancoAngeli, 2016, p. 37. Sul tema si consulti anche M. Freeman, *The best interest of the child? Is the best interest of the child in the best interest of the children?*, in *Family, State, and Law, Ashgate*, 1999; L. Lenti, "Note critiche in tema di interesse del minore", in *Rivista di di-*

patrio assistito) e rafforzare quelle già esistenti (quali ad esempio il diritto di ascolto del minore[27]).

I propositi della legge sono dichiaratamente quelli di mettere ordine alla tutela dei minori ed in particolare identificare le misure di accoglienza dedicate nonché rafforzare le difese e i diritti[28]; l'integrazione è anche un caposaldo di questa riforma che vuole porre le basi per una inclusione destinata a operare anche dopo il raggiungimento della maggiore età (art. 13) al fine di consentire l'evoluzione del sistema verso la modernizzazione di questa area[29].

Preliminare all'applicazione di questa disciplina è naturalmente la identificazione del minore e di conseguenza l'accertamento della sua età.

Sebbene valga la presunzione di minore età, laddove sia impossibile dirimere la questione, la riforma ha attivato un procedimento volto alla acquisizione dei dati rilevanti. Si rinvia a quanto più approfonditamente descritto in questo libro nel contributo dedicato a questo argomento,

ritto civile, 2016, 1, p. 90; P. Alston, B. Gilmour-Wish, *The best interest of the child. Towards a sinthesis of children's rights and cultural values*, Firenze, Innocenti Studies, 1999.

[27] Interessante la circostanza che la legge utilizza il termine colloquio in sostituzione di ascolto. È stato da taluni ipotizzato che a tale differenza terminologica corrisponda una differenza sostanziale; l'ascolto impone un ruolo attivo del minore e la disponibilità di colui che ascolta a valutare le scelte dello stesso; il colloquio al contrario porta con sé il rischio del condizionamento da parte dell'adulto nella fase dialettica. La lettura sistematica della legge Zampa ed il ruolo riconosciuto al minore nello stesso testo ma anche nell'ordinamento come modificato negli ultimi decenni dalle riforme anche in tema di diritto di famiglia (norme che incidentalmente si applicano ai minori stranieri) devono portare a concludere che il colloquio deve includere l'ascolto del minore. Tanto lo si giustifica facilmente se si pensa che la sua opinione è essenziale nella collocazione del minore ed delle scelte che lo riguardano (sull'eventuale rimpatrio assistito, sull'accertamento dell'età, sulle scelte scolastiche, trattamenti sanitari, ecc.) anche e soprattutto nella definizione del suo progetto di inserimento sociale; sul punto si veda anche M. Cirese, *Minori migranti. Diritti e tutela dei legami familiari*, Milano, Giuffrè, 2020, p. 58.

[28] Si veda la prefazione dell'on. Sandra Zampa in T. Bruno, I minori stranieri non accompagnati. Analisi ragionata della l. 7 aprile 2017 n. 47, Piacenza, La Tribuna, 2017.

[29] Si legga R. Senigaglia, "Considerazioni critico-ricostruttive su alcune implicazioni civilistiche della disciplina sulla protezione dei minori stranieri non accompagnati", in *juscivile*, 2017, 6, pp. 710 ss.; sul tema la bibliografia è ampia, a titolo di esempio: A. Cordiano, "Prime riflessioni sulle disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", in *Nuova Giurisprudenza civile commentata*, 2017, 9, p. 1299 ss.; C. Bonifazi, P. Demurtas, "I minori stranieri non accompagnati: dimensioni e caratteristiche nello scenario europeo ed italiano", in *minorigiustizia*, 2017, 3, pp. 33 ss.

pur rilevando in via sintetica come il procedimento descritto nella riforma (art. 5) si sviluppa in fasi in cui l'approfondimento diviene gradatamente più invasivo[30].

Al primo colloquio[31] con lo psicologo dell'età evolutiva (ed alla presenza del mediatore culturale) finalizzato ad accertare la condizione personale del minore, la storia personale ed acquisire i dati per la sua identificazione segue l'acquisizione dei documenti che ne possano attestare la sua identità ed età.

Questa ultima fase diviene eventuale in quanto non potrà essere avviata la collaborazione con le autorità del paese di origine nel caso in cui il minore abbia richiesto protezione o l'esigenza di tale protezione emerge in corso di colloquio o infine quando il minore si sia opposto al coinvolgimento delle autorità nazionali.

Permanendo dunque il dubbio sull'età, il Tribunale per i Minorenni[32] potrà autorizzare l'avvio di accertamenti clinici che dovranno essere svolti in ambiente idoneo, con metodologia poco invasiva, nel rispetto dell'età presunta, del sesso e dell'integrità fisica e psichica del minore.

La criticità legata a tale aspetto è stata la mancata adozione, nell'immediata promulgazione della legge, di una procedura standardizzata[33]

[30] Si veda anche J. Moyersoen, "Minori non accompagnati: l'articolata ed ostica questione dell'accertamento dell'età", in *Minoriegiustizia*, 2017, 3, p. 78.

[31] La legge ha richiesto la promulgazione di un decreto del Presidente del Consiglio dei Ministri per standardizzarne la procedura.

[32] Si veda G. Vecchione, *La Corte di Cassazione ed il rompicapo delle competenze in materia di minori stranieri non accompagnati*, in *minorigiustizia*, 2017, p. 211.

[33] Anche su questo tema precedentemente alla riforma si erano imposte diverse soluzioni supportate da altrettanto differenti protocolli: "Protocollo per l'identificazione e per l'accertamento olistico multidisciplinare dell'età dei minori non accompagnati" della Conferenza delle Regioni e delle Province autonome del 3 marzo 2016 (in https://www.minori.gov.it/sites/default/files/protocollo_identificazione_msna.pdf); Parere del Consiglio Superiore di Sanità "Accertamento dell'età dei minori non accompagnati", 2009 (in http://www.asgi.it/wp-content/uploads/2015/03/Parere-Consiglio-Superiore-Sanit%C3%A0.pdf); UNHCR, "L'accertamento dell'età dei minori stranieri non accompagnati e separati in Italia", 2014 (in https://www.unhcr.it/wp-content/uploads/2016/01/accertamento.pdf); Protocollo di intesa per l'accertamento di identità dei sedicenti minori promosso dalla Procura della Repubblica presso il Tribunale per i Minorenni del Piemonte e della Valle d'Aosta, 2014 (in http://www.asgi.it/wp-content/uploads/2015/03/Protocollo-Procura.pdf); Protocollo di intesa per accertamento dell'età dei minori migranti non accompagnati del Comune di Napoli nell'ambito dei procedimen-

che potesse evitare un'applicazione differente a livello locale e risolvesse anche il problema della "invasività" degli accertamenti socio-sanitari, con particolare riferimento alle valutazioni auxologiche (e con indicazione del margine di errore).

Si deve segnalare il recente accordo siglato in data 9 luglio 2020 dalla Presidenza del Consiglio dei Ministri con le Regioni e le autonomie locali per l'adozione di un Protocollo multidisciplinare concernente la determinazione dell'età dei minori stranieri non accompagnati[34] che regolamenta e scandisce le fasi dell'accertamento, il personale coinvolto, le tempistiche e che ha quale presupposto indefettibile l'informativa fornita al minore in relazione alla sua capacità di discernimento[35] e richiede la sua collaborazione.

Non si dimentichi, in questo ambito, il ruolo svolto dall'Autorità Garante dell'Infanzia e dell'Adolescenza che ha fortemente raccomandato la piena applicazione delle misure di cui alla riforma e la disincentivazione di procedure di accertamento non necessarie.

Il rafforzamento delle tutele e dei diritti del minore inizia con la previsione di divieto di respingimento e di espulsione (quest'ultimo derogato solo nelle ipotesi in cui non vi sia un rischio di gravi danni per il minore); sempre l'interesse del minore guida anche la previsione di rimpa-

ti civili e penali, 2013 (in http://www.asgi.it/wp-content/uploads/2015/03/protocollo-di-intesa-per-accertamento-dell-et%C3%A0-FIRMATO.pdf); Proposta di protocollo sull'accertamento dell'età presentata da ASGI al Tavolo inter-istituzionale del progetto NOMIS, 2014 (in http://www.asgi.it/wp-content/uploads/2015/03/Proposta-di-protocollo-sullaccertamento-dellet%C3%A0_Tavolo-interistituzionale-NOMIS.pdf), nonché il Protocollo di in uso presso il Tribunale per i Minorenni di Milano del 11 febbraio 2020 (reperibile in https://www.procmin.milano.giustizia.it/it/News/Detail/173881).

[34] Reperibile in http://www.statoregioni.it/media/2751/p3-cu-atto-rep-n-73-9lug2020.pdf.

[35] Generalmente ai fini di acquisire il parere del minore si suole distinguere il bambino infra-dodicenne da quello ultra-dodicenne essendo tale età convenzionalmente fissata per l'attribuzione della capacità di intendere e di volere. Nel caso di specie vi sono situazioni nelle quali tale distinzione non è possibile effettuare; diviene allora indispensabile acquisire il suo punto di vista sempre e sottoporre all'autorità giudiziaria l'eventuale decisione definitiva nella necessità di valutare se la scelta espressa dal minore (e dal suo tutore) sia conforme al suo benessere.

trio assistito[36] nel caso in cui il ricongiungimento[37] con la famiglia appaia conforme alla volontà dello stesso.

Tra i diritti fondamentali, oltre quello alla difesa, all'ascolto ed alla partecipazione a tutti i procedimenti amministrativi e giudiziari che lo vedono coinvolto, compaiono, espressamente disciplinati (art. 14), il diritto alla salute e quello all'istruzione, entrambi garantiti anche in pendenza di richiesta di permesso di soggiorno[38].

È sancito infatti l'obbligo di iscrizione al Servizio Sanitario Nazionale che consente l'accesso alle cure, come quello di iscrizione alla scuola fino all'età di 16 anni (limite imposto per l'obbligo scolastico).

Anche in questi ambiti non sono tuttavia mancate alcune criticità legate alla sfera applicativa di tali diritti; nel primo caso il problema è rappresentato ancora una volta dalla mancanza di prassi condivise in ordine alla iscrizione al servizio sanitario, in attesa del rilascio di permesso di soggiorno o di conclusione del procedimento di identificazione del minore che condizionano a loro volta il rilascio del codice fiscale e della dichiarazione di residenza. Ciò impedisce l'inserimento dei dati nel sistema informatico sanitario e dunque porta allo stallo nella erogazione del servizio; il rilascio del codice regionale STP (Straniero Temporaneamente Presente) ha talvolta consentito di aggirare l'ostacolo.

Il diritto all'istruzione (ossia l'accesso all'intero sistema educativo: dalla scuola dell'infanzia a quella superiore di secondo grado) costituisce un

[36] Art. 8, Legge Zampa. Il provvedimento è emesso dal Tribunale per i Minorenni a seguito dell'ascolto del minore, del tutore e valutata la relazione dei servizi sociali inerenti le condizioni del paese ospitante; preliminari sono ovviamente anche le indagini familiari svolte nel paese di origine con la collaborazione di quelle autorità. Anche in questo caso si necessita di protocolli attuativi sia con riferimento alla procedura di rimpatrio vero e proprio e, prima ancora, per il coordinamento con le autorità straniere ai fini stipulare convenzioni con organizzazioni internazionali, intergovernative e associazioni umanitarie, nello svolgimento delle indagini familiari volte a rintracciare i familiari dei minori stranieri non accompagnati. Si veda sul punto anche il report 2019 dell'Autorità Garante per l'Infanzia e l'adolescenza (in https://www.garanteinfanzia.org/sites/default/files/movimenti-minori-stranieri-frontiere-settentrionali.pdf).

[37] A. Arnull, "Family riunification and fundamental rights", in *England Law Review*, 2006, p. 611; R. Strick, B. De Hart, E. Nissen, *Family reunification: a barrier or facilitator of integration: a comparative study*, Nijmegen, Wolf Legal Publisher, 2013.

[38] La precedente disciplina di cui all'art. 34, d.lgs., 25 luglio 1998 n. 286 richiedeva per l'accesso al servizio nazionale sanitario il regolare permesso di soggiorno.

riconoscimento di particolare importanza anche per i riflessi che comporta sulla eventuale permanenza del soggetto nel territorio nazionale dopo il raggiungimento della maggiore età; da un alto, l'inserimento scolastico o in un percorso formativo successivo agevolano l'integrazione del minore e, dall'altro, ma al primo aspetto collegato, la necessità di proseguire gli studi o l'avvio all'attività lavorativa divengono elementi rilevanti nella decisione sul proseguo amministrativo, ossia quel procedimento che consente al soggetto diventato maggiorenne di evitare il rimpatrio.

Quanto all'inserimento scolastico questo può avvenire in qualsiasi momento dell'anno e per qualsiasi ordine e grado; la valutazione sull'inserimento è affidata al collegio dei docenti che tengono conto del corso di studi precedente, del livello di preparazione, adattando il programma di insegnamento, anche attraverso l'attivazione di corsi di consolidamento della lingua italiana. In questo ambito l'elaborazione di linee operative è diventata essenziale per garantire l'effettività della tutela.

Risale al 2014 l'istituzione dell'Osservatorio nazionale per l'integrazione degli alunni stranieri e per l'inter-cultura[39] con il compito, tra l'altro, di promuovere l'inclusione dello studente straniero e verificare l'attuazione delle misure proposte, incoraggiando accordi tra le istituzioni; propositi rinnovati con la costituzione del nuovo Osservatorio nel 2017[40] che si avvantaggia della partecipazione al progetto delle associazioni dei giovani di cittadinanza non italiana.

Le linee guida in materia[41] propongono modelli di integrazione e suggeriscono criteri di distribuzione per favorire l'eterogeneità delle cittadinanze nella composizione delle classi (in genere il livello di presenza di

[39] DM del 5 settembre 2014 n. 718 (in https://www.istruzione.it/allegati/2014/decreto_intercultura.pdf).

[40] DM 31 agosto 2017, n. 643 (in https://www.camera.it/temiap/2018/05/31/OCD177-3583.pdf), poi integrato con DM 20 settembre 2017, n. 685 (in https://www.camera.it/temiap/2018/05/31/OCD177-3583.pdf).

[41] Linee Guida per l'accoglienza e l'integrazione degli alunni stranieri (in https://www.istruzione.it/allegati/2014/linee_guida_integrazione_alunni_stranieri.pdf) ed ancora più recenti del le "Linee guida per il diritto allo studio deli minori fuori dalla famiglia di origine" elaborate dal Ministro dell'Istruzione, dell'Università e della Ricerca con il Garante nazionale dell'Infanzia e dell'Adolescenza (in https://www.miur.gov.it/documents/20182/2223566/linee_guida_per_il_diritto_allo_studio_delle_alunne_e_degli_alunni_fuori_dalla_famiglia_di_origine.pdf/55f8d934-a413-485f-20bc-9efbd2cb93b2?t=1564667202328).

stranieri nelle classi è fissato al 30%[42]) e la formazione dei docenti neoassunti anche nel campo della inter-cultura. Da menzionare anche la istituzione in ciascuna scuola secondaria di un referente per l'inclusione con il compito specifico, da un lato, di fungere da raccordo tra istituti ed enti di formazione per consentire l'acquisizione del titolo di studio ai minori stranieri che ne siano privi e, dall'altro, segnalare situazione di difficoltà, con conseguente rischio di abbandono, al fine di supportare l'antidispersione.

L'esercizio di tali diritti è spesso condizionato dalla nomina del tutore volontario (art. 11 Legge Zampa). È questa una figura già nota nel nostro ordinamento e che richiama i principi del codice civile in tema di tutela, ma i cui compiti e competenze la riforma ha reso "speciali".

Il tutore affianca il minore che sia sprovvisto dei genitori o di una persona per lui legalmente responsabile; si occupa, nella visione tradizionale di questo istituto, degli aspetti "economici" del pupillo, essendo il suo legale rappresentante.

È questo tratto che, nel caso di minori stranieri non accompagnati, assume una valenza ridotta per espandersi invece la funzione di cura ed assistenza. Il minore straniero difficilmente ha un patrimonio da gestire o preservare, quanto meno al suo arrivo sul territorio nazionale, necessita invece di una serie di "attenzioni" che gli consentano di esercitare i suoi diritti anche essenziali.

Il tutore allora è colui che si fa interprete di questi bisogni e che ne cura l'attuazione: dalla richiesta del permesso di soggiorno, alla istanza per la protezione internazionale, alla richiesta della iscrizione a scuola ed al servizio sanitario, alla ricerca di idonea collocazione in centri di seconda accoglienza o presso famiglie affidatarie, dalla "assistenza" alla procedura di identificazione ed accertamento dell'età, al rilascio di consenso alle cure, etc.

Il tutore[43] si deve fare carico delle necessità di vita del minore assumendo un compito complesso che include il progetto sia assistenziale che educativo, vicariando l'assenza genitoriale con l'assunzione di cura e re-

[42] Per i dati relativi all'afflusso scolastico si veda il report della Camera dei Deputati, L'integrazione scolastica dei minori stranieri, 15 maggio 2019 in https://www.camera.it/temiap/documentazione/temi/pdf/1112886.pdf.

[43] A. Di Pascale, C. Cuttitta, "La figura del tutore volontario dei minori stranieri non accompagnati nel contest delle iniziative dell'Unione Europea e della nuova normative italiana", in *Diritto, Immigrazione e Cittadinanza*, 2019, 1, pp. 1 ss.

sponsabilità del minore. È colui che è chiamato a recepire, a titolo gratuito[44], i bisogni del minore e tradurli in concrete azioni sostenendolo anche e soprattutto psicologicamente nel suo percorso di crescita e di integrazione[45]. Per adempiere a questi compiti è indispensabile rispettare il principio di "prossimità" in quanto un lavoro efficiente può essere solo svolto in caso di vicinanza, oltre che morale, anche fisica.

A tale scopo la legge Zampa ha pensato ad una figura con specifiche competenze che viene nominata dal Tribunale dei Minorenni sulla base di un elenco predisposto con l'ausilio dell'Autorità Garante per l'Infanzia e l'Adolescenza[46].

Quest'ultima avvia la selezione dei candidati che una volta scelti saranno onerati di un obbligo formativo solo al termine del quale potranno essere inseriti nell'elenco per la nomina. La nomina del tutore deve essere tempestiva e laddove non sia effettuata tali funzioni vengono svolte dal responsabile della struttura di prima accoglienza.

[44] Sul punto si deve segnalare la decisione della Corte Costituzionale, 29 novembre 2018, n. 218, che ha respinto la questione di legittimità costituzionale in ragione della disparità di trattamento rispetto ai tutori delle persone incapaci che beneficia del rimborso dei costi; la Corte ha confermato la gratuità dell'incarico precisando che una eventuale indennità deriva solo da gestioni patrimoniali complesse e non solo per le cure dedicate alla persona. Sul tema si veda B. Poliseno, "La tutela "speciale" del minore straniero non accompagnato e la mancata previsione di un'equa indennità", in *Foro italiano*, 2019, I, p. 383.

[45] Tanto in osservanza della raccomandazione del Comitato dei Ministri del Consiglio d'Europa CM (REC) 2007 9 del 12 luglio 2007.

[46] Anche questo aspetto è stato particolarmente discusso dopo l'adozione della legge; non era chiaro il ruolo della Autorità Garante come non erano chiari i requisiti per l'ammissione. Diverse sono state le prassi registrate a livello locale negli "accordi" tra Tribunali per i Minorenni e autorità garanti regionali; in generale possiamo sostenere che è richiesta la cittadinanza italiana o comunque di stato appartenente alla Unione Europea, una età minima di 25 anni, il godimento di diritti civili e politici ed una condotta incensurabile. Il possesso di particolari titoli di studio non è requisito di ammissione ma se ne tiene conto in sede di valutazione, come della conoscenza di lingue straniere, qualifiche professionali utili allo svolgimento dell'incarico, esperienze concrete di assistenza, volontariato, qualifiche professionali (professioni forensi, psicologiche, socio-sanitaria). La formazione generalmente avrà ad oggetto nozioni giuridiche (principi vigenti in materia a tutela dei minori, istituto della tutela, permesso di soggiorno, rimpatrio protezione internazionale, tratta), sistema di accoglienza, nozioni socio-sanitarie (identificazione del minore, accesso al servizio sanitario nazionale, codice di condotta, ecc.).

Sebbene ciascun tutore volontario possa avere in carico al massimo un numero di tre minori, accade frequentemente nelle zone a più alto impatto che se ne debba assegnare un numero maggiore per garantire a tutti questa tutela; la disomogenea distribuzione del numero dei minori rispetto al numero dei tutori è un problema ancora attuale. Ciò porta alla ulteriore conseguenza che divenendo assai gravoso il compito assegnato, si assiste a un crescente numero di richieste di "dispensa" in alcune aree della penisola (si pensi alla Sicilia che notoriamente ha il più alto numero di minori in carico).

Circostanza aggravata dal fatto che non vi sono ancora misure che favoriscano lo svolgimento di tale compito: manca qualsiasi forma di permesso retribuito per l'assistenza del minore, manca la copertura assicurativa per i danni conseguenti alla presa in carico del minore, manca un'adeguata copertura delle spese sostenute dal tutore; solo per citare le questioni più rilevanti.

Il sistema di accoglienza disciplinato dalla riforma[47] prevede due fasi (art. 4 Legge Zampa).

La prima accoglienza che è garantita in strutture governative per esigenze di soccorso e protezione immediata, istituite, nella previsione della riforma, con Decreto del Ministro dell'Interno[48]; si tratta di strutture dedicate ai minori stranieri ma di "passaggio" in quanto la loro permanenza è ivi limitata, dalla legge, a 30 giorni, necessari alla loro identificazione ed eventuale accertamento dell'età.

La seconda accoglienza distingue l'affidamento familiare (molto raro) e la collocazione in centri SIPROIMI[49] (prima destinati solo ai minori richiedenti protezione internazionale), a seguito del D. L. 21 ottobre 2020 n. 130, rinominati SAI. Nella seconda fase in particolare è prevista la collaborazione degli enti locali in quanto la mancanza di posti disponibili

[47] La riforma implementa il d. lgs. 18 agosto 2015 n. 142.

[48] Decreto Ministeto dell'Interno 1 settembre 2016 che individua i requisiti strutturali.

[49] Si tratta di Sistema di protezione per titolari di protezione internazionale e per i minori stranieri non accompagnati. Possano accedere al servizio anche vittime di violenza o tratta, vittime di violenza domestica, motivi di salute, vittime di sfruttamento lavorativo, calamità, atti di particolare valore civile. Si veda l'ultimo report Atlante SIPROIMI, Rapporto annuale SIPROIMI, *Sistema di protezione per titolari di protezione internazionale e per minori stranieri non accompagnti*, Roma, Eurolite, 2019.

nei centri indicati è sopperita dalla temporanea assistenza e accoglienza delle autorità del Comune in cui si trova il minore[50]; nel caso di indisponibilità verranno indirizzati presso l'accoglienza organizzata dalle prefetture, in caso di arrivi consistenti[51].

Il sistema delineato sarebbe, in linea teorica, efficiente se non fosse che i centri governativi non sono stati attivati nella misura prevista[52] e che l'afflusso dei minori continua ad essere gestito in modo emergenziale, facendo venire meno di fatto la distinzione tra prima e seconda accoglienza e imponendo il ricorso al supporto continuativo degli Enti locali che in modo difforme, nelle varie realtà regionali e provinciali, gestiscono il servizio. Si pensi ad esempio ai centri di pronta accoglienza, caratterizzati dalla presenza continua in struttura di assistenti sociali ed educatori, ai gruppi appartamento[53], caratterizzati, invece, dalla partecipazione degli ospiti alla gestione del servizio, più improntati alla acquisizione di una maggiore autonomia, o ancora alle diverse strutture supportate dall'associazionismo, che ha un ruolo attivo in questo settore.

Anche l'affidamento familiare (art. 6, Legge Zampa) non ha prodotto risultati apprezzabili. La collocazione dei minori presso famiglie affidatarie doveva, negli obiettivi, della legge essere un punto di forza. L'accoglienza in realtà familiari costituisce senza dubbio una alternativa migliore rispetto a qualsiasi struttura in quanto consente la costituzione di

[50] Si veda il protocollo di intesa della Prefettura di Siracusa con il Comune ed il Questore che illustra le "Buone prassi per l'accoglienza e l'integrazione sociale dei minori stranieri non accompagnati" del 23 gennaio 2018, in http://www.prefettura.it/FILES/AllegatiPag/1146/Protocollo_Buone_Prassi_MSNA24012018_0001.pdf.

[51] Si vedano anche le Linee di Indirizzo per l'accoglienza nei servizi residenziali per i minorenni, approvate in Conferenza Unificata il 14 dicembre 2017, dal Ministero del lavoro e delle politiche sociali, dal Ministero della giustizia – Dipartimento per la giustizia minorile e di comunità, dalla Conferenza delle Regioni e delle Province autonome, dall'Associazione nazionale Comuni italiani, dall'Autorità garante per l'infanzia e l'adolescenza, e da esperti indicati dal Ministero (in https://www.minori.gov.it/sites/default/files/Linee_%20guida_accoglienza_181203.pdf).

[52] Si vedano i dati riportati in Ministero del Lavoro e delle Politiche Sociali, Report di Monitoraggio. Dati al 30 giugno 2020. I minori stranieri non accompagnati in Italia, 2020 in https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Documents/Report-di-monitoraggio-MSNA-30-giugno-2020.pdf.

[53] Si tratta di accoglienza a bassa intensità assistenziale per un numero ridotto di minori.

legami affettivi più stretti, agevola il rapporto tra pari in caso di presenza di altri figli, assicura condizioni di cura ed educative più efficaci "riproducendo" un modello di famiglia che è stato sottratto al minore.

Tali soluzioni tuttavia richiedono la disponibilità, che è mancata, delle famiglie affidatarie ed un maggiore coinvolgimento delle istituzioni locali; la legge Zampa infatti ha previsto, con scarsi risultati, l'attivazione di corsi di "formazione" per le famiglie candidate all'affidamento nel corso dei quali focalizzare l'attenzione sulle particolari necessità di tali minori e prepararli all'accoglienza di soggetti particolarmente vulnerabili; anche le procedure di sensibilizzazione a carico degli Enti locali sono rimaste nella pratica inattuate.

Si pensi che nel triennio 2017-2020 presso il Tribunale per i Minorenni di Palermo che ha contato una presa in carico di 9.375 minori sono stati avviati solo 57 affidamenti familiari, mentre presso il Tribunale per i Minorenni di Cagliari nessun affidamento è stato disposto.

Incide su questo aspetto la circostanza che molti minori abbiamo un'età compresa tra i 16 e i 17 anni così che la loro collocazione presso famiglie affidatarie è meno semplice da realizzare e, di contro, l'accoglienza in struttura è più difficile da mantenere; la soluzione migliore in simili casi è quella della collocazione in semi-autonomia per escludere il rischio che si sottraggano al controllo in cerca di maggiore indipendenza e comunque favorire il loro inserimento sociale che deve prevedere anche il raggiungimento di un elevato livello di autodeterminazione.

Se l'affidamento familiare è dunque un obiettivo mancato dalla riforma, la possibilità di adozione per questi minori è risultata quasi impossibile da realizzare.

Si applicano ai minori stranieri le norme nazionali sull'adozione e tanto richiederebbe l'accertamento dello stato, irreversibile, di abbandono morale e materiale del minore.

È questo l'aspetto che nel nostro ordinamento differenzia l'affidamento dall'adozione che intende la recisione dei legami con la famiglia di origine e la creazione di quelli con la famiglia "sostitutiva" come *extrema ratio*. Nel caso di minore straniero privo della assistenza genitoriale ci troviamo innanzi ad un "abbandono" contingente; anzi talvolta la famiglia d'origine ha inviato il minore in cerca di condizioni di vita migliori, senza la volontà, neanche implicita, di abdicare alla propria funzione geni-

toriale. L'accertamento insomma della condizione di abbandono (e del disinteresse della famiglia d'origine al figlio) va accertato di caso in caso e spesso ha reso tale istituto inutilizzabile con riferimento al minore straniero. Si pensi che presso il Tribunale dei Minorenni di Palermo a fronte del numero consistente di minori registrati, ha disposto solo 16 adozioni.

In sintesi, possiamo concludere che la riforma introdotta nel sistema italiano ha senza dubbio il merito di avere messo ordine tra le norme relative ai minori stranieri non accompagnati e ha rappresentato una valida guida per la soluzione dei problemi inerenti i minori vulnerabili.

La sua efficacia, tuttavia, deve essere valutata alla luce della concreta applicazione nel triennio dalla sua promulgazione.

I risultati sono senza dubbio apprezzabili, ma alcune criticità sono emerse.

Il profilo finanziario è sicuramente un elemento da non sottovalutare alla luce del fatto che la legge stessa prevede come la tutela rafforzata non debba gravare sulle risorse finanziarie già stanziate. Questo elemento potrebbe avere inciso sulla mancata adozione da parte di alcuni enti locali dello sviluppo di piani di azione a favore della sensibilizzazione delle famiglie affidatarie, così compromettendo la soluzione più idonea per l'accoglienza del minore.

L'adozione delle norme attuative rappresenta un ulteriore punto debole da rafforzare.

Se con ritardo si è trovata la soluzione relativa alla nomina dei tutori volontari (ed il procedimento di formazione degli elenchi) alcuni aspetti ancora rimangono incerti perché non disciplinati nella riforma, ma necessari per la sopravvivenza di tale istituto (si veda la mancanza di copertura assicurativa, di permessi retribuiti, di "indennità" per i costi, ecc.).

Il ritardo nella adozione del protocollo sul colloquio informativo e la mancata attuazione della disciplina "regolamentare" per la ricerca dei legami familiari sono ulteriori elementi che minano la stabilità della riforma.

E non dimentichiamo che l'ambito dell'accoglienza, poi, è quello che richiederebbe norme di attuazione di dettaglio omogenee sull'intero territorio ma rimane una prerogativa di difficile realizzazione.

Ancora la formulazione della legge con la tecnica dei rinvii alle norme da integrare o modificare non rende facilmente fruibile la lettura e l'interpretazione delle disposizioni.

La puntuale attuazione di questa riforma richiede poi il funzionamento delle rete di servizi destinata ad operare e dunque la collaborazione degli stessi; dalle forze di polizia che hanno il compito di segnalare la presenza dei minori alla tempestività del Tribunale per i Minorenni che nomina il tutore volontario, al ruolo degli enti locali (i comuni, in particolare) che curano di fatto l'accoglienza dei minori, al mediatore culturale che ha il compito di agevolare l'interazione dello straniero con le istituzioni, al tutore che fa da raccordo in questa rete.

L'impianto normativo si presenta comunque adeguato per garantire la tutela del minore straniero e moderno nella concezione che lo fonda, il superamento delle criticità richiede una maggiore attenzione agli aspetti "esecutivi" della legge che si propone come modello di riferimento a livello europeo.

3. *Le politiche europee*

A livello sovranazionale l'attenzione prestata al "soggetto in divenire" acquista consistenza nei primi anni del secolo scorso.

Già nel 1924 la Società delle Nazioni adotta la prima "Dichiarazione sui diritti del Fanciullo" che contiene, in forma embrionale, l'essenza della tutela dei minori[54]. Questa, unitamente ad altre proclamazioni di principio, rimaneva tuttavia sul piano della *soft law* non avendo di fatto alcuna efficacia vincolante.

Si deve attendere l'adozione della Convenzione sui diritti del minore firmata a New York il 20 novembre 1989 per avere la "Carta Costituzionale" dei diritti del fanciullo[55].

[54] Sono racchiusi in dieci principi essenziali: il fanciullo deve godere di tutti i diritti senza alcuna discriminazione e gli devono essere assicurati eduzione (anche scolastica gratuita), protezione (anche da ogni forma di discriminazione e crudeltà o sfruttamento) e condizioni di vita sana ed amorevole; ha diritto ad un nome e ad una nazionalità e deve beneficiare della sicurezza sociale; ha diritto a cure speciali se si trova in una situazione di minoranza fisica, mentale o sociale.

[55] Sulla tutela internazionale dei minori: A. Saccucci, "Riflessioni sulla tutela internazionale dei diritti del minore", in *Giurisprudenza italiana*, 2000, p. 222; M. Berghè Loreti, *La tutela internazionale dei diritti del fanciullo*, Padova, Cedam, 1995; J. Thobin, *The UN Convention on the rights of the child. A Commentary*, Oxford, Oxford University Press, 2019; W. Vandenhole, G.E. Turkelli, S. Lembrechts, *Children's rights.*

Si tratta della tutela "minima" che ciascuno stato contraente si impegna a garantire ed include, sotto la guida dei diritti essenziali – quali la non discriminazione (art. 2), la tutela del superiore interesse del minore (art. 3), la vita, la sopravvivenza e lo sviluppo (art. 6) nonché l'ascolto (art. 12) – la proclamazione di tutti i diritti civili, sociali ed economici, senza escludere quello all'identità, alle libertà, alla religione ed alle proprie tradizioni. Il diritto a preservare i legami familiari (art. 8) rappresenta un altro caposaldo della convenzione che, nell'ambito di cui trattiamo, consente di proteggere il ricongiungimento familiare in caso di migrazione; la protezione speciale in caso di richiesta di asilo (art. 22) e la tutela della salute (art. 24) e della istruzione (28) completano il quadro delle garanzie assicurate.

Si aggiunga poi il Commento Generale n. 6[56] che riguarda più propriamente il minore straniero non accompagnato e dunque la "rilettura" dei diritti proclamati, alla luce di tale particolare vulnerabilità. Diviene essenziale vietare qualsiasi forma di discriminazione, dare voce ai bisogni del minore, dotare di concretezza il principio della tutela del benessere del minore nella ricerca di soluzioni di breve e lungo periodo (art. 20); il tutto per garantire anche la costruzione della sua identità e mirare alla nomina di un tutore (art. 18).

Non possiamo trascurare la Convenzione Europea per la salvaguardia dei diritti e delle libertà fondamentali (CEDU) adottata il 4 novembre 1950 dal Consiglio d'Europa che pur riguardando l'adulto non può non estendere la sua efficacia anche al minore.

Ancora, la Convenzione Europea sull'esercizio dei diritti dei fanciulli, di Strasburgo del 25 gennaio 1996 che attiene più specificamente all'esercizio dei diritti in sede giurisdizionale e dunque pone l'attenzione sulla necessità di informare il minore del procedimento che lo vede coinvolto

A commentary on the Convention on the rights of the child and its protocols, Elgar, 2019; C. Costello, *The human rights of the migrants and refugees in Eropean Law*, Oxford, Oxford University Press, 2016.

[56] E non si dimentichi il commento generale n. 14 sul concetto di benessere del minore; principi pure richiamati nelle linee Guida UNHCR UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, febbraio 1997, disponibili su: https://www.unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures- dealing-unaccompanied-children-seeking-asylum.html.

nonché di nominare un rappresentante legale; strumenti che devono essere estesi senza dubbio al minore straniero non accompagnato.

Sul versante più specificamente europeo, la Carta Sociale Europea del 1961 offre una tutela generale ai bambini come il Trattato sull'Unione europea e quello sul funzionamento dell'Unione Europea nonché la Carta dei diritti fondamentali dell'Unione Europea adottata il 7 dicembre 2000 ed emendata il 13 dicembre 2007.

Segue la legislazione[57] orientata alla tutela dei diritti fondamentali che dal dopoguerra tiene conto specificamente del fenomeno delle migrazioni internazionali, caratterizzanti l'epoca contemporanea.

Molti fattori hanno determinato un massiccio trasferimento della popolazione verso il continente europeo; dalla crescita dell'economia occidentale con il miglioramento del settore industriale ed agricolo, alla maggiore facilità negli spostamenti, grazie anche al potenziamento delle infrastrutture, dallo sviluppo della cooperazione internazionale alla crescente necessità di incrementare la forza lavoro. Fattori tutti che hanno agevolato l'ingresso di stranieri provenienti da realtà economiche meno sicure, tanto da portare da 7,5 milioni a 12,5 milioni il numero di migranti entrati nel continente europeo nel trentennio 1960-1990[58].

È in questo secolo che l'interesse per una disciplina unitaria, limitatamente agli ambiti di competenza europea, si esprime nella adozione di una serie di atti che includono espressamente o incidentalmente anche i minori; ricordiamo tra le più importanti:

- direttiva 2001/55/CE del Consiglio sulle norme minime per la concessione della protezione temporanea in caso di afflusso massiccio di sfollati e sulla promozione dell'equilibrio degli sforzi tra gli Stati

[57] Si ricordino anche gli strumenti di diritto internazionale privato quali: Convention concerning the powers of authorities and the law applicable in respect of the protection del 5 ottobre 1961 dell'Aja; la Convenzione europea sul riconoscimento e l'esecuzione delle decisioni sull'affidamento dei minori e sullo ristabilimento dell'affidamento dei minori del 20 maggio 1980; la Convenzione sulla giurisdizione, la legge applicabile e la cooperazione in materia di responsabilità genitoriale e misure per la protezione dei minori dell'Aja del 19 ottobre 1996; né si dimentichi Convenzione relativa allo status dei rifugiati del 1951 e dal suo Protocollo del 1967.

[58] E.M. Tonizzi, *Le grandi correnti del 900*, op. cit. pp. 78 ss.; S. Sassen, *Migranti, rifugiati, coloni. Dalle migrazioni di massa alla fortezza Europa*, Milano, Feltrinelli, 1999.

membri che ricevono gli sfollati e subiscono le conseguenze dell'accoglienza degli stessi;
- direttiva 2003/86/CE relativa al diritto al ricongiungimento familiare;
- direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di paesi terzi o apolidi, della qualifica di rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta (art. 20 e 30);
- direttiva 2008/115/UE (artt. 3, 5, 10) per il rimpatrio dei cittadini irregolari, la direttiva 2013/33/UE (art. 2) c.d. direttiva accoglienza;
- direttiva 2011/36/UE concernente la prevenzione e la repressione della tratta di esseri umani e la protezione delle vittime;
- direttiva 2011/95/UE recante norme sull'attribuzione, a cittadini di paesi terzi o apolidi, della qualifica di beneficiario di protezione internazionale, su uno status uniforme per i rifugiati o per le persone aventi titolo a beneficiare della protezione sussidiaria, nonché sul contenuto della protezione riconosciuta, art. 31 in merito alla rappresentanza del minore, la sua collocazione, la ricerca della fa miglia di origine;
- direttiva 2013/32/UE sul riconoscimento e revoca della protezione internazionale (in particolare art. 25 garanzie per i minori non accompagnati: rappresentante legale, informativa, conseguenze per mancato consenso alla visita medica);
- direttiva 2013/33/UE (art. 24) sull'accoglienza dei richiedenti protezione internazionale;
- regolamento 604/2013 del 26 giugno 2013 (c.d. Regolamento Dublino III) che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri da un cittadino di un paese terzo o da un apolide il cui art. 6 specificamente riguarda i minori non accompagnati e ne fissa garanzie ulteriori;
- regolamento (UE) 2016/399 del Parlamento europeo e del Consiglio, del 9 marzo 2016, che istituisce un codice unionale relativo al regime di attraversamento delle frontiere da parte delle persone (codice frontiere Schengen) (art.6).

Oltre tali disposizioni "vincolanti" ma limitate a specifici aspetti, il merito della Unione Europea[59] è stato quello di sollecitare gli stati membri all'adozione di misure efficienti nel più ristretto ambito dei minori stranieri non accompagnati; tanto ha fatto prima con la Risoluzione del Consiglio dell'Unione Europa del 26 giugno 1997 sui minori non accompagnati, cittadini di paesi terzi (97/C 221/03) e soprattutto con Risoluzione del Parlamento europeo del 12 settembre 2013 nella quale oltre a rammentare *"che un minore non accompagnato è innanzitutto un bambino potenzialmente a rischio e che la protezione dei bambini, e non le politiche dell'immigrazione, deve essere il principio guida degli Stati membri e dell'Unione europea a tal riguardo, rispettando il principio di base dell'interesse superiore del bambino… sottolinea l'importanza, per l'Unione europea e gli Stati membri, di dare una risposta coerente a questa problematica… esorta gli Stati membri, al fine di garantire coerenza e di uniformare le norme in materia di protezione dei minori non accompagnati all'interno dell'UE, ad assicurare ai minori non accompagnati, indipendentemente dal loro status e alle stesse condizioni dei bambini cittadini del paese ospitante"*.

Si richiedono: adeguate condizioni di accoglienza in centri specializzati o presso famiglie, la messa in opera del diritto all'istruzione ed alla formazione professionale, la garanzia del diritto alla salute e l'accesso gratuito a cure mediche, il diritto al riposo e al tempo libero, il diritto a valorizzare la propria identità e dei propri valori culturali, ivi compresa la propria lingua madre.

Ciò è in linea con il programma europeo orientato a promuovere una strategia efficace sui minori, avviato nel 2009 (Programma di Stoccolma) con il quale si invitava la Commissione Europea[60] a sviluppare un piano d'azione che attuasse l'art. 24 della Carta dei diritti fondamentali dell'Unione Europea, ponendo particolare attenzione al rimpatrio dei minori nei paesi di origine, al rischio di attrazione nella rete criminale ed alla

[59] P. Boeles, M. den Heijer, G. Lodder, K. Wouters, *European Migration law*, Antwerp, Intersentia, 2014; L. Azoulai, K. De Vries, *EU Migration Law. Legal Complexities and political rationales*, Oxford, Oxfrod University Press, 2014.

[60] Comunicazione della Commissione al Parlamento europeo e al Consiglio, Piano d'azione sui minori non accompagnati (2010-2014), COM(2010) 213 def. del 6 maggio 2010.

procedura di accertamento della minore età come requisito per avvantaggiarsi della normativa di favore.

Il piano è stato quello adottato nel 2010-2014 ed ha proposto tre linee di azione: prevenzione, programmi di protezione e soluzioni durature.

Il primo punto necessita di una maggiore comprensione del fenomeno migratorio e di collaborazione con i paesi dai quali proviene il flusso migratorio in uscita per attuare strategie di transito nonché porre in essere campagne di sensibilizzazione sui rischi correlati alla migrazione clandestina, rivolte ai bambini e alle loro famiglie. Sostenere lo sviluppo di sistemi di protezione attiene più precisamente agli strumenti di accoglienza ed assistenza in strutture adeguate idonee a consentire la identificazione del minore, accertare la sua età e rintracciare la sua famiglia, nonchè prevenire la scomparsa del minore che abbandona le strutture anche volontariamente. Le soluzioni durature, da valutarsi sempre nel rispetto dell'interesse del minore, prevedono, infine, il rimpatrio, la protezione internazionale o il trasferimento in uno stato terzo.

Nonostante i propositi di questo piano, le criticità legate ai flussi migratori hanno imposto di inserire nell'agenda 2015 sulla migrazione il proseguo di tali azioni programmatiche che sono state espressamente oggetto di nuova comunicazione della Commissione del 2016[61] in cui l'accertamento della minore età e l'accoglienza sono ancora i punti nodali; non è un caso che il decimo forum annuale sui diritti dei minori sia stato dedicato alla protezione dei minori migranti.

Nuovamente nel 2017[62] si ribadisce che *"sono necessari ulteriori, tangibili miglioramenti sulla protezione di tutti i minori migranti"* e si richiede una maggiore collaborazione tra gli stati anche ai fini dello scambio di informazioni rilevanti.

Parallelamente, il Consiglio d'Europa sviluppa un piano di azione (2017-2019) dedicato a *"Refugee and migrant children in Europe"* che si

[61] Comunicazione della Commissione al Parlamento europeo e al Consiglio sullo stato di attuazione delle azioni prioritarie intraprese nel quadro dell'agenda europea sulla migrazione, COM(2016) 85 del 10 febbraio 2016.

[62] Comunicazione della Commissione al Parlamento europeo e al Consiglio, La protezione dei minori migranti, COM(2017) 211 def. del 12 aprile 2017 ed ancora prima la Comunicazione della Commissione al Parlamento europeo e al Consiglio *Ongoing action contributing to the protection of children in migration* COM (2016) 85 def. del 10 febbraio 2016.

poggia su tre elementi fondamentali: accesso ai diritti dei minori, garanzia dell'effettiva protezione, miglioramento dell'integrazione e va a completare la strategia già avviata sui diritti dell'infanzia (2016-2021), sulla costruzione di società inclusive (2016-2019). Il piano pone tra i suoi obiettivi la creazione di linee guida anche comprensibili per i bambini (e dunque punta sulla diffusione), la tutela e l'accertamento dell'età nonché lo studio di standard per le strutture di accoglienza[63] e politiche per il problema dei minori vittime di tratta[64].

È evidente che gli argomenti sui quali, a livello sovranazionale, si concentra l'attenzione sono quelli afferenti alle tre macro-aree dell'accoglienza, dell'accertamento dell'età e della *guardianship* (con riferimento anche agli aspetti della qualità del servizio e della tempestività della nomina).

Con riferimento a questo ultimo tema si segnala la raccomandazione[65] sul ruolo del tutore nella quale si rintraccia una definizione onnicomprensiva e chiara sulle funzioni dello stesso *"guardian" refers to a person who is appointed or designated to support, assist and, where provided by law, represent unaccompanied or separated children in processes concerning them. Where an institution or organisation is appointed or designated as a guardian to support, assist and exercise the legal capacity fora child, it should designate a natural person to carry out the duties of guardian as set out in these guidelines. The guardian acts independently to ensure that the child's rights, best interests and well-being are guaranteed. The guardian acts as a link between the child and all other stakeholders with responsibilities towards him or her. This operational definition takes into account that the term used, as well as the function and manner of appointment of a guardian, vary from jurisdiction to jurisdiction"*.

[63] Si veda il report finale in https://rm.coe.int/-refugee-and-migrant-children-in-europe-final-report-on-the-implementa/16809c827d.

[64] Si veda il Final Report in the implementation of the Action Plan (2017-2019) "refugee and mkigrant children in Europe" in https://rm.coe.int/-refugee-and-migrant-children-in-europe-final-report-on-the-implementa/16809c827d.

[65] Recommendation CM/REC(2019)11 of the committee of ministers to member states on effective guardianship for unaccompanied and separated children in the context of migration in https://rm.coe.int/cm-rec-2019-11-guardianship-en/16809ccfe2.

Non si può trascurare, infine, la valenza in questo ambito degli strumenti di *soft law*[66] che pure avendo efficacia meramente persuasiva rappresentano strumenti preziosi per confidare in una convergenza dei sistemi giuridici su questioni che rimangono di competenza nazionale; ricordiamo, tra le tante[67], le linee guida emanate dallo European Asylum Support Office (EASO) 2018 (*Guidance on reception conditions for unaccompanied children: operational standards and indicators*)[68], quelle sulla procedura di identificazione[69], le EU *Guidelines on the Promotion and protection of the rights of the child*[70] del 2017.

In questo contesto, tuttavia, la legislazione nazionale rimane ancora oggi il punto di riferimento soprattutto rispetto alle tre macro-aree segnalate.

4. *Elementi di convergenza nei sistemi europei*

Inquadrato il fenomeno anche a livello internazionale ed europeo lo studio che abbiamo condotto si è concentrato sull'analisi comparativa dei sistemi giuridici stranieri al fine di tracciare alcune linee di convergenza o disegnare il quadro delle soluzioni alternative e valutarne l'efficacia.

Il primo elemento di valutazione è stata la definizione di minore straniero non accompagnato.

[66] Sulla valenza di tali atti si veda L.A. J. Senden, "Soft law and its implication for institutional balance in the EC", in *Utrecht Law Review*, 2005, 1, 2, pp. 79 ss. in particolare sulla problematica della efficacia dell'intervento para-normativo sulla concorrenza dei poteri europei e nazionali.

[67] Né si dimenticano le *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (che rientrano nel progetto Building a Europe for and with children) che espressamente estendono al minore non accompagnato la garanzia della libertà indipendentemente dalla richiesta di asilo o dal permesso di residenza nonché la necessità di preservarli dalle discriminazioni in considerazione della loro particolare vulnerabilità.

[68] In https://easo.europa.eu/sites/default/files/Guidance-on%20reception-%20conditions-%20for-unaccompanied-children.pdf.

[69] EASO Practical guide on Age Assessment, 2nd Edition, 2018, disponibile su https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf.

[70] https://ec.europa.eu/anti-trafficking/sites/default/files/eu_guidelines_rights_of_child_0.pdf.

In generale, si può sostenere che si ricalca la definizione offerta delle fonti europee omettendo tuttavia qualsiasi riferimento alla richiesta di asilo o protezione internazionale; con riferimento al sistema portoghese e danese la disciplina speciale pare, invece, condizionata dalla presenza di simile istanza. Non figura la indicazione della carenza di cittadinanza nazionale o europea rilevabile solo nell'ordinamento italiano.

L'età non rappresenta un indice differenziante avendo i diversi ordinamenti generalmente fissato il limite della minore età al compimento del diciottesimo anno di vita.

Elemento caratterizzante è l'assenza di un adulto di riferimento che può alludere ai genitori come a qualsiasi altro soggetto legato al minore.

In tutti i casi la definizione di minore è prodromica alla individuazione della disciplina applicabile a questa categoria di soggetti; la verifica è sulla sussistenza o meno di una disciplina organica è stata oggetto di valutazione.

Lo scenario è, in questo ambito, abbastanza comune, e tuttavia non rappresenta la soluzione ottimale.

Tutti gli ordinamenti (ad eccezione di quello italiano e quello spagnolo) presentano norme disseminate in diverse tipologie di legge e/o regolamenti che non consentono una immediata comprensione della materia, ma impongono una approfondita conoscenza del sistema per maneggiare gli istituti di protezione del minore straniero non accompagnato ed in particolare per ricostruire i suoi diritti essenziali. A tale "scomposizione" corrisponde anche la difficoltà di combinare testi che, in alcuni ambiti, appaiono sovrapporsi con quanto consegue in termini di problemi interpretativi.

Si pensi poi alla difficoltà di tracciare linee comuni all'interno dello stesso ordinamento quando sussistono diversi livelli di competenza come ad esempio nel caso della Spagna o della Svezia (in cui con la competenza statale concorre quella regionale o addirittura locale).

È bene, tuttavia, sottolineare che anche nel caso dell'ordinamento italiano e spagnolo la legge di riferimento non esaurisce completamente tutti gli aspetti relativi alla vita del minore così che quella disciplina deve essere comunque coordinata con altre disposizioni; in particolare, quanto al sistema italiano pensiamo alle regole che si occupano di identificare i sistemi di accoglienza (che sono soggette anche alla regolamentazione lo-

cale) o tutte quelle di dettaglio relative alla operatività delle tutele (si veda la disciplina attuata con protocollo per l'accertamento dell'età). Non si dimentichi poi che la legge italiana, per come è formulata, rappresenta una legge "quadro" che rinvia alle norme di dettaglio contenute nelle disposizioni per i migranti (in particolare il Testo Unico dell'Immigrazione) o al diritto nazionale (ad esempio la legge sull'affidamento familiare e l'adozione). Anche l'ordinamento spagnolo, nonostante la legge dedicata ed il protocollo attuativo, demanda alla regolamentazione regionale la organizzazione delle strutture di accoglienza.

La tendenza generale (questo elemento è comunque anche al sistema italiano e spagnolo) è quella della necessità di coordinare le norme di origine internazionale ed europea con quelle nazionali e tanto accade soprattutto a livello di protezione dei diritti fondamentali (che rinviano spesso alle carte costituzionali, dove presenti).

Quanto alla disciplina nazionale, le disposizioni da applicare sono riferibili generalmente al diritto civile, al diritto della migrazione, a norme di natura "amministrativa" o regolamentare.

Sotto il primo profilo si richiamano i principi posti a fondamento della tutela dei minori e più generalmente al diritto di famiglia; sempre a questa area afferiscono le norme in tema di affidamento familiare ed adozione (quando non si fa rinvio al diritto internazionale, come nel caso dei Paesi Bassi).

All'area del diritto dell'immigrazione afferisce principalmente la disciplina dei minori richiedenti asilo, che nella maggior parte dei casi prevede disposizioni di dettaglio; in ogni caso, questa regolamentazione include tutte le questioni tipicamente legate all'elemento di estraneità rispetto al diritto interno e dunque il rilascio del permesso di soggiorno, il ricongiungimento familiare, l'eventuale permanenza successiva al raggiungimento della maggiore età; solo in alcuni casi, il riferimento alla normativa sui migranti vale anche per il sistema di accoglienza (Portogallo, Danimarca, Slovenia, Svezia) e la procedura di accertamento dell'età (Danimarca, Polonia, Slovenia, Spagna, Svezia, Paesi Bassi).

Queste ultimi due aspetti sono altre volte collocati nell'area del diritto "amministrativo" (Italia) ossia relativa alla organizzazione statale o affidati a norme di natura regolamentare e dunque di c.d. *soft law* (Regno Unito, Francia).

L'età del migrante è l'elemento dirimente ai fini della applicazione della disciplina di favore.

Tutti i sistemi hanno adottato procedure di accertamento della minore età[71].

Questo aspetto è particolarmente importante nei casi in cui il minore abbia avanzato domanda di asilo o protezione internazionale in quanto la disciplina di ulteriore favore richiede rigorosità nella valutazione. Spesso la procedura di accertamento dell'età è disciplinata proprio in quell'ambito, e si applica in via estensiva al minore straniero non richiedente asilo.

Nonostante le peculiarità dei singoli sistemi nello svolgimento dell'accertamento si possono enucleare alcune caratteristiche comuni e che trovano il loro fondamento nella necessaria collaborazione del minore mai passibile di coartazione..

La comunicazione in ordine alla procedura da attivare, alle conseguenze ed i dettagli del procedimento sono informazioni generalmente fornite al minore (e al suo tutore) in una lingua per lui comprensibile.

La maggiore parte dei sistemi prevede una procedura che si fonda su un approccio olistico e multidisciplinare e che ammette una certa invasività nell'approccio medico solo a seguito di una sequenza progressiva di misure non risolutive. Il colloquio informativo è sempre un elemento imprescindibile di valutazione in quanto consente di acquisire informazioni utili alla costruzione del profilo anche anagrafico del minore; la valutazione dei documenti è un'ulteriore fase che potrebbe escludere, se attendibile, ulteriori accertamenti. Gli esami medici sono generalmente disposti su ordine dell'autorità giudiziaria quando le precedenti valutazioni non hanno escluso il dubbio sull'età.

Questo è il punto sul quale si registrano maggiori differenze sia all'interno dello stesso ordinamento, quando che non si dispone di una procedura standardizzata (ad esempio il sistema inglese[72]), sia tra i diversi sistemi giuridici.

[71] A. Mghebrishvili, "Unaccompanied Migrant Children. Their Rights and the Challenge for the State", in *Levan Alexidze Journal of International Law*, 2020, 1, 1, pp. 189 ss.

[72] Nel sistema inglese non vi è una procedura unica sul territorio in quanto ciascuna autorità locale potrà adottare i propri criteri di valutazione ed affidare tale procedura a differenti organismi; sussistono tuttavia delle linee guida fornite dalla High Court. Sebbe-

In alcuni paesi la procedura è devoluta a enti specializzati (si veda, in Portogallo, l'Istituto di Medicina Legale e Scienze Forensi) e comunque in generale ad equipe multidisciplinari; gli esami prescritti per giungere ad una valutazione dell'età sono vari[73] (radiografie clavicola, polso, dentarie, mandibolari, TAC, valutazione dello sviluppo sessuale e puberale, ecc.) e rimane in tutti i sistemi il problema dell'attendibilità degli stessi, soprattutto in ragione del margine di errore che grava qualsiasi metodica e che, nei casi di minori vicini alla maggiore età, può costituire l'elemento decisivo per l'esclusione della disciplina di favore.

In ragione delle incertezze che anche esami più invasivi non possono escludere, la presunzione di minore età è un principio generalmente riconosciuto.

Se è condivisa la necessarietà del consenso del minore all'esecuzione degli esami medici non sempre il rifiuto espresso è considerato irrilevante (si veda il sistema polacco e sloveno che in caso di diniego considerano il soggetto come maggiorenne).

È generalmente previsto un rimedio che consente di impugnare un eventuale accertamento negativo.

In ordine alla regolamentazione del minore richiedente asilo o protezione internazionale è comune l'adozione di una disciplina specifica che richiama quella applicabile all'adulto ma con alcune più dettagliate indicazioni[74].

Da segnalare perché singolare la disciplina danese nella quale l'età funge da elemento discriminante; i minori che hanno meno di 12 anni non sono ritenuti abbastanza maturi per essere parte attiva nel procedimento di richiesta di asilo per cui, se non possono fare rientro nel loro paese, rimarranno sul territorio con un permesso di soggiorno; quelli di età compresa tra 12 e 15 anni verranno sottoposti ad una valutazione sulla

ne non vi sia un obbligo del minore di sottostare all'accertamento di questa sua condotta si potrà tenere conto insieme alle altre informazioni.

[73] F. Kapadia, J. Stevens, D. Silver, "Dental Radiographs for Age Estimation in US Asylum Seekers: Methodological, Ethical, and Health Issues", in *American Journal of Public Health*, 2020; J. Rakić, "Age estimation for unaccompanied minors in the asylum system of European Union", in *International Journal*, 2020, 38, 5.

[74] K. Mets, "The fundamental rights of unaccompanied minors in EU asylum law: a dubious trade-off between control and protection", in *ERA Forum,* 2021, 21, pp. 625-637.

loro capacità di discernimento; i minori con età superiore ai 15 sono considerati sufficientemente maturi per potere avviare la procedura di asilo.

È principio consolidato che nella pendenza della domanda di protezione il minore non possa essere respinto né espulso dal paese richiedente e che lo stesso debba essere collocato in strutture adeguate (si noti che nell'ordinamento polacco l'accoglienza in emergenza è effettuata presso famiglie affidatarie che rispetto alle strutture hanno l'indubbio vantaggio di offrire al minore condizioni più confacenti quanto meno in termini di assistenza morale) nelle quali la protezione dei diritti deve essere garantita (supporto materiale e morale nonché assistenza medica).

La nomina di un tutore (in Francia si tratta di un tutore *ad hoc*) o un legale rappresentante (talvolta un avvocato; si noti che in Portogallo è altresì necessaria la rappresentanza da parte di un Ente o una organizzazione non governativa) deve essere prevista.

Allo stesso modo non si potrà prescindere dalla informativa (in una lingua comprensibile) resa al minore in ordine agli effetti della domanda, alla relativa procedura ed alle conseguenze di un eventuale respingimento della istanza, al procedimento di accertamento dell'età che conferisce una tutela "privilegiata"[75]; pure la ricerca della famiglia d'origine viene valutata ai fini di un eventuale ricongiungimento (laddove l'indagine possa essere svolta senza che le informazioni mettano a rischio la posizione del minore in caso vittima di persecuzioni).

Differenze rilevanti sono state registrate in ordine alla procedura ed alle tempistiche della stessa (si noti come la Polonia indica in 6 mesi la durata del procedimento mentre nei Paesi Bassi si prevede una *fast procedure* – destinata a concludersi in 8 giorni – ed una procedura estesa che dura tra 6 e 15 mesi[76]) mentre sempre prevista è possibilità di impugnare un eventuale provvedimento di diniego.

[75] È condiviso l'approccio che in pendenza della procedura di accertamento, la minore età viene presunta e dunque la legislazione speciale è applicabile fino alla conclusione dell'iter.

[76] Si veda https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/unaccompanied-minors/19a._netherlands_national_report_on_unaccompanied_minors_final_version_2feb10_en.pdf; si consulti anche E.A.E. Zijlsytra, C. van Os, J. Rip, D. Beltam, E.J. Knorth, M.E. Kalverboer, "Unaccompanied minors in Netherlands. Legislation, policy and care" in *Social Work & Society*, 2017, 15, 2, pp. 1 ss.; T. Smith, L.

Anche le modalità dell'accoglienza[77] sono assai diversificate ma sempre dichiaratamente improntate al rispetto dei diritti fondamentali.

Proprio l'accoglienza è uno degli aspetti che rende difficile tracciare delle linee comuni che non siano meramente programmatiche, in quanto l'attuazione delle norme nazionali implica soluzioni abbastanza diverse.

Nel sistema inglese una volta ottenuta la valutazione sullo stato di bisogno del minore questo potrà essere affidato alle autorità locali che dispongono un affidamento a lungo termine o una sistemazione in *residential care home*.

Il sistema francese distingue una collocazione temporanea (nel periodo in cui il minore viene identificato e se ne accerta l'età) ed una collocazione successiva attraverso il servizio di protezione dei minori (che lo collocano in case per minori, famiglie affidatarie, centri per bambini con difficoltà specifiche o raramente presso una persona designata dal servizio) o, eccezionalmente, istituti di educazione.

Analoga distinzione rintracciamo nel sistema italiano dove alla prima accoglienza fa poi seguito quella in famiglie affidataria (raramente) o in centri di seconda accoglienza gestiti per lo più a livello locale che organizzano diverse forme di sistemazione (strutture, appartamenti, ecc.).

Il sistema estone prevede gli istituti di protezione o centri di accoglienza e come misure alternative case o famiglie affidatarie.

Il sistema danese prevede la collocazione in centri per asilo dove i minori vengono sostenuti da operatori per la cura, il supporto psicologico e sociale (lì imparano la lingua e vengono avviati all'autonomia); eccezionale è la sistemazione in case private (ammessa solo in presenza dell'approvazione del servizio immigrazione che valuta la sussistenza di rigorosi requisiti degli ospitanti) e nell'istituto residenziale destinato a minori con difficoltà comportamentali.

Il sistema portoghese prevede misure di accoglienza tipiche per il minore richiedente asilo (centro temporaneo o per quelli di età superiore ai

Brownless, *Age assessment practice: a literiture review and annoted bibliography*, UNICEF Discussion Paper, 2010, in https://www.unicef.org/spanish/protection/files/Age_Assessment_Practices_2010.pdf.

[77] A. O'Higgins, E.M. Ott, M.W. Shea, "What is the Impact of Placement Type on Educational and Health Outcomes of Unaccompanied Refugee Minors? A Systematic Review of the Evidence", in *Clinical Child and Family Psychology Review*, 2018, 21, pp. 354-365.

16 anni nei centri di accoglienza per adulti) per il tempo necessario allo svolgimento della procedura; il minore straniero ammesso al soggiorno nel paese verrà sottoposto alle norme vigenti per i minori di nazionalità portoghese e dunque affidamento o soluzioni che ne favoriscano l'autonomia (appartamenti) se il minore vi acconsenta (età superiore a 15 anni) e con la predisposizione di supporti anche economici adatti.

Nei Paesi Bassi le forme di accoglienza sono distinte: affidamento familiare per i minori fino a 14 anni (e che sono sottoposti alla supervisione della fondazione Nidos); centri di accoglienza su piccola scala per i minori, con permesso di soggiorno, di età pari o superiore a 15 anni e limitato a 7 settimane (anche questi sottoposti al Nidos) nei quali l'assistenza è esternalizzata alle istituzioni locali; piccole unità abitative per minori con età pari o superiore a 15 anni senza permesso di soggiorno o per minori che non possono essere accolti in famiglie affidatarie; accoglienza protetta per vittime di tratta o richiedenti asilo.

Varie anche le soluzioni offerte dal sistema svedese[78] che vanno dalle *homes for care* alle sistemazioni ausiliarie (per minori almeno sedicenni) ossia la collocazione in appartamenti o stanze con cucina ed infine l'affidamento familiare.

La Polonia prevede case di accoglienza di tipo familiare o centri di sorveglianza, mentre la Spagna centri dedicati ai minori sotto la supervisione degli enti pubblici; la repubblica Ceca invece non prevede centri di accoglienza dedicati ai minori stranieri che ricevono lo stesso trattamento previsto per il minore in situazione di pregiudizio di nazionalità ceca (affidamento a parenti, affidamento familiare, istituti di cura).

Se è evidente che la gestione di questo aspetto risente della organizzazione statale[79], non è un caso che manchino, anche a livello internazionale linee guida, che non siano le raccomandazioni di principio.

[78] S. Gruber, *Migrant families, integration, and borders in Swedish foster care service*, in J. Hiitola, K. Turtiainen, S. Gruber, M. Tiilikainen, *Family Life in Transition: Borders, Transnational Mobility, and Welfare Society in Nordic Country*, London, Rouledge, 2020.

[79] I. Lietaert, M. Behrendt, O. Uzureau, S. Adeyinka, M. Rota, F. Verhaeghe, C. Watters, I. Derluyn, "The development of an analytical framework to compare reception structures for unaccompanied refugee minors in Europe", in *European Journal of Social Work*, 2020, 23, 3, .

Possiamo tuttavia sostenere che la maggior parte dei sistemi si affida a servizi di assistenza sociale[80], come diversamente denominati, che operano a livello locale con quanto consegue in termini di mancata uniformità sullo stesso territorio nazionale; la presenza di personale dedicato (talvolta specializzato) è un elemento costante anche se varia la misura del controllo (più presente nelle strutture organizzate e meno in forme che favoriscono l'autonomia). In tutte queste realtà si garantiscono i bisogni essenziali dei minori (cura, vitto, alloggio, abbigliamento, ecc.) e il supporto morale, talvolta anche con l'ausilio di personale specializzato (psicologi, mediatori linguistici o culturali); l'affiancamento del tutore è una costante ed un elemento di raccordo con la stessa istituzione.

Un dato che accomuna tutti i sistemi è la possibilità per il minore di accedere all'affidamento familiare[81] e all'adozione, ma che sono raramente impiegati.

Nella generalità dei casi troveranno applicazione le norme nazionali adattate alle specificità concrete con riferimento alle condizioni del minore ed ai requisiti per le famiglie affidatarie e/o adottive.

Quanto all'affidamento familiare trattandosi di situazione teoricamente transitoria nella quale il pregiudizio al minore viene dalla assenza di cura da parte dei genitori, l'istituto può generalmente trovare applicazione anche per i minori stranieri non accompagnati.

Accade ovviamente che nella scelta della famiglia affidataria si debba tenere conto della particolare condizione del minore e delle sue esigenze di integrazione sociale (in Italia è stato prevista a carico degli enti locali la sensibilizzazione e la formazione di queste famiglie); tanto richiede anche la collaborazione della famiglia affidataria con le istituzioni coinvolte nella gestione del bambino migrante.

L'adozione richiede un più approfondito accertamento delle condizioni di gravità in cui si trova il minore rispetto alle carenze della famiglia

[80] A. Pratiwi, A. Linnossuo, H. Marjanen, "Comparative social work practices with young refugee and asylum seeker: the European experiences", in *European Journal of Social Work*, 2020, 23, 2.

[81] J. Rip, E. Zijlistra, W. Post, M. Kalverboer, E.J. Knorth, "Cultural matching factors, child factors and fostering factors associated with successful foster placement: An explorative study into the perspectives of unaccompanied refugee children, their foster carers and guardians", in *Children and Youth Services Review*, 118, November 2020, in https://www.sciencedirect.com/science/article/pii/S0190740920307581.

di origine; l'elemento della estraneità all'ordinamento nazionale costituisce in alcuni paesi il requisito per l'applicazione dell'adozione internazionale (esempio Paesi Bassi) o quelle di diritto internazionale privato (Portogallo). L'ordinamento slovacco invece ritiene applicabile tale istituto al minore straniero nella misura in cui i genitori sono sconosciuti o non se ne conosce la residenza per almeno un anno (in alternativa al consenso).

In generale, si può sostenere che si tratta di una soluzione raramente applicata e che richiede di avere percorso preventivamente l'opzione del ricongiungimento familiare nel paese ospitante (o in un paese terzo) o del rimpatrio; tanto ovviamente nelle ipotesi in cui la ricerca suddetta non rechi pregiudizio al minore.

Collegato all'accoglienza e collocazione del minore è il titolo che consente al minore di permanere sul territorio nazionale.

In generale possiamo dire che il permesso di soggiorno[82] costituisce il riconoscimento in base al quale il minore è ammesso a soggiornare sul territorio nazionale; tale principio subisce un'eccezione solo nel caso del sistema francese che non richiede l'ottenimento di un permesso di soggiorno per il minore straniero.

Generalmente questo documento, che consente l'accesso ad una serie di servizi, viene rilasciato (temporaneo o permanente) al minore che abbia visto accolta la sua domanda di asilo o di protezione internazionale.

In assenza di domanda o se la stessa sia stata negata i diversi ordinamenti individuano differenti tipologie di "autorizzazione" alla permanenza soggette a differenti termini di rinnovo.

In Spagna il permesso di soggiorno è rilasciato entro 9 mesi dalla richiesta quando il minore non viene rimpatriato; si tratta di permesso annuale rinnovabile; in Polonia il minore straniero anche se soggiorna illegalmente può ottenere un permesso temporaneo quando si accerta che la sua partenza dal territorio nazionale possa creargli pregiudizio.

Nei Paesi Bassi il minore può ottenere un permesso di soggiorno per diversi motivi: familiari (se si rintracciano parenti sul territorio), per asilo, per protezione sussidiaria, tratta, o quando sia stabilita la sua accoglienza o per garantire il suo sviluppo.

[82] L. Bosniak, "Universal citizenship and the problem of alienage", in *Northwestern University Law Review*, 2000, 94, p. 963.

Nel sistema portoghese si prevede anche la possibilità di ottenere il permesso di soggiorno in pendenza del procedimento di naturalizzazione che può essere attivato per quei minori stranieri che si trovano soggetti alla custodia in istituti al fine di stabilizzare la loro condizione; questo non vale per i minori in affidamento.

In Danimarca le diverse tipologie di permesso sono legate all'età del minore; in ogni caso, laddove non sia accolta la domanda di asilo il minore si potrà ottenere un permesso speciale se vi è la prova che il rientro nel paese di origine non sia conforme al suo interesse (ciò accade ad esempio quando i genitori siano morti o non vi siano altri parenti).

In Italia le tipologie di permesso di soggiorno sono sostanzialmente due: per motivi familiari o per minore età. In questo sistema come in quello inglese la mancanza di permesso di soggiorno non ostacola l'accesso ad alcuni diritti fondamentali come la tutela della salute (e dunque l'accesso al servizio sanitario) e l'istruzione.

Il riconoscimento dei diritti dei minori è il fulcro della legislazione inerente i migranti non accompagnati.

È questo l'ambito nel quale si osserva la maggiore convergenza dei sistemi, agevolata senza dubbio dalla considerazione che tali diritti, spesso fondamentali, sono parte di ciascun sistema anche in ragione della osservanza degli obblighi internazionali.

È comune infatti la parificazione tra questi soggetti vulnerabili e i minori aventi cittadinanza nel paese.

Non vi è dubbio allora che i minori stranieri non accompagnati abbiano il diritto ad essere ascoltati (in ambiente protetto e con misure adeguate), il diritto alla istruzione (anche in assenza di permesso di soggiorno) ed all'inserimento professionale, alla rappresentanza legale, ad un alloggio, all'assistenza sanitaria (anche se irregolari) ed alla consulenza legale, all'inserimento nei programmi di vaccinazione, al diritto al lavoro una volta concluso l'iter di formazione scolastica obbligatoria.

La particolare condizione di vulnerabilità soprattutto nel caso di minore richiedente asilo o vittima di tratta consente il rafforzamento di talune tutele e dunque ad esempio l'accesso al sostegno psicologico o alla riabilitazione.

I rimedi che gli ordinamenti hanno poi standardizzato per l'inserimento sociale includono l'apprendimento della lingua, l'inserimento in programmi di inclusione generalmente a carico dell'associazionismo.

Da segnalare l'iniziativa belga che prevede il coinvolgimento delle c.d. "culture families", ossia realtà familiari che abbiano lo stesso background culturale, religioso ed etnico del minore da accudire al fine di fungere da spazio di transizione tra la famiglia di origine e l'inclusione nel paese ospitante.

Il programma di inserimento sociale del minore non accompagnato dovrebbe nel lungo periodo portare alla sua integrazione anche nella fase adulta così da consentirgli la permanenza sul territorio ospitante.

Il problema è legato alla circostanza che al raggiungimento della maggiore età spesso corrisponde la scadenza della tutela di favore (e del permesso di soggiorno, salvo, spesso, il caso di richiedenti asilo o protezione internazionale).

Il primo passaggio per consentire al neomaggiorenne di continuare ad usufruire dei servizi statali è quello di legalizzare la propria presenza sul territorio. Questo prevede l'accesso a permessi di soggiorno previsti per gli adulti generalmente legati alla vita familiare o necessità lavorative o di studio; le ipotesi sono tuttavia varie.

Alcuni sistemi hanno adottato soluzioni di sostegno.

Il sistema danese propone programmi di inserimento per gli ex minori stranieri non accompagnati che prevedono l'inserimento lavorativo, taluni benefit finanziari, il perfezionamento della lingua.

L'Estonia prevede un servizio di "aftercare" riconosciuto a tutti i giovani residenti sul territorio che fornisce un supporto anche finanziario per coloro che escono dalla "tutela".

La Francia ha previsto sia programmi di integrazione sociale fino ai 21 anni che non sono uniformi sul territorio, ma demandati ai singoli dipartimenti, sia programmi di inserimento nel mondo del lavoro (PACEA).

Allo stesso modo il sistema britannico prevede, come per i minori di nazionalità inglese, il "sostegno alla dimissione" dalla custodia dell'autorità locale fino a 21 anni o per chi studia fino a 24; fino a 25 anni, il sistema portoghese.

Il tema della tutela (*guardianship*) sebbene oggetto di attenzione anche a livello sovranazionale non è scevro da criticità in ordine ad una visione unitaria dell'istituto.

Se nella Convenzione Europea sull'esercizio dei Diritti dei Minori, adottata dal Consiglio d'Europa a Strasburgo il 25 gennaio 1996[83] compare la figura del rappresentante del minore che pare essere legata alla rappresentanza giudiziale, il protocollo della Convenzione ONU, le linee guida UNHCR[84] nonché le linee guida sull'accoglienza dei minori fuori dalla famiglia d'origine, adottate dall'Assemblea generale delle Nazioni Unite nel 2010[85] sottolineano l'importanza che il minore privo di assistenza debba essere affiancato, al fine di ponderare le scelte utili alla tutela del suo benessere lasciando immaginare una portata più ampia dei suoi compiti.

Esigenza che si viene recentemente ribadita nel Patto per una migrazione sicura, ordinata e regolare promosso dall'Assemblea Generale delle Nazioni Unite il 19 dicembre 2018[86] nella quale pare che le funzioni del tutore siano considerate *"as essential means to address their particular vulnerabilities and discrimination, protect them from all forms of violence, and provide access to sustainable solutions that are in their best interests"*.

Nonostante queste indicazioni generali si riscontrano ancora notevoli differenze[87] nella regolamentazione di questo istituto.

[83] Pure più recentemente confermata dalla Risoluzione del Consiglio d'Europa, Unaccompanied children in Europe: issues of arrival, stay and return, n. 1810 (2011) nella quale si ribadisce la necessità di *"adopt and implement common standards and procedural safeguards on guardianship and legal aid for all unaccompanied children to ensure that their interests and protection needs are safeguarded throughout all administrative and judicial procedures"*.

[84] UNHCR, Guidelines on determining the best interests of the child, 2008, in https://www.unhcr.org/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html; M. Marchegiani, "The best interests principle's impact on decision concerning asylum seeking and refugee children", in E. Bergamini, C. Ragni, *Funadamental and best interests of the child in transational families*, Antwerp, Intersentia, 2019, p. 39 ss.

[85] Guidelines for the Alternative Care of Children, 24 febbraio 2010, A/RES/64/142.

[86] Global Compact for Safe, Orderly and Regular Migration, risoluzione dell'Assemblea generale del 19 dicembre 2018, A/RES/73/195.

[87] Si veda anche EMN Ad-Hoc Query on Unaccompanied Minors – *Volunteer Tutor/Guardian*, in https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1270_italy_unaccompanied_minors_.pdf.

Tra i tratti differenzianti compaiono: procedure di nomina, profilo professionale o qualificazioni richieste, l'eventuale formazione[88] del tutore necessaria a fronteggiare aspetti complessi del rapporto con il minore e con le istituzioni; le tempistiche delle procedure di nomina che rischiano, se troppo lunghe, di vanificare la sua opera (soprattutto nei casi di richiedenti asilo o protezione internazionale); funzioni, compiti e responsabilità con connessi oneri indennitari (tanto dipende spesso dal ruolo che è chiamato a ricoprire).

Alcuni sistemi (ad esempio l'Italia e Repubblica Ceca) prevedono che il tutore (volontario) prenda in carico il minore sia quanto agli aspetti patrimoniali che quelli di educazione e cura.

In altri sistemi (Danimarca) tale figura è spesso collegata alla presentazione della domanda di asilo e comunque ad una presa in carico "parziale" di sostegno nelle relazioni con le autorità e può estendersi alla collaborazione per la creazione di nuove relazioni sociali. Generalmente si tratta di persona che non deve avere requisiti particolari (età minima, indipendenza, condotta irreprensibile). Il tutore è tendenzialmente nominato dall'autorità giudiziale.

Una disciplina piuttosto particolareggiata è quella Slovena nella quale il tutore è nominato dai servizi sociali sulla base degli elenchi predisposi dal Ministro per gli affari familiari e sociali a seguito di bando pubblico; i candidati che devono avere particolari requisiti e devono superare un colloquio.

Il sistema spagnolo riconosce la tutela in capo al Pubblico Ministero; è tuttavia prevista la possibilità di aprire la tutela in favore di associazioni non governative o organizzazioni dedicate alla protezione del minore; in maniera analoga, il sistema francese riconosce per i minori stranieri non accompagnati la tutela in favore dell'ASE (Aide Sociale à l'Enfance); come i Paesi Bassi che riconoscono questo ruolo a Nidos. Anche l'ordinamento inglese non prevede espressamente la nomina di un tutore sebbene il minore sia affidato alle autorità locali che debbono curarne le ne-

[88] Pare che non tutti i sistemi prevedano la formazione come risulta dal report a cura dell'European Union Agency for Fundamental Rights, *Guardianship system for childre deprived of parental care in European Union. With a particular focus on their role in responding to chid trafficking*, Luxembourg, Publication Office of the European Union, 2015.

cessità; un rappresentante legale è invece previsto nel procedimento per domanda di asilo.

Nel sistema polacco i compiti del tutore sono limitati alla rappresentanza processuale se il tutore è temporaneo o allo svolgimento del procedimento per il riconoscimento della qualità di rifugiato; i poteri del tutore legale sono infatti correlati all'accertamento della morte dei genitori o della decadenza dalla potestà genitoriale.

Nel sistema svedese si assiste alla previsione di una doppia figura: il tutore (anche nominato per la procedura di asilo) che prede in carico il minore non accompagnato (ma non ne sopporta il costo del mantenimento né la cura quotidiana) la cui procedura di nomina varia da comune a comune e dipende dal *Guardianship Board* e il "custode legale" nominato dal Tribunale che interviene nel momento in cui al minore viene rilasciato un permesso di soggiorno e che di fatto include nelle sue funzioni di cura e rappresentanza.

Accanto alla figura "tipica" del tutore come regolamentata dal codice civile, il sistema portoghese prevede anche la possibilità di nomina del «apadrinhamento civil», ossia una sorta di affidatario (persona singola o famiglia) che sostituisce il ruolo genitoriale.

La breve rassegna delle posizioni nazionali relative agli ordinamenti analizzati rende evidente come siamo ancora lontani da una uniforme disciplina del fenomeno sebbene si possa concludere che talune criticità siano comuni ai diversi sistemi che dovrebbero operare per il rafforzamento di alcuni cardini della tutela minorile; si allude, in particolare, al consolidamento dell'affidamento familiare come rimedio utile per i minori migranti, alla presa in carico del minore da parte di un soggetto formato per assicurare le sue migliori condizioni di vita (tutore) nonché ai procedimenti di inclusione che rappresentano il presupposto per la regolarizzazione nell'età adulta quando il soggetto perde la tutela rafforzata.

5. *Tutela del minore straniero non accompagnato:* soft law *e cooperazione*

Il problema della protezione dei minori stranieri non accompagnati in Europa resta di grande attualità e sebbene molti sforzi siano stati impiegati per la ricerca di soluzioni condivise rimangono ancora delle criticità a livello locale che si riflettono a livello sovranazionale[89].

Il piano giuridico è strettamente connesso a quello sociale, economico nonché politico e richiede la collaborazione di tutte le parti coinvolte per una soddisfacente soluzione[90].

Non siamo ancora vicini ad una risposta ottimale per garantire le esigenze dei minori migranti, ma su tante questioni è stata fatta chiarezza; sono emerse le comuni necessità e sono evidenti gli obiettivi altrettanto comuni da raggiungere, anche grazie ai piani di azione avviati a livello europeo; tuttavia, gli strumenti di realizzazione sono ancora difformi sebbene in alcuni ambiti si rilevino alcune convergenze.

I diversi sistemi giuridici hanno, nel tempo, elaborato disposizioni specifiche per l'accoglienza e la protezione dei minori stranieri non accompagnati condizionate, da una parte, dalla necessità di garantire i diritti fondamentali dei minori, anche in osservanza degli impegni internazionali, e, dall'altro, di regolamentare il fenomeno migratorio anche attraverso politiche di contenimento.

Il risultato è una comune tendenza ad applicare al minore straniero (dove manca una legge organica) le disposizioni vigenti in tema di diritto minorile integrate con quelle in tema di immigrazione; non si deve sottovalutare la questione relativa al rapporto con le istituzioni che, con riferimento ad esempio all'accoglienza, al permesso di soggiorno ed alle modalità di accesso alle strutture per la messa in atto dei diritti (si pensi alla salute, alla istruzione, ecc.), sposta il *focus* su questioni "amministrative", come avviene in alcuni sistemi anche per la nomina del tutore.

[89] J. Bhabha, D. Senovilla Hernandez, J. Kanincs, *Handbook on migration and childhood*, Elgar, 2018.

[90] I. Iusmen, "Whose Children? Protecting Unaccompanied Migrant Children in Europe: A Case of Diffused Responsibility?", in *The International Journal of Children's Rights*, 2020, 28, 4, pp. 925 ss.; P. Ferrara, G. Corsello, A. Sbordone, L. Nigri, O. Caporale, J. Ehrich, M. Pettoello-Mantovani, "The "Invisible Children": Uncertain Future of Unaccompanied Minor Migrants in Europe", in *European Paediatric Association Pages*, 2016, 169, p. 332.

Le norme vigenti nei diversi sistemi giuridici tracciano i confini della tutela e spesso rinviano la messa in opera di taluni profili tecnici alle buone pratiche; questo vale soprattutto con riferimento al problema dell'accertamento dell'età o l'accoglienza.

Simile tendenza è conforme a quella sovranazionale in cui, negli ultimi anni, si assiste al proliferare di linee guida che possano contenere "raccomandazioni" di dettaglio per la migliore salvaguardia delle esigenze dei minori.

Le procedure di accertamento dell'età, ad esempio, sono varie, ma tendenzialmente orientate ad acquisire le informazioni relative alla identità ed all'età, in via graduale, fino a giungere alla esecuzione di esami più invasivi, sempre condizionati al consenso del minore e del tutore; sotto il profilo dell'accoglienza gli strumenti si presentano altrettanto variegati, spaziando dalla collocazione in centri di accoglienza statali o locali, a istituti gestiti dall'associazionismo, all'affidamento familiare, a soluzioni che facilitino l'acquisizione di una semi-autonomia. Queste ultime alternative sono fruibili per la maggior parte dei minori in movimento che hanno una età prossima ai 18 anni e comunque un vissuto che li ha portati ad acquisire una certa autonomia, anche per fasce di età inferiori.

È noto che la collocazione in ambienti a conduzione familiare o comunque l'affidamento familiare[91] possono migliorare un adeguato sviluppo psico-fisico del soggetto e contribuire a perseguire il progetto educativo di inclusione[92]; eppure tale soluzione è quella meno praticata nella generalità dei sistemi analizzati. Ancora una volta l'età dei minori migranti costituisce un ostacolo al loro inserimento familiare; anche la particolare vulnerabilità di questi soggetti costituisce un ulteriore fattore deterrente alla diffusione di tale sistema e la mancata sensibilizzazione verso questo strumento ne amplifica lo scarso utilizzo. Soluzione invece che consentirebbe, se praticata, la creazione di veri legami affettivi nel paese ospitante che ben si adatterebbe al mantenimento del contatto con la fa-

[91] A. Sirriyeh, "Hosting strangers: Hospitality and family practices in fostering unaccompanied refugee young people", in *Child & Family Social Work*, 2013, 18, 1, pp. 5-14; J. Wade, A. Sirriyeh, A. Kohli, J. Simmonds, *Fostering unaccompanied asylumseeking young people: Creating a family life across a 'world of difference*, London, BAAF, 2012.

[92] L. Drammeh, *Life Projects for unaccompanied migrant minors. A handbook for front-line professionals*, Council of Europe Publishing, 2010 in https://www.refworld.org/pdfid/545ca9e74.pdf.

miglia d'origine, magari in attesa del ricongiungimento[93].

Altro tema cruciale è la nomina di un legale rappresentante del minore che si scontra con le peculiarità del singolo sistema sull'estensione dei poteri, sulle modalità di nomina, sui requisiti del nominato. Tale materia è particolarmente delicata in quanto questa figura è l'interprete delle necessità specifiche del singolo minore e dunque la persona di "raccordo" tra il sistema ed il minore. Ciò che preoccupa è l'accertamento delle capacità del tutore e la sua predisposizione a sintonizzarsi con la personalità del minore nonché le tempistiche con le quali si procede alla sua nomina; è indispensabile che lo stesso sia presente fin dalle prime fasi di accoglienza anche per l'avvio dell'eventuale procedura di asilo o la valutazione del rimpatrio.

Altra criticità è il raggiungimento della maggiore età che significa la perdita di qualsiasi beneficio prima riconosciuto e l'inserimento repentino di questo soggetto nell'area "adulti" del diritto dei migranti. Laddove il minore sia giunto nel paese ospitante in tenera età è possibile che il suo progetto educativo e di inserimento abbia portato risultati apprezzabili e si sia, ad esempio, già inserito nel mondo del lavoro o sia stato adottato; ma la gran parte dei minori in viaggio ha una età compresa tra i 16 ed i 17 anni così che il breve tempo a disposizione per l'inserimento sociale non è generalmente sufficiente a garantirgli una stabilità ed una autosufficienza anche economica sul territorio. Il rischio concreto è che raggiunta la maggiore età, perso anche l'appoggio del tutore o del rappresentante legale, saranno costretti a lasciare il paese o divenire irregolari; questo perché non sempre i sistemi giuridici adottano programmi di "proseguo"[94] o, laddove presenti, non sono spesso efficaci o attuabili a causa della "scomparsa[95]" del minore al momento dell'avvicinarsi della maggiore età.

[93] Sui rapporti tra minore, famiglia affidataria e famiglia d'origine si veda: E. Backe-Hansen, *Formal and everyday participation in foster families: a challenge?* In A. Falch-Eriksen, E. Backe-Hansen, *Human rights in child protection. Impolication for professional practice and policy*, Palgrave, 2018, p. 227.

[94] C. Gimeno-Monterde, J.D. Gómez-Quintero, J.C. Aguerri, "Unaccompanied young people and transition to adulthood: Challenges for child care services", in *Children and Youth Services Review*, 2021, p. 121.

[95] Si veda sul fenomeno la guida *European Migration Netwok, How do eu member states treat cases. of missing unaccompanied minors?*, 2020 in https://orbilu.uni.lu/bitstream/10993/43330/1/Inform_Missing-Unaccompanied-Minors.pdf.

È evidente che questa materia risente della pluralità dei piani di intervento che lo stato deve approntare per mettere in esecuzione i diritti riconosciuti; è difficile immaginare norme uniformi in ragione della interferenza, in ciascun ordinamento, di scelte politiche e organizzative interne in cui anche la gestione delle risorse economiche contribuisce a creare disallineamenti, acuiti oggi anche dalla emergenza sanitaria.

Non vi sono, allo stato, le condizioni giuridiche né politiche per costruire una regolamentazione unitaria che prevede peraltro la necessità dei singoli stati di "abdicare" alla ricerca di un *common core* su un tema che include molte aree tipicamente di pertinenza nazionale e spesso legate alle tradizioni locali (si pensi a tutta l'area della tutela che generalmente appartiene al diritto di famiglia strettamente connesso all'evoluzione giuridica e sociale del paese).

Ciò non significa tuttavia affermare che soluzioni condivise non possano essere accolte anche in via "sperimentale" a seguito dell'adozione di raccomandazioni o linee guida che affondino le proprie radici nella consapevolezza che il riconoscimento della "cittadinanza" al minore – intesa non come acquisizione della nazionalità ma come sentimento di appartenenza allo stato ospitante e partecipazione alla vita sociale – è elemento favorente l'inclusione[96].

E tale senso di appartenenza non potrà essere sviluppato se non attraverso una collaborazione tra tutti i protagonisti, ossia il minore, lo stato e gli enti locali, le isitituzioni pubbliche e private nonché la cooperazione tra gli stati.

[96] G. Biagioni, *Il diritto all'inclusione, in Autorità Garante per l'Infanzia e l'Adolescenza, La convenzione delle Nazioni Unite sui diritti dell'Infanzia e dell'adolescenza. Conquiste e prospettive a 30 anni dall'adozione*, Tipografia Legatoria Rossini, 2019, pp. 162 ss.; R. Bertozzi, *Le politiche sociali per i minori stranieri non accompagnati. Pratiche e modelli locali in Italia*, Milano, FrancoAngeli, 2012.

The Spanish regulations on unaccompanied foreign minors[*]

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Summary: 1. Introduction; 2. Concept and regulation of the 'unaccompanied foreign minors'; 3. Bodies involved in the management of the unaccompanied foreign minor; 4. Procedure for ascertaining the minor's age; 5. Refugee minors; 6. Minor's foster care and adoption; 7. Legal guardianship; 8. Minor's foster care and adoption; 9. Residence authorization; 10. Rights recognized to the unaccompanied foreign minors; 11. Reach of the age of majority; 12. Final considerations.

1. *Introduction*

Since the end of the 90s (notably since 1996, although in other European countries the phenomenon was already relevant in the decade of the 70s and 80s), the arrival of foreign minors to Spanish territory has increased substantially. The arrival of unaccompanied foreign minors to Spain has gone from being considered as a transient phenomenon to become one of the priority intervention groups within the Spanish system of minors protection: it has been a challenge for the protection systems, which have found it necessary to adapt their procedures to the specific needs of these teenagers.

The arrival in Spain of foreigners under age, traveling alone or with adults who do not have responsibility on them, has become a new and significant migration strategy[1].

[*] Preliminary note: all names referred in this article to people, especially minors, that are made in the masculine gender for simplification purposes, will be understood to be made indistinctly in the masculine and feminine gender according to the sex of the person in question.

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[1] I. Lázaro Gonzáles, "Menores extranjeros no acompañados. La situación en España", *Prolegómenos. Derecho y Valores*, 2007, Vol. X, No. 19, p. 149.

Currently, Spain is one of the European countries with more unaccompanied foreign minors welcomed, being placed between the second and fourth country. These minors' profile is as a young man between 15 and 18 years old, from Morocco (mainly), Algeria, Senegal, Mali, Nigeria, Guinea-Bissau or the Republic of Guinea that comes to Spain to look for his life", sometimes in a way voluntary and, in others, encouraged by his family, although in recent years there has been an increase in the arrival of girls from sub-Saharan Africa and potencially vulnerable to human trafficking in particular to sexual exploitation[2].

In these cases, there is a great risk of social maladjustment due to an inappropriate interaction between the minor and his surroundings. It is a dynamic process, susceptible to aggravation quickly, and on the contrary, of being reversible thanks to a good intervention, if it occurs[3].

In this article we intend to offer an overview of the Spanish regulatory system for the reception and management for the unaccompanied foreign minors.

2. *Concept and regulation of the* 'unaccompanied foreign minors'

In order to resolve this situation, the successive Spanish immigration regulations have progressively observed and regulated the figure of the "unaccompanied foreign minors", leading to the fact that the current regulation devote a specific discipline to them, and give a legal definition of who these "unaccompanied foreign minors" are.

This regulation is fundamentally constituted by the general legal rules on the rights and freedoms of foreigners in Spain contained in the Organic Law 4/2000, of January 11th, on rights and freedoms of foreigners in Spain and their social integration (LOEX) and its development

[2] I. Lázaro Gonzáles, "Menores extranjeros no acompañados. La situación en España", *Prolegómenos. Derecho y Valores*, 2007, Vol. X, No. 19, p. 150; R. Fuentes Sánchez, "Menores Extranjeros No Acompañados (MENA). Foreign Unaccompanied Minors", *Azarbe. Revista internacional de Trabajo Social y Bienestar*, 2014, No. 3, p. 107.

[3] V. Gallego Obieta, J.J. Martínez Soler, A. Ortiz Barahona, M. Pastor Valdés, I. Pérez Burrull, M. Valero Torrejón, "La integración social de los Menores Inmigrantes No Acompañados: nuevos retos en la Comunidad de Madrid", *Acciones e investigaciones sociales*, 2016, Extra. No. 1, p. 109-4.

through the regulation approved by the Royal Decree 557/2011, of April 20th.(REX). Arts. 185-198 of the REX refer to foreign minors, and specifically 189-198 to unaccompanied foreign minors (*menores extranjeros no acompañados*, who have become broadly known as *MENAs*).

Article 189 of the REX defines the MENAs as "*foreigners under 18 of age who arrive in Spanish territory without being accompanied by an adult responsible for them, either legally or in accordance with custom, being appreciable the risk of lack of protection for the minor, as long as the adult responsible has not effectively taken care of the minor, as well as any foreign minor who once in Spain finds himself in that situation*". This definition agrees with the UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997: "*An unaccompanied child is a person who is under the age of eighteen, unless under the law applicable to the child majority is attained earlier, and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so*".

The UNHCR and UNICEF (2009) definitions on unaccompanied foreign minors brings together all concepts, terms and figures, as well as those requirements that define the legal concept of unaccompanied foreign minor assumed by international, European and national legislations (minor under 18 years old, foreigner – i.e., minors from third countries – and being not accompanied by an adult responsible for him and in a situation of helplessness or lack of protection); and they are the most based on a common consensus and validated by all public and private entities who work with these minors[4]. These definitions are collected by Spanish legislation.

In most of the EU countries it is understood as "foreign minor", that minor from a non-member state of the European Union. However, there are some EU Member States that also include unaccompanied foreign minors who are nationals of the EU within the same concept, and in this sense in Spain unaccompanied foreign minors who are nationals of the European Union or assimilated are included in this concept in everything that is favorable to them. In any case, logically, as we will see, the scope

[4] R. Fuentes Sánchez, "Menores Extranjeros No Acompañados (MENA). Foreign Unaccompanied Minors", *Azarbe. Revista internacional de Trabajo Social y Bienestar*, 2014, No. 3, p. 106.

of intervention and protection of the Spanish authorities does not have the same breadth in the case of European minors as non-European ones

In this sense, the concept of MENA is very broad, as it covers not only unaccompanied foreign minors who are nationals of a non-EU country, but also all foreign minors at risk (including nationals of a EU country), and especially those who are at risk for having entered the national territory clandestinely or surreptitiously or intending to cross the Spanish border posts together with an adult who, pretending to be their parent, relative or person responsible for the child, does not provide true or reliable documentation of the alleged bond, and, furthermore, an objective danger for the comprehensive protection of the minor is appreciated; those who are in a situation of patent helplessness or lack of protection, significantly due to the risk of being subjected to human trafficking networks; and those who as stowaways are on board a ship, ship or aircraft that is in a Spanish port or airport.

It should be noted that the model of action developed in Spain makes these adolescents' condition of minors prevail over their condition of immigrants, making use of the general resources destined for the care of unprotected children and young people to also assist to the teenagers arriving from other countries without the company or guardianship of any adult[5].

Specifically, Article 35 of the LOEX refers to unaccompanied children, being developed by the REX, whose Articles 189-198 regulate some aspects of unaccompanied children: definition, age determination, repatriation procedure, possibility of residence permit, and arrival of the minor to the age of majority.

There is also a Frame Protocol for Unaccompanied Foreign Minors (hereinafter, the Protocol), derived from the agreement of several public institutions involved in the management and treatment of unaccompanied foreign minors: the Ministries of Justice; Employment and Social Security; Health, Social Services and Equality, Interior, and Foreign Affairs and Cooperation, and the Prosecutor-General. This Protocol seeks to coordinate the intervention of all affected institutions and administrations, from the location of the minors or alleged minors to their identi-

[5] A. Bravo, I. Sántos-Gonzales, "Menores extranjeros no acompañados en España: necesidades y modelos de intervención", *Psychosocial Intervention*, 2017, No. 26, p. 55.

fication, determination of their age, making them available to the Public Service for the protection of minors, and documentation.

The regulation of residential care for the unaccompanied children and of the centers where it is carried out is made by regional regulations.

Moreover, General Observations No. 6 and No. 14 of the UN Committee on the Rights of the Child, adopted respectively on September 1st, 2005 and February 1st, 2013, highlight the particularly vulnerable situation of unaccompanied minors, and that the concept of the minor's best interests is complex and its content must be determined on a case-by-case basis.

3. *Bodies involved in the management of the unaccompanied foreign minor*

The scope of the bodies involved in the management of the unaccompanied foreign minor is very broad, ranging from any institution that meets an unaccompanied foreign minor to the police corps, the regional Public Entity for the protection of minors and the Child Protection Centers, all under the supervision of the Public Prosecutor's Office.

Firstly, any institution that welcomes or meets an unaccompanied foreign minor must communicate it immediately to the Provincial Brigade of Foreigners and Borders of the National Police Corps, as well as the corresponding Delegation or Sub-delegation of the Government and the Public Prosecutor's Office.

The Police will check that the minor is already registered. If not, he will be entered in the Registry of unaccompanied foreign minors (RMENA), and shall be given a Foreign Identity Number (NIE) and a Personal Identity Number (NIP). When the Police locates an unaccompanied foreign minor to whom the legal regime of the European Union is applicable[6], it will immediately inform the Public Prosecutor's Office and the Consulate or diplomatic representation of that country.

The Regional Public Entities for the protection of minors also have an important role in relation to unaccompanied foreign minors, since in

[6] Namely, a minor with the nationality of an EU country.

cases of lack of protection of minors (foreigners or Spanish), their guardianship is assumed by these entities[7].

It must also be considered the Child Protection Center, where the minor has his residence, under the supervision of the Public Entity for the protection of minors and the Public Prosecutor's Office. They are publicly owned by the regional government or private (often managed by NGOs), but any case supervised and coordinated by the regional government, and are ruled by regional regulations for the protection of minors in distress.

If the foreigner is a minor, he will be admitted to an open center where the appropriate protection measures (maintenance, education) will be adopted, and may not be subject to expulsion or admission to a Foreigner Internment Center. The Child Protection Centers, as institutions that temporarily assume the care and education of children who lack an environment that can satisfy their biological, emotional and social needs, have as their main objective to ensure that children recover their family environment or find them a suitable family environment.

[7] Article 171.1 of the Spanish Civil Code (CC):

"*When the Public Entity to which, in the respective territory, the protection of minors is entrusted, finds that a minor is in a situation of distress, it has the guardianship of the minor by operation of law and must adopt the necessary protection measures to its guardianship, bringing it to the attention of the Public Prosecutor's Office and, where appropriate, of the Judge who agreed to the ordinary guardianship. The administrative resolution that declares the situation of helplessness and the measures adopted will be notified in legal form to the parents or guardians and to the affected minor if he is sufficiently mature and, in any case, if he is over twelve years of age, immediately without that it exceeds the maximum period of forty-eight hours. The information will be clear, understandable and in an accessible format, including the causes that gave rise to the intervention of the Administration and the effects of the decision adopted, and in the case of the minor, adapted to his degree of maturity. Whenever possible, and especially in the case of the minor, this information will be provided in person.*

A situation of helplessness is considered to be one that occurs in fact due to non-compliance or the impossible or inadequate exercise of the protection duties established by the laws for the care of minors, when they are deprived of the necessary moral or material assistance.

The assumption of guardianship attributed to the Public Entity entails the suspension of parental authority or ordinary guardianship. Notwithstanding, acts of patrimonial content carried out by parents or guardians on behalf of the minor and which are made in the interest of the minor will be valid.

The Public Entity and the Public Prosecutor's Office may promote, if applicable, the deprivation of parental authority and the removal of guardianship".

Finally, the Public Prosecutor's Office supervises all the procedures, according to its statute. When a procedure is necessary in order to the determination of the foreigner's age, the file concludes through a decree from it, as we will see later.

However, there is not a special involvement of the judicial system. The supervision on the procedures is from the Public Prosecutor's Office. Notwithstanding, the administrative decisions are subject to appeal, and If from the statements of the adult accompanying the minor or any other indicator or news, a situation of imminent risk is appreciated in the person of the minor, the Public Prosecutor can urge a judicial resolution that prevents the minor from leaving the center in the company of the adult, while the risk situation is being evaluated, without judicial authorization.

In general, the protection of minors (foreign or Spanish) is a matter of administrative competencies, under the superior supervision of the Public Prosecutor's Office.

4. *Procedure for ascertaining the minor's age*

When the unaccompanied foreign minors arrive in Spain, they usually do not have the documentation that identifies them or it is false. Therefore, If the foreigner is considered a minor, he will be placed at the disposal of the competent protection services, but if he has reached the age of majority, then will receive the treatment as an irregular adult immigrant.

It may happen that they are in possession of a passport but the information regarding the age contained in it is contradictory with the results of the age determination tests that were previously carried out in Spain. In these cases, according to the Protocol (II.6), the minor will be considered undocumented, which could contradict the recent jurisprudence of the Spanish Supreme Court[8].

[8] Supreme Court judgments of 23rd and 24th September 2014 declare, regarding the value of the documentation carried by unaccompanied foreign minors when such documentation contains data that cannot be reconciled with the individual's physical reality, that "*the immigrant whose passport or equivalent identity document states his minority cannot be considered an undocumented foreigner for being subjected to complementary tests to*

The determination of age is developed in various stages[9]:

1. Disclosure or initiation: once an undocumented minor is found by the Police, he is brought to the attention of the Public Prosecutor. The presence of the full report at the headquarters of the Prosecutor's Office is not necessary, but any form of communication recordable in fact is sufficient (communication by email or even by telephone).
   According to Article 35.3-4 LOEX, when the Police locates an undocumented foreigner whose minority cannot be established with security, he will be given, by the competent services for the protection of minors, the immediate attention that he needs, in accordance with the provisions of the protection legislation for the minor, making the fact immediately known to the Public Prosecutor's Office, which will determine his age, for which the appropriate health institutions will collaborate, as a priority, carrying out the necessary tests; this procedure is unique throughout the Spanish national territory. Once the age has been determined, if he is a minor, the Public Prosecutor will make him available to the competent services for the protection of minors of the territory where he has been located.
2. Investigation phase: in this phase, the Public Prosecutor will authorize the necessary tests to be carried out. The Protocol states that the decision to perform medical tests for the age determination corresponds to the Public Prosecutor.

determine his age, since it is questionable without a reasonable justification why such tests are carried out when he has a valid passport. Therefore, it must be done a judgment of proportionality and to weigh adequately the reasons why the document is considered not reliable and that for this reason it is necessary to make to the age determination tests".

[9] I. Lázaro Gonzales, *Los menores extranjeros no acompañados*, Madrid, Tecnos, 2010.

We can underline some considerations about the following tests.

- The decision on conducting the tests should be adopted once the information in the RMENA has been consulted, where later the result of the medical tests of the determination of age will be recorded.
- These tests are performed in health centers attached to the Social Security or a public Hospital. Driving the minor to one or another specific health center must be decided by the Territorial Prosecutor's Office.
- The medical center must be in a position to carry out such tests. That is, prioritizing those that have a radiological emergency service operating 24 hours a day.
- Medical tests ordered by the Public Prosecutor's Office will be governed by the principle of speed, requiring the prior consent of the affected person and a specialized medical-sanitary control and will be carried out with respect for the dignity of the person. The Public Prosecutor will authorize the practice of medical tests only if the affected party gives his consent, after having been reliably informed, in the official form for it.

In the event of refusal before the acting police officers to consent to the practice of the medical tests, the foreigner will be brought into the presence of the Public Prosecutor, who after receiving his statement and taking into account all the circumstances in the file, may determine that he is an adult. The supposed minor may withdraw his consent at any time before the medical tests are performed, in which case they will cease or be rendered ineffective, being valued in the same way as if it were a previous refusal. However, if among the concurrent circumstances there are indicators that the foreigner could be a victim of trafficking in human beings, the presumption of minority will prevail, and immediate protection measures must be adopted.

Under article 35.1 LOEX, it is also not the competence of the Public Prosecutor's Office to coerce the imposition of evidence when a presumed minor refuses to be submitted to it. Therefore, on these occasions, there is no alternative for the Public Prosecutor to consider him of legal age, except when there are indications he is a victim of trafficking in human beings. We understand this could be a violation of recognized rights to minors by national and international regulations,

since the subject could effectively be a minor (having the corresponding rights) and such a condition would be denied simply because of his refusal to submit to medical tests.

- The Prosecutor-General's Office does not rule and cannot rule on the necessary medical tests to be carried out: rather, it is the competence of health institutions. According to their science rules, it is up to the medical practitioners to determine the adequate and sufficient evidence to eliminate the insecurity regarding the minority of the affected foreigner. Whatever the tests performed to determine the degree of bone or dental maturation (radiological test of the left carpus of the wrist, examination of the dentition, particularly of the third molar, by means of an orthopantomography, and X-ray scan of the clavicle for quantification of ossification changes), the prior physical and personal examination of the supposed minor will be mandatory.
- The medical tests consist of an radiography of the left wrist and part of the arm to observe the state of the bones, as their development follows a pattern until the age of 20 or 21. The reliability of the test is not total, but rather presents a margin of error of approximately two years, which until now has been considered a major problem in determining the age of many minors.

  Likewise, sometimes an examination of the oral cavity and a radiographic study are also carried out to define pathologies that could alter the rate of maturation.

  Medical tests will not be authorized when they repeat other ones already carried out or when, in view of the repetition with which the previous tests have been carried out and the radiation doses to which the subject has been subjected, there may be a risk for the health of the minor according to a previous report from the doctor or forensic doctor.
- During the time that elapses until the age is determined, the minors are housed in protection centers or first reception centers, since the determination time can be extended up to three weeks.

3. Decision phase: once the appropriate tests have been carried out, the prosecutor must issue a reasoned resolution (decree) determining whether or not the affected person is a minor. Therefore, if the resolu-

tion has established that the foreigner is a minor, he will be made available to the competent regional services for the protection of minors.

5. *Refugee minors*

Spanish regulations on unaccompanied foreign minors contain some specific rules in the case in which the child is a refugee or has applied for international protection.

Applicants of asylum under the age of 18 (full age) in a situation of helplessness will be referred to the competent services for the protection of minors, informing the Public Prosecutor's Office. The guardian who will be legally assigned to the minor will represent him during the processing of the file. Asylum applications will be processed in accordance with the criteria contained in the international conventions and recommendations applicable to minors seeking asylum (Article 15.4 of the Regulation for the application of Law 5/1984, of March 26th, regulating the right to asylum and refugee status, approved by Royal Decree 203/1995, of February 10th).

According to the Protocol, once these formalities have been fulfilled, in particular the giving knowledge to the Public Prosecutor's Office, the determination of the applicant's age, the making him available to the competent Public Entity for the protection of minors and the corresponding assignment of a legal representative, the unaccompanied foreign minor will be informed by the Public Entity for the protection of minors under whose legal guardianship, custody or provisional protection is, in a reliable way and in a language that can reasonably understand, about the basic content of the right to international protection and the procedure provided for his request, being recorded in writing. For the effective formalization of the application for international protection, the unaccompanied foreign minor must appear in the administrative offices provided for this purpose together with the person designated by the Public Entity for the protection of minors responsible for his guardianship in order to assist him in the corresponding formalization and processing, guaranteeing the minor's best interests and completing his capacity to act when necessary. The Spanish authorities will not be allowed to contact the diplomatic representations of the country

of origin of an unaccompanied foreign minor who is requesting international protection.

6. *Minors' expelling and repatriation. Family reunification*

The unaccompanied foreign minor cannot be automatically refused at the Spanish external border, whenever it is appreciated that he is at risk: all minors detected will be subjected to the procedure contemplated in the Protocol. In this sense, as we have indicated previously, the Protocol establishes that it will apply, among others, to foreign minors who are at risk for having entered the national territory clandestinely or surreptitiously or intending to cross the Spanish border posts together with an adult who, pretending to be his parent, relative or person in charge of the child, does not provide true or reliable documentation of the alleged bond, and also shows an objective danger for the comprehensive protection of the minor.

All minors detected in the Spanish national territory will be also subjected to the procedure contemplated in the Protocol. Only at the end of the procedure, they may be repatriated, when it is considered that the minors' best interests are satisfied by reuniting with their family or making them available to the protection services of their country of origin. The minor is allowed to make allegations and appeal the final decision, personally or through his representative. Minors over 16 years old will be able to intervene in the repatriation procedure.

Once the impossibility or inadvisability of the minor's repatriation has been proven, he shall be given a residence permit.

Moreover, in accordance with the Protocol (Section I.3.2), the policy on these minors will be aimed at family reunification in their country of origin or where their family resides or, where appropriate, upon return to their country (recommending to the attention of the child protection services) when this is in their best interests, bearing in mind that the United Nations Declaration of the Rights of the Child and the United Nations Convention on the Rights of the Child establish the priority that must be occur to the minors' development within their family or in an environment in which the traditions and cultural values of their own have an important presence, all without prejudice that all these factors

may very well not concur, in which case the return would not be in the interests of the minors.

The Public Entity for the protection of minors that receives the minors must make inquiries about the circumstances of them in order to verify if there is a real situation of distress, if it is possible to regroup them with their family in their country of origin or where they reside and, eventually, if there is a need for international protection that had not been previously detected (Section VII.1.2 of the Protocol).

7. *Legal guardianship*

Unaccompanied foreign minors' legal guardianship is developed by the Public Entity for the protection of minors.

Under Article 172 of the Spanish Civil Code (CC), when the Public Entity finds that a minor is in a situation of helplessness, it has the minor's guardianship by operation of law and must adopt the necessary protection measures to his custody, telling it to the Public Prosecutor's Office and, where appropriate, the judge who agreed to the ordinary guardianship. The administrative resolution that declares the situation of helplessness and the measures adopted will be notified in legal form to the parents or guardians and to the affected minor if he is sufficiently mature and, in any case, if is over twelve years of age, immediately without that exceeds the maximum period of forty-eight hours. The information will be clear, understandable and in an accessible format, including the causes that gave rise to the intervention of the Administration and the effects of the decision adopted, and in the case of the minor, adapted to his degree of maturity. Whenever possible, and especially in the case of the minor, this information will be provided personally.

A situation of helplessness is considered to occur due to non-compliance or the impossible or inadequate exercise of the protection duties established by the laws for the care of minors, when they are deprived of the necessary moral or material assistance.

The assumption of guardianship attributed to the Public Entity entails the suspension of parental authority or ordinary guardianship. The Public Entity and the Public Prosecutor's Office may promote, if applicable, the deprivation of parental authority and the removal of guardianship.

However, Article 35.11 LOEX states that the General State Administration and the regional authorities may establish agreements with non-governmental organizations, foundations and entities dedicated to the protection of minors, in order to assign them the ordinary guardianship of unaccompanied foreign minors. The agreement will specify the number of minors whose guardianship the entity undertakes to assume, the place of residence and the material means that will be used to care for them. The regional Administration which held the minor's custody shall be entitled to promote the constitution of guardianship, before the court of the place where the minor will reside, attaching the corresponding agreement and the agreement of the entity that will assume the guardianship. This guardianship regime will be the ordinary (provided for in the Civil Code and in the Civil Procedure Law).

8. *Minor's foster care and adoption*

Since the unaccompanied minor is placed under the protection of the Public Entity for the protection of minors, the conditions are the same as for Spanish children. The foster care is a useful remedy for unaccompanied foreign minor since it looks for the integration of the child in a familiar environment.

The foster care can be provided by all couples or people who are willing and able to offer children and teenagers who cannot live with their families a family environment of coexistence in which to grow, which allows them to develop their capacities and provides them with respect and love they deserve, until they can return to their family of origin or a more suitable alternative is determined.

According to Article 172 ter CC, the child custody will be carried out firstly through foster care and, not being possible or convenient for the minor's interest, through residential foster care. Foster care will be carried out by the person or persons determined by the Public Entity. Residential foster care will be exercised by the Director or head of the center where the minor is housed, in accordance with the terms established in the legislation for the protection of minors. Those who cannot be tutors may not be fosterers. The resolution of the Public Entity in which the guardianship measure is formalized will be notified to the parents or

guardians who were not deprived of parental authority or guardianship, as well as to the Public Prosecutor's Office.

The minor's best interests will always be sought and, when it is not contrary to that interests, it will be prioritized his reintegration into his own family and that the custody of the siblings be entrusted to the same institution or person so that they remain united. The minor's situation in relation to his family of origin, both with regard to his custody and the visitation regime and other forms of communication, will be reviewed at least every six months.

According to Article 173 CC, foster care will produce the full participation of the minor in family life and imposes on the recipient the obligations of looking after him, keeping him in his company, feeding him, educating him and providing him with comprehensive training in a loving environment. In the case of a minor with a disability, he shall have to continue with the specialized support that has been receiving or adopt others more appropriate to his needs. Foster care will require the consent of the fosterers and of the foster child if he is sufficiently mature and, in any case, if he is over twelve years of age.

If serious problems of coexistence arise between the minor and the person or persons to whom the foster care has been entrusted, the former, the fosterer, the Public Prosecutor, the parents or guardian who were not deprived of parental authority or custody. the guardianship or any interested person may request to the Public Entity the removal of the guardian.

The foster care of the minor will cease:

a) by judicial resolution;
b) by resolution of the Public Entity, ex officio or at the proposal of the Public Prosecutor, of the parents, guardians, fosterers or the minor himself if he has sufficient maturity, when it is considered necessary to safeguard his interests, after hearing the foster family, the minor, their parents or guardian;
c) due to the death or declaration of death of the minor's foster caregiver;
d) by the minor's reaching of his full age.

Moreover, the helpless foreign minor can also be adopted, like a Spanish minor. Adoption is a child protection measure that provides a defin-

itive family to boys and girls who, due to certain circumstances, cannot remain in their family of origin. In adoption, the child's best interests and respect for his rights must prevail, having to give up, in the event of conflict, the aspirations of the applicants for adoption, no matter how legitimate they may be.

In Spain, the regional governments, within the framework established by the 1978 Constitution, have assumed with respect to their territory, among others, the competence related to the protection of minors, becoming the competent public entities in matters of adoption.

According to Article 175 CC, adoption requires that the adopter be over 25 years of age, although if there are two adopters, it will be enough if one of them has reached that age. In any case, the age difference between the adopter and the adopted shall be at least sixteen years and may not exceed forty-five years, except in some cases. When there are two adopters, it will be enough that one of them does not have that maximum age difference with the adopter. If future adopters are able to adopt groups of siblings or minors with special needs, the maximum age difference may be greater. Those who cannot be tutors cannot be adopters.

Only non-emancipated minors may be adopted. Exceptionally, the adoption of an adult or an emancipated minor will be possible when, immediately prior to emancipation, there has been a foster care situation with the future adopters or of stable coexistence with them for at least one year.

It cannot be adopted a descendant, a relative in the second degree of the collateral line by consanguinity or affinity (brothers, sisters and brothers- and sisters-in-law), or a ward by his tutor or guardian until the guardianship justified general account has been definitively approved. No one may be adopted by more than one person, unless the adoption is carried out jointly or successively by both spouses or by a couple united by an analogous relationship of affection to the conjugal one. The marriage celebrated after the adoption will allow the spouse the adoption of his consort's children; this provision will also be applicable to couples that are formed later. In the event of the adopter's death, or when the adopter suffers an exclusion of custody, a new adoption of the adoptee will be possible.

In case that the adoptee is in permanent foster care or custody for the purpose of adoption of two spouses or of a couple united by an analogous relationship of affection to the conjugal one, the legal separation or divorce or rupture of the relationship of them established prior to the adoption proposal will not prevent joint adoption from being promoted as long as the effective coexistence of the adopter with both spouses or with the couple united by a similar relationship of a marital nature for at least two previous years is proven.

Article 176 CC states that the adoption will be constituted by a judicial resolution, which will always take into account the adopted person's best interests and the suitability of the adopter or adopters for the exercise of parental authority. In order to start the adoption file, it will be necessary the previous proposal of the Public Entity in favor of the adopter or adopters that it has declared suitable for the exercise of parental authority. The declaration of suitability must be prior to the proposal. However, such a proposal will not be required when any of the following circumstances concur in the adopting party:

1. being an orphan and relative of the adopter up to the third degree of blood of family relationship;
2. being the child of the spouse or of the person united to the adopter through a similar relationship of affection to the spouse;
3. to have been in custody for more than one year for adoption purposes or to have been under the guardianship of the adopter for the same time;
4. being an adult or an emancipated minor.

Being an adoptive family is, from a legal point of view, everything that being a family means and from a psychosocial point of view, it implies most of the experiences and characteristics of the family with biological children, but it also implies the acceptance of certain challenges or specific differences, or at least more frequent, in adoption. Among them, the most important, the unconditional acceptance of a minor who is the natural child of other people and the duty to make him their own child. Therefore, for a family to be suitable for adoption, in addition to a series of aptitudes, a special disposition is required in the form of motivations, attitudes and expectations towards the minor to be adopted. More than the ability to care and educate, it is also the ability to respond to the spe-

cial needs of a minor who has been abandoned or separated from his biological family for different reasons and is to give him his "place of son or daughter" that implies his unconditional acceptance.

Article 176 bis CC contemplates the possibility of also constituting a pre-adoptive foster care. The Public Entity may delegate the custody of a minor declared to be in a situation of helplessness to persons who, meeting the requirements of capacity to adopt and having given their consent, have been prepared, declared suitable and assigned for adoption. in this sense, the Public Entity, prior to the presentation of the adoption proposal, will delegate the custody for the purposes of adoption until the judicial resolution of adoption is issued, by means of a duly motivated administrative resolution, after hearing the parties and the minor, if he is of sufficient maturity and, in any case, if he is over twelve years of age, the parents or guardians not deprived of parental authority or guardianship will be notified. Guardians for adoption purposes will have the same rights and obligations as foster families.

Unless the minor's best interests were otherwise convenient, the Public Entity will proceed to suspend the visitation and relations with the family of origin when the pre-adoption period of coexistence begins.

The adoption proposal to the judge will have to be made in the shortest possible time and, in any case, before three months have elapsed from the day on which the guardianship delegation was agreed for adoption purposes. However, when the Public Entity deems it necessary, depending on the minor's age and circumstances, to establish a period for the minor to adapt to the family, the period of three months may be extended up to a maximum of one year.

In case the Judge does not consider such adoption appropriate, the Public Entity must determine the most appropriate protective measure for the minor.

9. *Residence authorization*

The Protocol procedure provides that the minor's residence authorization will be requested when it will not be suitable his repatriation.

The Protocol states that the Public Entity will ask for the residence permit in a time of three months since the minor was made available to

the Center for the Protection of Minors. If, for unjustified reasons, the resolution proposal has not been raised by the Public Entity, the Government Delegation or Sub-delegation corresponding to the minor's domicile will initiate, ex officio, the procedure relating to the residence authorization. The processing and resolution of the file must be carried out with the greatest speed – in any case, after a maximum period of nine months from the availability of the minor, whatever the processing status, the Government Delegation or Sub-delegation will grant the residence authorization.

The duration of this residence permit is one year, from the date of the resolution of the Public Prosecutor's Office by which it was determined the availability of the minor to the minors protection service (Article 196.4 REX), and it shall be renewed for successive annual periods (unless a long-term residence permit is applicable) being requested during the sixty calendar days prior to the expiration date of its validity (Article 196.5 REX).

Within a month from the date of notification of the resolution granting the authorization, it shall be requested for the minor, before the Foreigners Office or Police Station, the Foreigner Identity Card.

In any case, the granting of a residence permit shall not be an obstacle to subsequent repatriation when it favors the minor's best interests.

The advantages for the minor from having the residence permit granted are the regularization of his situation (therefore the request of this permit is compulsory), and the subsequent possibility of asking for a work permit for the minor.

The integration of these minors is encouraged in their educational process, through the methodological design of the educational project. There are intervention and prevention plans developed by social services in order to promote a suitable social and labor growth of minors on social risk.

The danger of maladjustment is manifested in deprived environments and in processes of destructuring, and if protective and corrective social instances are not mediated, minors may enter into processes of socialization and undesirable lifestyles.

10. *Rights recognized to the unaccompanied foreign minors*

The unaccompanied foreign minors, as foreigners with a legal residence, can exercise rights recognized to them in conditions of equality with Spaniards, being interpreted in accordance with the Universal Declaration of Human Rights and with international treaties and agreements (Article 3 LOEX). Foreigners with a legal residence will have the following rights, to the extent that their age allows it (Articles 4-14 LOEX): documentation, freedom of movement, suffrage in municipal elections, meeting and demonstration, association, education (in accordance with the provisions of educational legislation), working and Social Security, unionization and strike, health care, access to public aid systems in housing and access to social services.

Moreover, as minors, they have some rights, contemplated in the Organic Law 1/1996, of January 15th, on the Legal Protection of Minors (hereinafter, LOPJM). Foreign minors who are in Spain have the right to education, health care and basic social services and benefits, under the same conditions as Spanish minors, and specifically Public Administrations will ensure especially vulnerable groups such as unaccompanied foreign minors and others, guaranteeing compliance with the rights provided by law (Article 10.3).

All minors have the right to have their best interests valued and considered paramount in all actions and decisions that concern them, both in the public and private spheres, prevailing their superior interest over any other interest that could attend (Article 2.1); every measure in the minor's best interests must be adopted respecting the minor's rights to be informed and heard, and to participate in the process in accordance with current regulations (Article 2.5.a); and in that sense the minor has the right to be heard in any procedure in which he is affected and that leads to a decision that affects his personal, family or social sphere, duly taking into account his opinions, depending on their age and maturity (to do this, the minor must receive the information that allows him to exercise this right in understandable language, in accessible formats and adapted to his circumstances), being guaranteed that the minor, when he is sufficiently mature, can exercise this right by himself or through the person he designates to represent him, being considered, in any case, that he has sufficient maturity when is twelve years old (Article 9). Minors have also

rights to honor, privacy and self-image, information, ideological freedom, participation, association and assembly and freedom of expression (Articles 4-8).

For this purpose, when the Public Entity assumes the guardianship of a foreign minor who is in Spain, the General State Administration will provide, if it does not have it, as soon as possible, and together with the presentation of the guardianship certificate issued by the Public Entity, the documentation proving his situation and the residence permit, once the impossibility of returning with his family or to his country of origin has been proven, and in accordance with the provisions of current regulations on immigration (Article 10.4).

There are also regional laws about guarantee of child and teenager rights.

Specifically about education and health care, the LOEX states some provisions.

Foreigners under the age of sixteen have the right and duty to *education*, which includes access to basic, free and compulsory education. Foreigners under the age of eighteen also have the right to post-compulsory education. This right includes obtaining the corresponding academic qualification and access to the public system of scholarships and aid under the same conditions as Spaniards. In case of reaching the age of eighteen during the school year, they will retain that right until its completion. Therefore, the unaccompanied foreign minors will receive a proper education at the center for the protection of minors where they are assigned, or will be registered in an educational center.

Foreigners (in general) have also the right to *health care* under the terms provided in current legislation on health matters. The Law 14/1986, of April 25th, on General Health, states in its Article 1.2 that holders of the right to health protection and healthcare are all Spanish and foreign citizens who have established their residence in the Spanish national territory. To that purpose, the unaccompanied foreign minors will be provided with a Health care card.

Regarding minors protected or kept by Public Entities, the recognition of their insured status in relation to health care will be carried out ex officio, upon presentation of the certification of their guardianship or custody issued by the Public Entity, during its duration (Article 10.5 LOPJM).

11. *Reach of the age of majority*

When the minor reaches the age of 18, the Public Entity for the protection of minors shall issue a resolution establishing his consequent withdrawal from the center for the protection of minors. Social services usually have programs for their social integration.

According to Articles 35.9 LOEX and 197 REX, foreign minors under guardianship who have a residence permit and reach the age of majority may renew their authorization or access a residence and work authorization, taking into account, where appropriate, the positive reports that, for this purpose, may be submitted by the competent Public Entities referring to their integration effort, the continuity of the training or studies that were being carried out, as well as their incorporation, effective or potential, into the labor market. The regional authorities will develop the necessary policies to enable minors to enter the labor market when they reach the age of majority.

The former minor will be able to request the renewal of the residence permit, during the sixty calendar days prior to the expiration date of its validity. The authorization will be renewed taking into account the existence of financial means for his support, the positive reports that, where appropriate and for these purposes, may present the competent Public Entities and the insertion of the applicant in the Spanish society. The validity of the renewed permit will be two years, unless a long-term residence authorization corresponds, and the applicant will have to ask for a Foreigner Identity Card.

12. *Final considerations*

The Spanish regulation on unaccompanied foreign minors follows the guidelines established internationally, based on documents already issued by international organizations: UNICEF, UN Committee on the Rights of the Child, European Union. In this sense, the current Spanish regulation is up-to-date and benefits from the accumulated experience of years of international regulation and national case-law (Constitutional Court, Supreme Court) on unaccompanied foreign minors. Moreover, many specifically designed programs and services have been created for these

teenagers which have favored their training and integration in the host context.

Notwithstanding, it presents some deficiencies derived from the fact that in practice the radiological tests to determine the presumed minor's age continue to be abused when they are not necessary, and some aspects of this regulation are also defective, such as that the legal consequences that the subject's refusal to submit to these tests may entail, could be a violation of recognized rights to minors by national and international regulations.

Besides, it presents certain deficiencies derived from the distribution of competences in this area between the State National Administration and regional governments, which that should be corrected and improved: as foreigners, there is an exclusive jurisdiction of the State on foreigners, added to that there is a common (national) unitary framework in civil regulations on the protection of these minors (Civil Code, general regulations), and it is also national the competence on minors' fundamental rights as well as the basic regulations regarding the application of protection procedures; on the other hand, there are the regional protection regulations in relation to social services for these minors, and the location of each Public Protection Entity within the regional jurisdiction, determining the respective administrative protection procedures in its region. As a consequence of this distribution of competence, we find a different service model in each region, carrying out the creation of different resources and specific services, even though several protocols have been established to agree on basic practices. Thus, for example, the differences in the provision of programs to support the transition to adult life for this group are very notable in the different regions.

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Accertamento dell'età dei minori stranieri non accompagnati: normativa e prassi

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Sommario: 1. Introduzione; 2. L'accertamento dell'età: quadro normativo; 3. Misure applicative; 4. Le criticità dell'accertamento dell'età; 5. Brevi considerazioni conclusive.

1. *Introduzione*

Era il 3 settembre 2015 quando il corpo di Ayal Kurdi, bimbo di tre anni di Kobane (Siria), venne trovato riverso sulla spiaggia di Bodrum in Turchia. Quell'immagine è ancora scolpita, indelebile, nelle menti di ognuno di noi e ha fatto da spartiacque nella presa di coscienza che l'Europa non poteva più stare a guardare inerte di fronte alla tragedia che si stava perpetrando ai danni di tante giovani vite e che bisognava fare qualcosa di concreto.

Dall'emergenza umanitaria dei Paesi del Nord Africa del 2011, derivata dalla Primavera Araba, il fenomeno dei flussi migratori dei minori stranieri non accompagnati (MSNA)[1] in Italia ha assunto una portata sempre più consistente e rilevante, a seguito dell'acuirsi di guerre e conflitti locali, così come ci dicono i report statistici pubblicati periodicamente dal Ministero del Lavoro e delle politiche sociali; ma, accanto ai numeri "ufficiali", vi è il c.d. numero oscuro ossia coloro che sfuggono alla segnalazione all'autorità pubblica e all'identificazione.

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[1] Art. 2, L. 7 aprile 2017, n. 47: "[…] *per minore straniero non accompagnato presente nel territorio dello Stato si intende il minorenne non avente cittadinanza italiana o dell'Unione europea che si trova per qualsiasi causa nel territorio dello Stato o che è altrimenti sottoposto alla giurisdizione italiana, privo di assistenza e di rappresentanza da parte dei genitori o di altri adulti per lui legalmente responsabili in base alle leggi vigenti nell'ordinamento italiano*".

In questo articolo prenderemo in esame uno degli aspetti più delicati che caratterizza il percorso migratorio del minore straniero non accompagnato nel momento in cui approda sul suolo italiano: l'accertamento dell'età.

Procedura che nella sua applicazione pratica ha incontrato notevoli difficoltà e problematiche.

Dall'essere identificato come minore piuttosto che adulto discendono diritti e tutele previsti dall'ordinamento italiano, in osservanza della normativa internazionale, che ne cambiano notevolmente la posizione sia dal punto di vista giuridico civile, amministrativo e penale sia dal punto di vista dell'accoglienza sul suolo italiano.

Basti pensare alla competenza dell'autorità giurisdizionale che è diversa se chi ha commesso un reato di rilevanza penale è un minore (che, ricordiamo, non è imputabile se infra-quattordicenne) o adulto; nel primo caso la competenza è del Tribunale per i minorenni nel secondo del Tribunale ordinario.

Ancora, di fondamentale rilevanza, riveste l'identificazione come soggetto minorenne per la applicabilità delle misure speciali a favore del minore, soggetto vulnerabile da tutelare; prima fra tutte, il divieto assoluto di respingimento[2] alla frontiera dei MSNA, respingimento che non può essere disposto in alcun caso[3]; ancora, il divieto di espulsione dei minori stranieri che può essere derogato solo per motivi di ordine pubblico e sicurezza dello Stato ed a condizione che il provvedimento non comporti un rischio di danno grave per il minore[4].

[2] In merito vedasi anche il principio di non-refoulement previsto dall'art. 33 della Convenzione di Ginevra: "*Nessuno Stato Contraente espellerà o respingerà, in qualsiasi modo, un rifugiato verso i confini di territori in cui la sua vita o la sua libertà sarebbero minacciate a motivo della sua razza, della sua religione, della sua cittadinanza, della sua appartenenza a un gruppo sociale o delle sue opinioni politiche*".

[3] Art. 19, comma 1*bis*, D.lgs. 25 luglio 1998, n. 286, recante TU immigrazione.

[4] Il Tribunale per i minorenni decide tempestivamente e comunque non oltre trenta giorni; art. 3, L. 7 aprile 2017, n. 47. Si pensi anche che nell'eventualità che sia stato disposto il divieto di respingimento o di espulsione, i minori stranieri non accompagnati possono accedere a due tipi di permesso di soggiorno (art. 10, L. 7 aprile 2017 n. 47; L. 4 maggio 2013 n. 184; art. 31, comma 1, D.lgs 25 luglio 1998 n. 286) il permesso per minore età ed il permesso per motivi familiari. Il primo viene rilasciato per il solo fatto di essere "minore d'età" e ha validità fino al compimento della maggiore età. Il permesso di soggiorno per motivi familiari viene rilasciato quando il minore è: a) sottoposto

L'identificazione e il corretto accertamento dell'età diventano di decisiva importanza soprattutto in relazione alla presenza, in continuo aumento, in Italia di c.d. "grandi minori" ovvero di soggetti di età compresa tra i 16 e i 17 anni.

Frequentemente i minori che arrivano in Italia provengono da realtà molto povere, senza risorse, e afflitte dalle guerre e il costo del viaggio che ha sostenuto la famiglia del minore è molto oneroso per cui accade che soggetti minori si dichiarano maggiorenni per poter accedere al mondo del lavoro e poter ripagare quel debito contratto dalla famiglia di origine e per poter inviare i denari a chi è rimasto in quelle realtà.

Segnaliamo solamente, ma richiederebbe una più approfondita analisi che esula dal nostro contesto, la presenza di minori stranieri non accompagnati (più di frequente di nazionalità nigeriana) che sono vittime della tratta che dichiarano una età falsa, ossia di essere maggiorenni, allo scopo di essere sistemati in centri di accoglienza per adulti per allontanarsene più facilmente sotto il controllo del trafficante[5].

D'altra parte, non possiamo non menzionare il fenomeno dei migranti maggiorenni che si dichiarano minorenni al fine di sottrarsi all'espulsione, distogliendo così risorse e fondi destinati ai MSNA.

Il tema dell'accertamento della età è pertanto rilevate e come si dirà nel proseguo ha sollevato criticità in ordine alla tutela dei diritti fondamentali del minore per le modalità non sempre uniformi sul territorio italiano di verifica.

2. *L'accertamento dell'età: quadro normativo*

Nel ricercare le norme di riferimento relative all'accertamento dell'età dei minori stranieri non accompagnati non possiamo ignorare l'art. 4, D.lgs. 4 marzo 2014 n. 24 e dal D.P.C.M. 10 novembre 2016, n.

alla tutela di un cittadino italiano o di un cittadino straniero regolarmente soggiornante e convivente con il tutore; b) affidato ad un cittadino italiano o a un cittadino straniero regolarmente soggiornante, ai sensi dell'art. 4 della Legge 4 maggio 1983 n. 184; c) affidato "di fatto" a parente entro il quarto grado (fratello/sorella, nonno/a, zio/zia, cugino/a) ai sensi dell'art. 9, comma 4, della Legge 4 maggio 1983 n. 184.

[5] https://it.usembassy.gov/it/rapporto-sul-traffico-di-persone-2020/, consultato in data 14 febbraio 2021.

234 (con riferimento ai minori vittime di tratta), l'art. 19 D.lgs. n. 25 del 2008 (per ciò che concerne i minori non accompagnati richiedenti protezione internazionale) e l'art. 8 D.P.R. 22 settembre 1988, n. 448 (nell'ambito dei procedimenti penali).

È dunque immediatamente evidente una certa disorganicità della disciplina frammentata in testi legislativi di diversa natura ed applicazione.

Si deve aspettare l'entrata in vigore della c.d."*legge Zampa*", L. 7 aprile 2017 n. 47[6] (che ha finalmente disciplinato le "*Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati*") per vedere disciplinato questo aspetto nel suo art. 5 che introduce l'art. 19-*bis* nel D.lgs. n. 142/15, relativo specificamente ai minori stranieri non accompagnati.

La legge Zampa ha, dunque, portato ordine e organicità nel panorama legislativo consentendo e garantendo una applicazione uniforme delle norme su tutto il territorio, introducendo nuove regole (per esempio in tema di tutela volontaria, art. 11, pure rilevante per questo aspetto), o rafforzando disposizioni già presenti mediante la codificazione delle stesse.

Si tratta pur sempre di un aspetto che tuttavia richiede di fissare modalità attuative condivise.

Prima della entrata in vigore della legge Zampa, in tema di accertamento dell'età, il quadro normativo era, si ripete, disorganico, frammentato e disciplinato da fonti di natura diversa, secondarie e di limitata applicabilità. Il riferimento era il regime penale[7] e la protezione internazionale[8] ed il criterio che veniva utilizzato era quello della analogia[9]; nonché il ricorso a fonti secondarie quali le Circolari ministeriali[10] o le Linee Guida, e le raccomandazioni dell'UNHCR del 2014 ("L'accertamento dell'età dei minori stranieri non accompagnati e separati in Italia")[11].

[6] Pubblicata in Gazzetta Ufficiale, Serie Generale, n. 93 del 21 aprile 2017.

[7] Art. 8 del D.P.R. 22 settembre 1988, n. 448.

[8] Art. 28, D.lgs. 19 novembre 2007, n. 251.

[9] Art. 19, D.lgs. 28 gennaio 2008, n. 25 di attuazione della direttiva 2005/85/CE; art. 19 del D.lgs. 18 agosto 2015, n. 142 di attuazione delle direttive 2013/33/UE e 2013/32/UE.

[10] Circolare 9 luglio 2007 (prot. N. 17272/7) «Identificazione di migranti minorenni».

[11] https://www.unhcr.it/wp-content/uploads/2016/01/accertamento.pdf, consultato in data 8 febbraio 2021.

A livello locale vi sono state da parte di taluni Enti Locali l'adozione di alcuni protocolli d'intesa di buone prassi per l'accoglienza e l'integrazione sociale dei MSNA, a titolo di esempio, ricordiamo quello delle città di Torino[12], di Siracusa[13] e di Napoli[14].

Un punto di riferimento sono state le linee guida fornite dalle organizzazioni che operano a livello internazionale quali Save The Children, Intersos in paternariato con l'UNICEF, Terres des Hommes, Emergengy nonché le raccomandazioni del 2014 dell'UNHCR

Nel 2008 il Ministero dell'interno ha indetto una Conferenza col compito di cercare una linea unitaria da seguire per le procedure di identificazione e accertamento dell'età. A seguito della Conferenza è stato conferito mandato ad un gruppo tecnico interistituzionale e multidisciplinare presso il Ministero del lavoro, della salute e delle politiche sociali, che ha dato vita al c.d. "Protocollo Ascone": "Protocollo per l'accertamento dell'età dei minori secondo il modello dell'approccio multidimensionale" che nel 2009 ha ricevuto il parere positivo da parte del Consiglio Superiore della Sanità.

Solo il 3 marzo 2016 vi è stata però la approvazione in sede di Conferenza delle Regioni e delle Province autonome (16/30/CR09/c7-15), del "Protocollo per l'identificazione e l'accertamento olistico multidisciplinare dell'età dei MSNA"[15].

Infine, il 9 luglio 2020 è stato sancito, in conferenza unificata tra il Governo, le Regioni e le Province Autonome di Trento e Bolzano e gli Enti Locali, il «Protocollo multidisciplinare per la determinazione dell'età dei minori stranieri non accompagnati»[16].

[12] https://www.ordineavvocatitorino.it/sites/default/files/documents/scheda%20riassuntiva%20accertamento%20et%C3%A0%20+++.pdf, consultato in data 14 febbraio 2021.

[13] http://www.prefettura.it/FILES/AllegatiPag/1146/Protocollo_Buone_Prassi_MSNA24012018_0001.pdf, consultato in data 14 febbraio 2021.

[14] http://www.prefettura.it/napoli/allegati/Download:Protocollo_d_intesa_per_l_accertamento_dell_eta_di_minori_stranieri_non_accompagnati-5818104.htm, consultato in data 14 febbraio 2021.

[15] https://www.minori.gov.it/sites/default/files/protocollo_identificazione_msna.pdf, consultato in data 8 febbraio 2021.

[16] http://www.integrazionemigranti.gov.it/Attualita/Notizie/Pagine/Protocollo-per-la-determinazione-delleta-dei-minori-stranieri-non-accompagnati.aspx, consultato in data 8 febbraio 2021.

Questa è la breve, e non certo esaustiva, analisi dell'*iter* che ha portato allo stato normativo attuale in Italia. Quadro normativo che ha cercato di dare una risposta al fenomeno migratorio dei minori con interventi volti a tamponare una situazione sempre emergenziale e urgente.

3. *Misure applicative*

L'accertamento dell'età richiede in via preliminare l'identificazione del soggetto.

Nel momento in cui il presunto minore straniero non accompagnato arriva sul suolo italiano devono essere messe in atto le misure di assistenza umanitaria, protezione e soccorso immediate e deve essere accolto nelle strutture di prima accoglienza. Le operazioni di identificazione devono concludersi entro dieci giorni.

In tale occasione il (presunto) minore riceve tutte le informazioni che concernono i diritti e le tutele del minore compreso quello di richiedere la protezione internazionale.

L'identità del minore straniero non accompagnato è accertata, nel momento del rintraccio e/o segnalazione della presenza di un minore, dalle Forze di Pubblica Sicurezza, identificazione che deve avvenire alla presenza di un mediatore culturale, di un tutore o del tutore provvisorio se già nominato[17]. Qualora il tutore non sia stato ancora nominato il rappresentante legale della struttura di accoglienza presso la quale il minore viene collocato ne diviene il tutore *pro tempore*[18]. La segnalazione deve essere inviata alla Procura della Repubblica presso il Tribunale dei Minorenni di competenza del luogo dove il minore si trova o della struttura in cui è stato collocato.

Così come è previsto per gli adulti anche il minore di età maggiore ai 14 anni ha l'obbligo di rilasciare le impronte digitali che, unitamente alle generalità dichiarate, verranno inserite nella banca dati AFIS e Eurodac.

Il personale della struttura di prima accoglienza provvede ad effettuare un primo colloquio che, come indica il Protocollo del 9 luglio 2020,

[17] Art. 19 *bis*, comma 3, D.lgs. 18 agosto 2015, n. 142 come introdotto dalla L. 7 aprile 2017 n. 47.

[18] Art. 402 c.c.; art. 3, comma 11, L. 4 maggio 1983, n. 184.

deve avvenire in un ambiente idoneo e qualora siano emersi elementi certi circa la minore età del soggetto non si procede alla ricerca di elementi successivi.

Nei casi in cui invece dagli elementi raccolti emergano dei dubbi circa l'età dichiarata si procede all'accertamento; ciò accade quando il soggetto si dichiara minore ma vi è il fondato dubbio che sia maggiorenne o, viceversa, il soggetto si dichiara maggiorenne ma vi è il fondato dubbio che sia minorenne.

In attesa che si concluda la procedura di accertamento dell'età il soggetto viene trattato come minore, vi è quindi una presunzione di minore età e vengono attivate tutte quelle garanzie a tutela del suo *status*.

Il minore potrà rimane nella struttura di prima accoglienza per un periodo non superiore a trenta giorni[19]; successivamente verrà collocato nelle strutture facenti parte del Sistema di protezione per titolari di protezione internazionale e minori non accompagnati – SIPROIMI[20] (*ex* SPRAR).

Il primo passaggio dell'accertamento si effettua mediante l'esame dei documenti anagrafici in possesso del presunto minore, anche avvalendosi della collaborazione delle autorità diplomatico-consolari. Naturalmente la collaborazione non può e non deve essere richiesta nell'ipotesi in cui il presunto minore abbia espresso la volontà di richiedere la protezione internazionale a seguito del colloquio sociale, oppure se il minore abbia dichiarato di non volersene avvalere.

I documenti anagrafici che sono ritenuti idonei ai fini dell'accertamento dell'età sono il passaporto o un documento di identità, anche non in corso di validità, ovvero altro documento di riconoscimento che sia munito di fotografia.

Altri documenti privi di fotografia, come per esempio il certificato di nascita o un documento scolastico, possono essere utilizzati ai fini della valutazione complessiva.

Bisogna però tener presente che non sempre vi è la presenza dei documenti:

- non in tutti i paesi da cui provengono i minori vi è la registrazione dei bambini alla nascita; in quanto i costi della registrazione sono troppo

[19] Prima era di 60 ma è stato ridotto dalla L. 7 aprile 2017, n. 47.

[20] D.L. 4 ottobre 2018, n. 113.

onerosi per le famiglie più povere oppure perché il certificato di nascita non viene rilasciato alle famiglie[21];

- alcuni minori invece non sono in grado di identificare la propria data di nascita per via della differenza di utilizzo dei calendari;
- nei casi di apolidia non esistono certificati di nascita;
- talvolta i minori sono in possesso dei documenti ma questi vengono smarriti durante il viaggio o vengono sottratti dai trafficanti;
- i documenti esistono ma sono in possesso dei genitori nel paese di origine o presso altri adulti ma non sono reperibili.

Se dunque la ricerca o la visione dei documenti non è dirimente occorre procedere con l'accertamento dell'età.

Va subito detto che, ad oggi, non esiste alcun metodo scientifico che consenta di determinare l'età con certezza e l'affidabilità dei metodi utilizzati è stata oggetto di discussione in ambito scientifico[22].

Qualora persistano dei dubbi fondati in merito all'età dichiarata dal presunto minore e non è stato possibile accertarne l'età mediante i documenti anagrafici si procede nel rispetto del superiore interesse del minore e su richiesta dell'Autorità giudiziaria competente con la determinazione dell'età secondo l'approccio multidisciplinare.

La procedura – che si deve attivare entro tre giorni dalla richiesta dell'Autorità giudiziaria competente e deve concludersi entro dieci giorni e, comunque, non oltre venti giorni – è condotta da una équipe multidisciplinare, ed è suddivisa in fasi successive e progressive ad invasività in crescendo:

- colloquio sociale;
- valutazione psicologica e neuropsichiatrica;
- visita pediatrica auxologica, con ricorso ad accertamenti sanitari, utilizzando modalità il meno invasive possibili e rispettose dell'età presunta, del sesso e dell'integrità psicofisica del minore.

[21] https://www.unicef.it/media/registrazione-alla-nascita-nel-mondo-un-terzo-dei-bambini-resta-invisibile/, consultato in data 8 febbraio 2021.

[22] L. Benso, S. Milani, *Alcune considerazioni sull'uso forense dell'età biologica*, 2013, https://www.asgi.it/banca-dati/position-paper-alcune-considerazioni-sulluso-forense-delleta-biologica/, consultato in data 8 febbraio 2021.

Gli accertamenti devono essere svolti in un ambiente idoneo, presso il luogo in cui il minore è stato accolto o presso le strutture sanitarie del Servizio Sanitario Nazionale.

Se all'esito di ciascuna fase della procedura dovessero emergere elementi certi che possano far determinare l'età non si procede alle successive fasi.

Qualora, anche dopo l'accertamento socio-sanitario, permangano dubbi sulla minore età del soggetto, l'età si presume minore ad ogni effetto di legge.

Il presunto minore deve essere informato preventivamente del fatto che la sua età potrà essere determinata attraverso una procedura multidisciplinare. L'informativa deve essere effettuata in una lingua comprensibile al minore e in conformità al suo grado di maturità e livello di alfabetizzazione; ovvero deve essere verificata la sua capacità di discernimento.

Il minore può sempre rifiutare di sottoporsi agli esami in quanto la legge non impone tale verifica contro il volere del minore. Condizione per l'accertamento è il consenso informato e le conseguenze che derivano dall'accertamento e dal rifiuto[23].

La Legge Zampa prevede che le informazioni devono essere comunicate, con eguale chiarezza e trasparenza, anche a colui che esercita i poteri tutelari anche in via temporanea.

Nel caso di presunto minore vittima di tratta è previsto che il minore possa rifiutarsi di svolgere un esame/indagine sanitaria particolare, come per esempio la valutazione dello sviluppo sessuale, che in un soggetto che è stato vittima di sfruttamento sessuale può essere emotivamente e psicologicamente difficile da accettare.

Nel dettaglio le fasi possono essere così schematizzate.

Colloquio sociale: è volto a comprendere la storia e la biografia personale, familiare e sociale del minore nonché gli elementi significativi evinti dall'ascolto in relazione alla percezione dei bisogni e alla attivazione delle risorse personali e ambientali. Analoga attenzione è riservata alla presenza di reti di sostegno e agli esiti degli interventi sociali eventualmente già

[23] E. Napoli, "Riflessioni a margine della "nuova" procedura di accertamento dell'età del minore straniero non accompagnato ai sensi dell'art. 5 della L. 47/2017", in *Diritto, Immigrazione e Cittadinanza*, 2017, 3, p. 17.

attivati. Il colloquio è condotto da un assistente sociale con l'ausilio di un mediatore culturale, ove necessario.

In questa fase è centrale l'approccio psicosociale in quanto si è in presenza di persone, in una età fragile, che arrivano nel nostro Paese dopo un lungo viaggio fatto di difficoltà, sofferenze, speranze ed incognite.

Alcuni minori spesso intraprendono il viaggio autonomamente oppure si affidano a reti specializzate.

Bisogna tener presente il paese di partenza, la condizione sociale e culturale nonché il contesto in cui essi arrivano che spesso è solo una meta di passaggio in quanto la destinazione finale è un paese diverso dall'Italia.

Il minore che lascia il proprio paese lo fa per motivi di povertà, di guerra, di minacce alla famiglia e con un carico di aspettative di riscatto personale e sociale.

Frequentemente soffrono della sindrome post traumatica causata dalle asperità del viaggio, dalle violenze subite o viste, dall'esser sopravvissuti rispetto ai compagni di viaggio.

Valutazione piscologica/neuropsichiatrica: non essendo al momento disponibili test specifici per determinare il livello di maturazione psicologica del presunto minore, tale valutazione si effettua attraverso un colloquio, condotto da uno neuropsichiatra infantile oppure da uno psicologo dell'età evolutiva adeguatamente formato, con l'ausilio di un mediatore culturale.

Il Protocollo specifica che il colloquio dovrà essere organizzato con una modalità di raccolta di dati standardizzata, attraverso l'utilizzo dell'intervista semistrutturata con lo scopo di ridurre la eventuale variabilità data dal giudizio dell'operatore e massimizzare la collaborazione del soggetto in esame.

Il colloquio potrà valutare le capacità del soggetto di farsi comprendere dall'interlocutore e altre competenze quali la capacità di ragionamento astratto e di previsione delle conseguenze dei propri comportamenti.

L'indagine mira a valutare il grado di maturazione psicologica e la sua coerenza con le dichiarazioni rese dal presunto minore in sede di identificazione circa la propria età.

In presenza di eventuali elementi psicopatologici del soggetto è richiesta la valutazione del neuropsichiatra infantile.

Il Protocollo prevede che se all'interno del *team* multidisciplinare è presente il neuropsichiatra infantile, questi, qualora lo ritenga necessario, potrà richiedere la valutazione dello psicologo dell'età evolutiva; il neuropsichiatra infantile o lo psicologo dell'età evolutiva valuteranno e segnaleranno al pediatra eventuali condizioni che sconsiglino, durante la visita medica, la valutazione morfologica dello sviluppo puberale.

Visita pediatrica-auxologica: svolta da un pediatra auxologo, tenuto conto delle raccomandazioni emerse nel corso delle valutazioni del profilo psichico, comprende la rilevazione di tutti quei parametri utili a fornire indicazioni sull'età (misurazioni antropometriche, valutazione del grado di maturazione corporea generale e dello sviluppo puberale, identificazione degli eventuali disturbi dello sviluppo). La visita pediatrico-auxologica deve essere svolta con le dovute cautele per la sensibilità del presunto minore nel rispetto del suo genere e sesso, cultura e religione e della sua integrità fisica e psichica.

Al termine dell'esame di propria competenza, ciascun professionista coinvolto valuta e formula il proprio parere; successivamente, viene effettuata la valutazione collegiale ed elaborata la relazione multidisciplinare finale.

Il Protocollo del 9 luglio 2020 fonrisce inoltre indicazione su come devono essere svolte le fasi sopra descritte fornendo delle "tracce" da seguire per condurre nel modo più idoneo le procedure.

Relazione multidisciplinare: l'*iter* dell'accertamento si conclude con la redazione della relazione multidisciplinare secondo il modello fornito dal Protocollo stesso. Deve comprendere l'indicazione di attribuzione dell'età cronologica media stimata con il margine di errore insito nella variabilità biologica, i riferimenti sulle metodiche utilizzate nonché il margine di imprecisione insito in ciascuna metodica utilizzata con i valori minimi e massimi di riferimento attribuibili.

Nella relazione deve sempre essere indicato il margine di errore.

Comunicazione: il Protocollo prevede che la relazione debba essere comunicata al presunto minore, in modo congruente con la sua età, maturità e livello di alfabetizzazione, in una lingua a lui comprensibile, alla persona che, anche temporaneamente, ne esercita i poteri tutelari e all'autorità giudiziaria che ha disposto l'accertamento.

Notifica: il provvedimento di attribuzione dell'età viene emesso dal Tribunale per i minorenni e deve essere notificato al presunto minore e, contestualmente, alla persona che, anche temporaneamente, ne esercita i poteri tutelari. Il provvedimento deve essere comunicato anche all'Autorità di Polizia affinché possa procedere al completamento della procedura di identificazione al Ministero del lavoro ai fini dell'inserimento dei dati nel sistema informativo nazionale dei minori stranieri non accompagnati.

Se, anche dopo il completamento della procedura di accertamento dell'età, rimane l'incertezza nei confronti di un soggetto migrante che si è dichiarato minore, si presume la minore età a tutti gli effetti in termini di legge.

Il superiore interesse del minore prevale.

4. *Le criticità dell'accertamento dell'età*

Dall'analisi della normativa e del Protocollo di attuazione della procedura di accertamento dell'età, che riprendono i principi cardine del *best interests of the child* della Convenzione delle Nazioni Unite sui Diritti del Fanciullo, emergono i seguenti assiomi.

Si procede all'accertamento dell'età del presunto minore solo qualora vi sia un fondato dubbio che l'età dichiarata non sia veritiera e dopo aver escluso altre possibilità di verifica (documenti identificativi muniti di fotografia).

Ciò significa che l'accertamento non deve essere effettuato sistematicamente ma deve essere, appunto, l'*extrema ratio*.

Nel corso della procedura per l'accertamento dell'età del presunto minore deve essere sempre messo al centro il superiore interesse del fanciullo che acquista valore preminente e prevalente su qualsiasi decisione con l'obiettivo principale di assicurare la protezione del minore e le tutele a lui riservate.

Quanto al rilascio del consenso informato e all'ascolto del minore è previsto che le informazioni e comunicazioni debbano esser fatte in una lingua a lui comprensibile in una modalità *child-friendly*, con l'ausilio di un mediatore culturale, mettendolo al corrente del tipo di esami cui sarà sottoposto, sulla loro finalità e sul fatto che vi si può opporre e che questa sua eventuale opposizione non andrà ad inficiare l'esito dell'accerta-

mento, che dovrà essere comunicato al MSNA, al tutore o al tutore *pro tempore*.

Quando non vi siano elementi certi da cui si possa dedurre l'età questa si presume minore. Se, all'esito della procedura di accertamento, considerato il margine di errore, permangono ancora dei dubbi sull'età si presume minore ad ogni effetto di legge (*favor minoris*). Ad ogni modo, nell'attesa dell'accertamento dell'età, il soggetto deve essere trattato e tutelato come soggetto minore; vige, pertanto la presunzione della minore età.

Laddove venga, invece, emesso il provvedimento di attribuzione dell'età[24] questo deve essere notificato, con traduzione in una lingua a lui comprensibile, al minore e al tutore o tutore pro tempore[25].

Rispetto alla prassi utilizzata nel passato che prevedeva un approccio olistico e multidisciplinare con il Protocollo del 9 luglio 2020 si è messo da parte l'aspetto olistico ed integrato dirigendo l'attenzione sulla collaborazione di diversi professionisti che operano in via sequenziale, perdendo di vista l'uniformità della prassi su tutto il territorio nazionale.

L'accertamento socio-sanitario deve essere effettuato in un ambiente idoneo con l'utilizzo dell'approccio multidisciplinare svolto da professionisti con formazione adeguata e alla presenza di un mediatore culturale, se necessario.

Le figure professionali che formano l'équipe sono: un pediatra (con competenze auxologiche in servizio presso il Servizio Sanitario Nazionale), uno psicologo dell'età evolutiva o un neuropsichiatra infantile (in servizio presso il Servizio Sanitario Nazionale), mediatore culturale, un assistente sociale (in servizio presso il Servizio Sanitario Nazionale o l'ente locale incardinati nei settori relativi alla materia).

[24] Va ricordato che qualora non sia stato adottato uno specifico provvedimento di attribuzione dell'età l'errata identificazione potrà essere contestata nell'ambito dei procedimenti penali a carico dell'interessato o nell'ambito di eventuali altri procedimenti, a titolo di esempio, il provvedimento di espulsione, respingimento, trattenimento o rigetto di rilascio del permesso di soggiorno per minore età.

[25] Il provvedimento può essere impugnato a mezzo reclamo ex art. 739 c.p.c. nel termine di dieci giorni avanti la Corte d'Appello Sezione per i minorenni. Avverso il provvedimento emesso dalla Corte di merito, sebbene non sia esplicitamente indicato, è ammesso ricorso per Cassazione.

Viene individuato un professionista coordinatore e devono avere una formazione specifica e periodico aggiornamento; devono inoltre avere competenze in merito all'area geografica e culturale di provenienza dei minori oggetto dell'esame.

Indicazioni queste previste dal Protocollo che però trovano difficile applicazione nella realtà pratica; purtroppo gli accertamenti vengono fatti nei Pronto soccorsi ospedalieri dove viene effettuata una radiografia ossea del polso o della mano o dello scheletro o una radiografia dell'apparato dentario.

Nella relazione redatta dalla équipe multidisciplinare, prima, e nel provvedimento di accertamento dell'età, poi, dovranno esser sempre riportati i metodi che sono stati utilizzati e il margine di errore.

Va osservato che non vi è univocità tra "età cronologica" ed "età biologica" infatti: "*l'età cronologica è il tempo intercorso dalla nascita al momento dell'esame, ed è definita allo stesso modo per tutti*"; mentre "*l'età biologica è il grado di maturazione raggiunto dal soggetto al momento dell'esame, che varia da soggetto a soggetto, perché ciascuno matura con il suo ritmo, anche in assenza di patologie*". Ciò significa, in sintesi, che: "*la variabilità individuale nel ritmo dello sviluppo corporeo rende incerto l'uso dell'età biologica come surrogato o predittore dell'età cronologica (variabilità biologica)*"[26].

I metodi che vengono generalmente utilizzati in Italia per determinare l'età biologica sono:

- il metodo Greulich e Pyle: si deriva l'età scheletrica dal grado di ossificazione della mano, carpo, metacarpo e falangi) e del polso (ulna e radio) e si basa su radiografie di comparazione di bambini e adolescenti nati negli Stati Uniti nel periodo delle due guerre mondiali, dunque soggetti caucasici vissuti negli anni '30 e '40 provenienti da un contesto sociale ed economico medio altro;
- il metodo Tanner-Whitehouse (TW, nelle sue successive edizioni TW1, TW2 e TW3), è stato sviluppato nel Regno Unito analizzando 2700 radiografie di bambini inglesi delle classi medio-basse; utilizza gli stessi segmenti ossei rispetto al metodo G&P ma si valutano

[26] L. Benso, S. Milani, "Alcune considerazioni sull'uso forense dell'età biologica", op. cit.

le immagini di singoli segmenti ossei, invece che della mano e polso per intero, ciò consente di evitare la variabilità causata dall'operatore.

Va tenuto in considerazione che però entrambi i metodi non nascono con lo scopo originario di determinare l'età cronologica bensì quello di valutare la differenza tra l'età cronologica e biologica in soggetti che presentavano determinate patologie.

Il margine di errore, nel 95% dei casi, è più o meno 2 anni; nel 5% dei casi può essere superiore a questo valore.

Tale indeterminatezza della stima è il risultato di tre effetti:

- la variabilità biologica: ovvero la maturazione tra soggetti coetanei varia in base alla genetica, alle condizioni di vita, all'etnica, alla classe sociale.
- distorsione sistematica: si fonda sul fatto che si presume che la maturazione scheletrica sia uguale a quella dei soggetti campione non tenendo conto che i soggetti coinvolti nei flussi migratori contemporanei sono appartenenti ad altre etnie, classi sociali dei livelli bassi, probabilmente interessati da malnutrizione.
- imprecisione della valutazione: è l'errore che viene commesso dall'operatore, seppur esperto, nell'esaminare una radiografia. Margine di errore che oscilla in base all'esperienza e alla qualità della radiografia.

La determinazione dell'età scheletrica in alcuni Paesi europei, per esempio nel Regno Unito e in Grecia, non è più utilizzata per l'accertamento dell'età cronologica.

Sul tema è interessante una recente pronuncia della Corte di legittimità in materia di accertamento dell'età del minore straniero non accompagnato emessa a seguito di ricorso presentato da un cittadino straniero che si era visto attribuire la maggiore età sia dal Tribunale per i minorenni di Bologna sia dalla Corte d'appello; la Suprema Corte si è espressa in merito alla individuazione del criterio e della corretta metodologia da seguire [27].

Il mediatore culturale svolge un ruolo centrale nel percorso che deve affrontare il presunto minore. Basti pensare al senso di smarrimento che egli prova nel momento in cui si ritrova in un paese di cui nulla conosce e che, spesso, è solo un luogo di passaggio per arrivare alla meta finale (spesso il Nord Europa) per ricongiungersi con la famiglia.

[27] Cass. Civ., Sez. I, 3 marzo 2020, n. 5936

Spesso si tratta di persone che sono della stessa area di provenienza o che hanno un vissuto personale simile. Si tratta di una figura "ponte" tra il minore, ma anche migrante, e le autorità con cui egli dovrà interagire.

In particolar modo è essenziale l'approccio che viene utilizzato nel primo colloquio nel minore che vive quella particolare condizione di solitudine e di spaesamento ben descritta da Abdelmalek Sayad come "doppia assenza"[28]: il migrante – e dunque, ma forse ancor di più, il minore straniero non accompagnato – vive la necessità insufficiente del paese di partenza ma anche di quello di approdo.

5. *Brevi considerazioni conclusive*

A dispetto di quanto è stato fatto con l'implementazione del quadro normativo con la legge Zampa e con il Protocollo del 9 luglio 2020 possiamo affermare senza ombra di dubbio che la strada per arrivare ad una uniformità della prassi su tutto il territorio nazionale è ancora lunga in quanto spesso la sorte dei minori stranieri non accompagnati cambia a seconda del luogo in cui vengono accolti.

Il sistema di accoglienza è ancora fragile e opera sempre in uno stato emergenziale; non sempre chi opera a contatto con i minori stranieri non accompagnati è davvero a conoscenza del bagaglio pesante soprattutto psicologico di cui sono gravati.

Accanto alle buone prassi e all'implementazione legislativa a tutela del minore straniero non accompagnato deve esserci anche una formazione adeguata di chi, per professionalità differenti, entra in contatto col minore, capace di saper riconoscere e "contenere" il portato emotivo.

Particolare attenzione deve essere posta nel periodo iniziale di permanenza del minore con l'obiettivo di potenziare la resilienza posta in atto come meccanismo di difesa e di adattamento alla nuova realtà.

I Servizi Sociali sono fondamentali per il ruolo che sono chiamati a svolgere ma purtroppo il loro operato risente delle difficoltà connesse alla mancanza di personale, alla necessità di formazione continua e specifica,

[28] Si veda A. Sayad, *La doppia assenza. Dalle illusioni dell'emigrato alle sofferenze dell'emigrato*, Milano, Raffaello Cortina, 2002.

del carico di lavoro sempre più maggiore ma, soprattutto, dello stato di emergenza nel quale sono chiamati a lavorare.

Grande rilevanza deve avere la messa in sicurezza del minore e l'immediata risposta ai bisogni primari (un luogo dove dormire, alimentazione, abbigliamento, lavarsi) ma deve anche esserci il supporto psicologico e la presa in cura di bambini e adolescenti che durante il viaggio, quasi sempre irregolare, hanno vissuto esperienze drammatiche e traumatiche e che cercano di intraprendere un nuovo percorso di vita, ognuno portatore di una storia personale che necessita di risposte specifiche ed adeguate.

Il supporto psicologico e/o terapeutico è necessario per aiutare a superare la sintomatologia della sindrome post-traumatica ed evitare quella che gli esperti definiscono ri-traumatizzazione.

E poi vi è quel numero oscuro, quella percentuale dei minori che sfuggono all'accoglienza e al controllo o che abbandonano i centri, diventano irreperibili e che vivono da invisibili, diventando facile preda delle organizzazioni criminali (che offrono facilità di guadagni) dello sfruttamento lavorativo e sessuale (prostituzione e pedopornografia).

Le autorità competenti hanno segnalato alla Direzione Generale dell'immigrazione e delle politiche di integrazione del Ministero del Lavoro e delle Politiche Sociali che nel primo semestre del 2020 c'è stato l'allontanamento di 706 minori stranieri non accompagnati, con prevalenza del genere maschile (95,2%) e di 16 anni di età (78,7%). Le cittadinanze maggiormente coinvolte sono state: afghana, tunisina, egiziana, ivoriana e marocchina[29].

I MSNA decidono di allontanarsi dalle strutture di accoglienza e dalle comunità a causa della lentezza delle procedure di ricongiungimento famigliare ai sensi del Regolamento Dublino III, ricorrendo a spostamenti irregolari e alla criminalità organizzata.

Il processo di accertamento dell'età che dovrebbe essere messo in atto solo quantunque vi sia il dubbio su quanto dichiarato dal presunto minore è diventato la prassi sistematica e così come strutturato rimane, a nostro modo di vedere, ancora carico di ostacoli ed incertezze.

[29] https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/minori-stranieri/Documents/Report-di-monitoraggio-MSNA-30-giugno-2020.pdf, consultato in data 11 febbraio 2021.

Da quanto sopra esposto si evince che i metodi massivamente utilizzati per la valutazione auxologica risentono del fatto che sono tarati su referti di adolescenti anglosassoni e che vengono comparati con quelli di adolescenti che provengono dall'Africa e dall'Asia; l'età biologica non consente di stabilire con certezza quella cronologica.

Le variabili connesse sia alla qualità del referto radiografico sia all'abilità e all'esperienza dell'operatore, il margine di errore, la variabilità scheletrica in ragione del patrimonio genetico e delle condizioni ambientali di vita portano a concludere che, allo stato attuale, non vi è possibilità di certezza nello stabilire l'età e che ciò può cambiare sensibilmente il futuro di coloro che sono nella linea di confine tra la minore e la maggiore età.

Da ultimo, non possiamo non fare cenno alla tragedia umanitaria che si sta consumando sulla rotta Balcanica dove tra i migranti e i rifugiati ai confini orientali dell'Unione Europea vi sono anche minori stranieri non accompagnati e famiglie con bambini.

Le autorità di Pubblica Sicurezza considerano maggiorenni quei migranti intercettati che cercano di varcare il confine Italia-Slovenia senza il vaglio giurisdizionale richiesto dalla Legge Zampa e dal Protocollo del 9 luglio 2020 e, dunque, in disaccordo con le tutele e le protezioni previste e garantite per i minori stranieri non accompagnati[30].

[30] https://www.savethechildren.it/press/l%E2%80%99allarme-delle-organizzazioni-della-societ%C3%A0-civile-le-pratiche-di-respingimento-dell%E2%80%99italia, consultato in data 14 febbraio 2021.

Accoglienza e integrazione dei minori stranieri non accompagnati

L'esperienza del servizio del Comune di Reggio Emilia

Alessandra Margini, Luca Colombo, Elisabetta Corrias*

Buon pomeriggio a tutti sono Alessandra Margini, coordinatrice del Servizio Inclusione e Intercultura del Comune di Reggio Emilia.

Innanzitutto intendo ringraziarvi per l'invito e per l'opportunità: l'Amministrazione collabora con l'Università per diversi temi, ma penso sia per noi oggi ancora più importante avere l'occasione di un confronto a livello accademico, sia per condividere contenuti e riflessioni sia per collocare i nostri interventi in una cornice più ampia e in un contesto differente.

Spesso la quotidianità, in questo periodo caratterizzata da diverse urgenze, con ritmi di lavoro incalzanti, non consente momenti di valutazione e "ri-acculturazione".

Il mio compito è quello di fornire una breve cornice istituzionale ed organizzativa in cui collocare il Servizio e le progettazioni che si occupano di MSNA.

All'interno del Comune di Reggio Emilia facciamo parte dell'Area Servizi alla Persona.

Da febbraio 2020 per una riorganizzazione interna siamo passati dai Servizi Sociali al Servizio "Politiche di Welfare e Intercultura", il nostro assessore è Daniele Marchi , la nostra Dirigente Lorenza Benedetti.

Il gruppo di lavoro che Coordino viene definita una Unità Operativa Complessa, e complessa lo è veramente e comprende i Servizi per l'Inclusione e Intercultura.

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Progetto Rosemary che si occupa di prostituzione, contrasto alla tratta e sfruttamento lavorativo; il Progetto Carcere, l'ufficio informazioni stranieri, il Pronto Intervento Sociale per le persone senza residenza e l'ambito grave emarginazione adulta , il Progetto Siproimi (ex Sprar), l'Ufficio Minori Stranieri non accompagnati, il Progetto Nomadi, i bandi FAMI , progettazioni per lo più sperimentali finanziate con il Fondo Asilo Migrazione Integrazione, l'Ufficio Intercultura che sviluppa iniziative di carattere culturale e coordina la rete diritto di parola (corsi di italiano per stranieri) e cura le cerimonie di conferimento delle cittadinanze.

Collaboriamo inoltre con le Fondazioni Mondinsieme ed E35 per attività legate all'intercultura e alla città internazionale.

Gran parte delle nostre attività sono multidisciplinari, prevedendo integrazione socio sanitaria con Azienda AUSL, collaborazione resa sempre più necessaria con le problematiche connesse al coronavirus.

In continuità con l'intervento del Dott Masin è nostro compito sviluppare una collaborazione con i Servizi Sociali , non solo per il lavoro sulle singole situazioni ma per un importante investimento nel lavoro di comunità e progettazione territoriale con il mondo del terzo settore e del volontariato. Le reti per favorire l'inclusione sociale spesso vanno ricostruite, le azioni vanno promosse, sollecitate, ma anche mantenute e curate.

Ci tengo a visualizzarvi in quale contesto organizzativo lavoriamo perché la complessità e la delicatezza del nostro contesto professionale rappresenta una ricchezza da un lato, ma un rischio di sovraccarico di carichi di lavoro, di riferimenti interni ed esterni, di aspetti amministrativi che spesso influiscono sul nostro operato.

Le connessioni a carattere istituzionale e politico vedono a livello locale costanti contatti con Prefettura e Questura.

Il nostro ambito di competenza è Comunale ma per alcune azioni svolgiamo un'azione di coordinamento a livello Distrettuale e Provinciale.

Partecipiamo regolarmente ai coordinamenti regionali e alle formazioni organizzate da Emilia Romagna Terra d'Asilo e ANCI Emilia Romagna e dal Servizio Politiche per l'integrazione sociale, il contrasto alla povertà e Terzo settore.

È molto arricchente confrontarsi con altri Comuni, le diverse organizzazioni traducono mandati simili in progettazioni differenziate.

A livello nazionale per la gestione e il coordinamento dei progetti SIPROIMI attivi sul nostro territorio siamo in costante contatto con il Servizio centrale del Ministero dell'Interno

Il nostro Ente è invitato a partecipare alla Commissione Immigrazione e Politiche per l'Integrazione promossa da Anci Regionale e Anci Nazionale ,che ha visto di recente un approfondimento alla presenza del Sindaco di Prato e delegato ANCI all'Immigrazione, Matteo Biffoni, e del Viceministro dell'Interno, Matteo Mauri.

A settembre abbiamo inoltre partecipato ad un approfondimento sull'attuazione della L. 47/2017 con la prima firmataria On. Sandra Zampa, attualmente Sottosegretaria alla Salute nell'ambito del Tavolo minori migranti un network coordinato da *Save the Children*.

Nonostante la quotidianità ci porti spesso ad essere concentrati sulla gestione delle situazioni ritengo un dovere professionale contribuire alla ricerca e alla formazione, alla costruzione di pensiero e innovazione, ed essere soggetti attivi nel dibattito politico sui temi legati ai fenomeni su cui lavoriamo.

Per entrare nel vivo del tema del seminario odierno lascio la parola ai due professionisti che si occupano di MSNA per il Comune di Reggio Emilia, Luca Colombo, funziorio di reti Educative e a seguire Elisabetta Corrias, educatrice di ASP Città delle Persone.

La normativa definisce i Minori Stranieri Non Accompagnati i minorenni non cittadini italiani o dell'Unione Europea senza assistenza e rappresentanza da parte dei genitori o di altri adulti per loro legalmente responsabili.

In quanto minorenni non possono essere espulsi dal territorio italiano, hanno diritto di ottenere un Permesso di Soggiorno per minore età, all'assistenza e alla protezione, alla salute e all'istruzione, all'affidamento a una famiglia o a una comunità, alla nomina di un Tutore.

La legge 47/2017 riafferma il principio di parità con altri minori, superando l'idea dei MSNA come materia a cavallo di due legislazioni:

quella sui minori, che si basa su principi di protezione e sostegno e quella sugli stranieri, improntata a principi di controllo e difesa.

Non è facile trovare categorizzazioni per descrivere i minori stranieri non accompagnati. L'esperienza rivela una sensibile differenza tra come li percepiamo (soggetti soli, da tutelare e a cui sostituirsi, da orientare e integrare) e come essi si percepiscono (soggetti con connazionali di riferimento – vicini o lontani – con alto livello di indipendenza). Un tratto comune, legato all'età e ai presupposti dell'esperienza migratoria, è una prefigurazione del loro futuro spesso molto distante dalla realtà. Il lavoro sulle aspettative, le opportunità effettive e i limiti è sicuramente centrale nella presa in carico e nell'accompagnamento dei percorsi di questi minori, anche perché spesso all'alto investimento personale che caratterizza l'arrivo sul territorio e l'avvio dell'accoglienza fanno seguito reazioni di disorientamento, nostalgia, disillusione.

Il percorso dei MSNA vede come prima tappa il rintraccio e l'accesso alla rete dei servizi.

Nella nostra realtà la maggior parte viene intercettata dalle Forze dell'ordine tramite un accesso spontaneo in Questura o un rintraccio nelle attività di monitoraggio del territorio.

Altri minori inizialmente accolti su altro territorio, possono essere segnalati dal Servizio Centrale della rete Siproimi (Sistema di Protezione per Titolari di Protezione Internazionale e Minori Stranieri non Accompagnati).

Possono inoltre pervenire segnalazioni da parte della Prefettura, per minori accolti come maggiorenni nei centri di accoglienza straordinaria del territorio e successivamente dichiaratisi di età inferiore ai 18 anni.

Un altro canale di rintraccio è rappresentato dalle unità di strada che possono agganciare minori coinvolti nella tratta.

Nel caso invece i minori siano accompagnati da parenti il servizio valuta la possibilità di affidamento.

Al momento del rintraccio l'identità viene accertata dalle autorità di pubblica sicurezza attraverso il fotosegnalamento. Secondo la legge la procedura di identificazione dovrebbe essere svolta alla presenza del tutore legale e con la partecipazione di un mediatore culturale, anche se questo in realtà non avviene.

Eventuali dubbi sull'età dichiarata dovrebbero essere chiariti in via principale attraverso un documento di identità, del quale molto spesso i minori non sono in possesso. Se il minore non è richiedente protezione internazionale è possibile chiedere un documento o un'attestazione di nazionalità alle rappresentanze diplomatico-consolari del Paese d'origine.

In caso esistano dubbi sull'età e non sia disponibile un documento anagrafico, la Procura della Repubblica presso il Tribunale per i Minorenni può disporre l'accertamento socio-sanitario dell'età, che prevede un approccio multidisciplinare (visita auxologica pediatrica, colloquio sociale e valutazione psicologica). Se l'esito è incerto si presume la minore età ad ogni effetto di legge, a maggior tutela della persona.

Successivamente al rintraccio da parte delle Forze dell'Ordine di un minore, viene attivato il Servizio h24 per la collocazione immediata in una struttura, che oggi prevede l'effettuazione del tampone Covid e l'isolamento in attesa di esito.

La presa in carico formale da parte del nostro Servizio avviene a seguito della ricezione del verbale di consegna e di alcuni adempimenti formali che autorizzano l'inserimento del minore nella struttura designata, e la registrazione nel Sistema Informativo Minori (SIM), database nazionale che ha la funzione di monitorare la presenza dei minori non accompagnati e tracciarne gli spostamenti sul territorio nazionale e di gestire i dati relativi all'anagrafica dei MSNA, allo status e al loro collocamento.

Quanto prima possibile viene organizzato presso la sede del servizio il primo colloquio con il nuovo giunto, che avviene alla presenza di un mediatore linguistico culturale. Oltre alla raccolta della storia familiare e migratoria, fondamentale è presentare la condizione di minore straniero non accompagnato, e in virtù di questa l'inquadramento normativo ed il percorso di regolarizzazione e integrazione.

È di competenza del servizio la redazione della relazione di segnalazione, che viene inviata alla Procura c/o Tribunale per i Minorenni, alla Questura Ufficio Anticrimine/Minori e alla Cancelleria del Tribunale per i Minorenni per la contestuale richiesta di apertura della tutela.

Il servizio sociale ha il ruolo di definire e monitorare il progetto di regolarizzazione e integrazione, ma anche di creare e consolidare il lavoro di

rete con le con le istituzioni e le realtà territoriali, quali l'Ausl, le scuole, gli enti di formazione, i servizi comunali e del privato sociale.

Le strutture di accoglienza si distinguono per tipologia di accoglienza: la *comunità di pronta accoglienza* è il primo approdo per ragazzi neo-arrivati, in cui possono rimanere al massimo 30 giorni, tempo utile per una prima osservazione e orientamento del futuro progetto. Sin dai primi giorni di accoglienza si investe sulla comprensione delle regole e del funzionamento sia dei luoghi di accoglienza che del contesto, si impostano modalità funzionali di relazione con pari e adulti.

La fase successiva prevede l'inserimento in un altro luogo valutato in base all'età, al profilo, alle prime osservazioni sui profili dei ragazzi.

I ragazzi con profili idonei ad un progetto di semi-autonomia sono accolti in *gruppi appartamento*, piccole unità abitative da 4 posti con una copertura educativa di 36h settimanali e adulti accoglienti formati in orario notturno.

Per i ragazzi più giovani o che non hanno un profilo adeguato all'accoglienza in semi-autonomia vengono invece predisposti inserimenti in *Comunità educative*.

Le *Comunità integrate* sono riservate per situazioni in co-progettazione con il servizio di Neuropsichiatria infantile dell'Ausl.

Agli operatori delle strutture viene affidata la gestione quotidiana dei progetti educativi e la collaborazione alla realizzazione dei percorsi di integrazione. Il dialogo tra i gestori dell'accoglienza e il servizio è costante, sia per il regolare monitoraggio dell'andamento dei progetti sia per l'attivazione di risorse di rete in presenza di episodi significativi o di elementi di devianza o sofferenza psicologica.

Operatori dell'Ufficio MSNA ed équipe dei gestori delle strutture di accoglienza che accolgono i MSNA concorrono congiuntamente alla definizione degli obiettivi dei percorsi di integrazione che vedono come obiettivi prioritari l'apprendimento della lingua italiana, la formazione professionale e l'avviamento al lavoro, l'accompagnamento del percorso di costruzione dell'identità personale, crescita psico-fisica e cura delle relazioni interpersonali. Nel progetto di accompagnamento all'autonomia la priorità viene data all'integrazione sociale nel contesto territoriale con una facilitazione nel rapporto col vicinato e con i quartieri, con una pro-

mozione delle le iniziative sportive e ricreative, anche in collaborazione con i luoghi di culto o associazioni culturali.

Nel lavoro con i minori stranieri non accompagnati il ruolo del *mediatore linguistico-culturale* è di fondamentale importanza: questa figura professionale funge da "ponte", non solo per l'interpretariato linguistico ma per il sostegno alla comprensione interculturale. La sua presenza è prevista nei colloqui di monitoraggio dei percorsi con i ragazzi e negli incontri di rete con altri professionisti. Egli garantisce l'ascolto dei ragazzi e, soprattutto nella fase iniziale, "mitiga" l'estraneità del servizio, contribuisce alla lettura delle situazioni e alla costruzioni dei progetti. È inoltre un importante tramite nella relazione con le famiglie d'origine.

Altrettanto indispensabili e preziose sono le figure dell'operatore legale e dello psicologo, che rappresentano un valore aggiunto nella costruzione del progetto individuale.

Osservazioni sul fenomeno

In questi anni abbiamo accolto MSNA provenienti dai seguenti Paesi: Afghanistan, Albania, Bangladesh, Costa d'Avorio, Egitto, Etiopia, Gambia, Ghana, Guinea Bissau, Guinea, Mali, Marocco, Niger, Nigeria, Pakistan, Senegal, Somalia, Tunisia. Nell'ultimo anno abbiamo registrato un forte aumento di arrivi dalla Tunisia.

Nei primi anni 2000 i percorsi migratori avevano una forte matrice economica: i flussi erano caratterizzati da minori albanesi, dell'est Europa, Nigeria, Pakistan, Maghreb, con un forte collegamento con il territorio e le comunità di stranieri residenti.

Gli anni della cosiddetta "emergenza migranti" hanno registrato provenienze diverse, frutto di una redistribuzione sui territori di MSNA e richiedenti asilo con assenza di legami territoriali ed una rete di relazioni che si costruiva all'interno del circuito di accoglienza.

Negli ultimi anni abbiamo accolto giovani provenienti da paesi noti (Tunisia, Pakistan, Egitto…) ma con progetti non unicamente legati a ragioni economiche, caratterizzati dall'assenza di riferimenti adulti sul territorio ma in collegamento con altri minori in accoglienza, con situazioni familiari complesse e in alcuni casi problematiche di natura sanitaria.

L'accoglienza femminile può essere definito un fenomeno "intermittente" che riguarda giovani donne, per la quasi totalità di nazionalità ni-

geriana, di scarsa rilevanza numerica ma di alta complessità dato il collegamento con il fenomeno della tratta.

Il Comune di Reggio Emilia aderisce dal 2015 al Sistema di protezione per titolari di protezione internazionale e minori stranieri non accompagnati SIPROIMI (ex Sprar) con 18 posti per MSNA inseriti in 4 gruppi appartamento dislocati in luoghi diversi della città.

Uno sguardo ai dati visualizza la dinamicità del fenomeno: nel 2016 il nostro Servizio ha accolto 90 MSNA, nel 2017 107, nel 2018 79, nel 2019 il totale degli accolti è 70.

Part III

Proposal for guidelines[*]

Cinzia Valente[**]

The final part of this research aims to provide some elements of discussion. Our purpose is to set up a starting point for a more convergent regulation on some aspects relating to unaccompanied foreign minors in European systems.

This is based on the results of the research we carried out in the past three years concerning vulnerable subjects. The following suggestions are only related to specific aspects of the phenomenon and are not expected to be considered comprehensive, also due to the complexity of this topic.

These "recommendations" take into account various areas of law which are typically connected to local traditions; the relation between the power of central government and local authorities is also an element of evaluation and makes the "standardization" process difficult.

1. *Unaccompanied children: definition*

There is a certain degree of convergence on the definition of an unaccompanied foreign minor. This excludes any reference to the condition of refugee or to the request for international protection, due to the common practice of dedicating a separate discipline to minors seeking asylum.

It is common to exclude also any reference to the European or non-European origin of minors, and this appears preferable in order to guarantee more extensive protection.

[*] The paper is the result of the study conducted within the project granted by European Commission, Grant decision n. 2017-1903/001-001 – concerning the Jean Monnet module "Unaccompained Children: National and European Protection", cod. 587039-EPP-1-2017-1-IT-EPPJMO-MODULE, University of Modena and Reggio Emilia, scientific responsible prof. Maria Donata Panforti and related to the research "La protezione dei minori stranieri non accompagnati. Prospettive europee", Department of Education and Human Science.

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The following definition is proposed:

Unaccompanied minor is a foreign person, under the age of 18, who arrives on the territory of the country or stays in this territory without an adult who takes care of him in accordance with the law in force in the hosting country.

2. *Legal discipline*

The study recorded a general tendency of national systems to disseminate the rules relating to unaccompanied minors into various legislative acts, with the exception of the regulation of minors seeking asylum or international protection (generally included in a single text or related to adults).

This situation is partially attributable to the different nature of the rules concerning the foreign minor, which belong to different areas of law, in particular that of family, immigration and "administrative" or soft law (guidelines, protocols, recommendations, etc.).

A uniform solution in this area would require an insightful intervention in each legal system, which would affect some institutions that are typical of domestic law (for example the reception facilities) and would require a consequent reorganisation of national institutions; as a result, the choices of migration policy would be compromised.

Among the required areas of intervention are the duties of the police, local reception structures, social services, etc.

Currently, we consider it difficult to envisage a major national reform in all European countries.

Conversely, our recommendations involve two different areas of action: the reorganization of domestic law and some suggestions on specific topics.

As for the first area of action, our proposal avoids major intervention on the national legal system, but it would allow it in order to avoid misinterpretation.

Our recommendation is the following:

In order to guarantee legal certainty and rights' protection, it is suggested to create an organic (single) text that collects all (reformed) rules concerning the unaccompanied foreign minor.

The second area of action involves targeted interventions on individual issues, favouring the convergence of national legislation. These are the recommendations listed below.

3. *Non-discrimination rule*

The common principle is the equalization between the rights of the minor of domestic nationality and those of the foreign minor.

Despite this, some services, however, may be subject, in some countries, to the acquisition of citizenship or are associated to a residence permit.

Unaccompanied foreign minors have the same rights as minors having citizenship in the country regardless of their nationality, immigration status or resident permit.

4. *Rights recognition*

The recognition of the fundamental rights of foreign minors derives mainly from international conventions. However, at a national level it is suggested to specify some of those rights which are essential to the implementation of protection of the foreign minor.

The unaccompanied foreign minor must be received in a suitable accommodation and must be guaranteed care, moral and material support. He has the right to access education and health services. He must be informed about any proceedings concerning him in a language which he understands. He has the right to be heard and to express his opinion. Legal representative and legal assistance must be provided for him.

The minor accesses kindergarten and compulsory schooling in the host country. Access to the school is allowed at any time of the year. The minor could be assisted by a support teacher if necessary. The school draws up an inclusion program aimed at him acquiring the specific skills for each order and grade.

The foreign minor has access to the health service for any urgent or ordinary treatments.

5. *Identification process and age assessment*

National systems may put different procedures in place to determine the minor's identity and his age. These are essential elements in order for the child to exercise his rights, and require a quick implementation.

The following recommendation is made.

The identity and age of the minor must be ascertained within 3 days of arrival on the national territory.

During the assessment procedure he must be assisted by the guardian, the linguistic mediator and the psychologist.

The identification procedure must take place in an appropriate environment and must stop at any time when the result is achieved.

The first step involves the acquisition of the documents in possession of the minor and the informative interview.

The interview is focussed on personal history, travel history, existing family relationships, language skills and maturity of the child.

When clarification is needed, the authorities of the country of origin are consulted, if this is not against the interest of the child.

If the previous steps have not led to a reliable result, upon authorization of the court the minor can be subjected to a medical examination, after obtaining his consent and that of the guardian.

The clinical examination is carried out in specialized centers by a medical team which includes a child neuropsychiatrist. The age assessment must take into account the apparent degree of maturity and respect the dignity of the minor, his sex and physical and mental integrity.

The minor must be informed that medical tests (such as X-ray, CT scan etc.) are characterized by a margin of error.

The results of the assessment and tests must be communicated to the minor, together with the information for appealing negative decision about minor age.

The refusal of medical examinations will be evaluated together with the other elements

6. *Care system*

The reception system is the most difficult step to be standardized because it is most affected by national organization and social policies.

Therefore, our proposal is based exclusively on an evaluation of the best possible solution for the minor.

When an accompanied minor arrives on the national territory or he is traced in the hosting country, the child must be located in a first facility accomodation dedicated to minors.

First aid must be provided in the first reception facility.

The minor is guaranteed accommodation, suitable clothing for the season, food and medical assistance.

The minor is supported by a cultural mediator and an interpreter, and the process of appointment of the guardian is started.

Time spent in the first reception facilities must be limited to the period needed to complete the identity and age assessment (no longer than one week).

The placement in a foster family is the preferable solution for the second reception.

The presence of other children and the cultural and religious traditions of the minor will be taken into account when choosing a family.

Foster families are adequately trained to provide emotional support and practical help and assistance with regards to the inclusion needs. Foster families must help the child maintaining personal links with the family of origin where this is appropriate and possible.

When the placement in foster families is not possible, the minor will be placed in state or local structures (reception facilities) that will take care of him.

A legal representative of the minor is identified and he is responsible for the minor's educational project.

Reception facilities are subject to a process of regular monitoring, which includes interviewing the child.

Reception facilities work with other stakeholders to facilitate the social inclusion of the minors.

In case of minors over the age of 16, placement in shared apartments or accommodation is allowed.

In any case, supervision by national social services guarantees that the rights of the child are exercised.

7. *Guardianship*

Guardianship is affected by the traditions of each legal system and by the absence of disciplinary instruments at the international level (except for the recent guidelines developed at a European level). However, the guardian has an essential role for guaranteeing the protection of minors.

We propose the following recommendations:

The suggestion is for a single individual who carries out all the duties of the child's care.

When the unaccompanied foreign minor is on the national territory, he must be assisted by a guardian appointed by the judicial authority or by a government body.

Every child should have a guardian regardless of his immigration status.

The appointment must take place as soon as possible and in any case before ascertaining the identity and age.

The guardian has the following functions:

- *legal representation of the minor;*
- *care of the minor (i.e. promotion of well-being, adequate standard of living, appropriate housing, healthcare, education, training)*
- *assistance and support (assessment of individual needs, material assistance, integration in the hosting country, life project, gathering information)*
- *asset management*
- *safeguarding the rights of the child*
- *protection of the well-being of the child*
- *cooperation with institutions.*

In particular, the guardian will be able to help the minor in the application for asylum or international protection, repatriation, age assessment procedure (i.e. consent to medical treatment), residence permit, request for damages, all civil, criminal and administrative proceedings.

The guardian is appointed from a list of qualified individuals, kept by the court or government body.

The requirements for the admission to the list of eligible individuals are:

- *age over 25 years*
- *exercise of civil rights*
- *good behaviour*
- *possession of suitable qualifications.*

The guardian will be subject to annual training.

The guardian has the right to reimbursement of expenses, to paid leave to carry out his / her role, and has an insurance to cover damage paid by the state.

The court or government agency will supervise the performance of the guardian and will periodically update the lists of qualified individuals.

Each guardian may have a maximum of three minors in charge.

The guardianship lasts until the child reaches adult age or parental responsibility is restored in favour of parents or relatives.

8. *Resident permit*

The European legal systems generally set that regular stay in the country is conditional to the issue of a residential permit. The different types of permit are heterogeneous and depend on various requirements.

Our suggestion is the following:

The unaccompanied foreign minor (except in the case of a minor seeking asylum or international protection for which a specific permission is required) has the right to a residence "permit for minors", which lasts until the conclusion of the educational project for social integration has been reached.

9. *Durable solution*

The reception measures for the subject who has reached adult age are not particularly efficient in the systems analysed.

The following recommendation is made:

In the year before reaching adult age, the minor is supported by a nationally recognized association which, in collaboration with social services, implements practical measures to support his integration into the world of work or his intention to continue school or training.

The association will take care of finding accommodation in apartments or shared housing.

10. *Non refoulement and expulsion*

The prohibition of refoulement of minors is a principle of international law which we must reiterate as it has not been incorporated in some systems

The minor cannot be refouled at the border.

Expulsion (except in the case of a minor seeking asylum or international protection) can only be ordered by the judge when it does not involve a serious risk for the minor.

Voluntary repatriation of the child is always allowed (in the country of origin or in a third country) when it has been possible to trace the family of origin and it is not in contrast to the interest of the child.

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L'imponenza dei flussi migratori registrati negli ultimi decenni ha portato all'attenzione delle istituzioni il problema della protezione dei minori che giungono sui territori europei senza un adulto di riferimento, i c.d. minori stranieri non accompagnati.
L'analisi degli strumenti per la protezione dei minori migranti è stata oggetto di ricerca finanziata dalla Commissione Europea attraverso il programma *Jean Monnet Module* i cui risultati sono presentati in questo volume.
Alcuni aspetti critici legati alla tutela del minore straniero (tra i quali l'accoglienza, l'accertamento dell'età, la nomina dei tutori, il permesso di soggiorno, etc.) sono stati temi del questionario distribuito agli esperti nazionali di alcuni paesi europei le cui risposte, contenute nel libro, hanno fornito dati interessanti ai fini della predisposizione di regole condivise.
L'opera include anche alcuni saggi dei relatori del convegno "Minori Emigranti. Regole giuridiche e prospettive politiche" relativo alla ricerca finanziata.

Il C.Æ.DI.C. Centro Æmilia di Diritto Comparato, fondato a Modena dalla Prof.ssa Maria Donata Panforti e dal gruppo di ricerca dalla stessa diretto, si occupa dello studio e dell'analisi su base comparata delle più rilevanti ed attuali tematiche giuridiche e sociali. Attraverso la collaborazione con docenti e professionisti del settore, italiani e stranieri, il C.Æ.DI.C. raccoglie ed offre una panoramica globale dello sviluppo del mondo contemporaneo.

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