Unaccompanied minors:

from their arrival through their possible deportation & Application of the Children's rights Convention in Europe

Guidelines

EU Bars Federation (EBF)
Unaccompanied minors Committee

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Geneva Bar Association

Members of the Committee

France

Mélanie Duverney Prat
Delphine Lassailly
Josine Bitton
Anita Bouix

Germany

Barbara Wilsing
Jonas Erkan

Italy

Sara Gini
Béatrice Rigotti

Spain

Andres de Ceballos

Switzerland

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Céline Squaratti (Co-President; E-mail)
Rayan Houdrouge
Kathryn Kruglak
Milena Peeva
Mahault Frei de Clavière
Jessica Depré

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Introduction

An unaccompanied minor is a child with foreign nationality, who is less than 18-years-old and who arrived in a State (i.e. the host State) without being accompanied by their legal representative(s).

As indicated in the preamble to the Convention on the Rights of the Child[1] "*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*". This is one of the reasons that the Convention on the Rights of the Child was adopted in New York on 20 November 1989.

In particular, this is the case when it comes to unaccompanied minors, who by virtue of their situation, are at a much higher risk of being exposed to abuse and extreme suffering.[2]

For a number of years, the migration of young unaccompanied minors has preoccupied the courts and the administrative authorities of EU States.

In 2019, out of the 33 million documented migrants worldwide, 12%, or approximately four million, were children.[3]

In 2020, according the latest figures from the French Directorate for Research, Studies, Evaluation and Statistic, more than 200,000 young persons were received by the French child welfare services (*Aide sociale de l'enfance*).

From their arrival in the host State, these children are subjected to a cumbersome procedure whose purpose, on the one hand, is to care for them and, on the other hand, is their possible deportation.

Effectively, one of the problems is that these minors generally are undocumented, making it difficult for the State authorities to establish their "*minority*".

Thus, a procedure, which often is invasive, is undertaken by the State authorities with the aim of establishing the age of the child. That procedure often involves medical exams that can include examination of their menstrual cycle and testicles, and can be traumatic for a child.

In Europe, in principle, the States are responsible for the minor during this procedure, which is why the assessment is carried out with a certain partiality, which is controversial, given that establishing the age of an individual is a process that must take into account a multitude of criteria.[4]

Additionally, that procedure is generally long and often finishes with the individual running off or going missing, since as long as the child's minority has not been established by the competent administrative authority. They usually receive only partial and insufficient care in the host State.

As detailed below, the manner for establishing minority differs according to the State, which is why this document aims to:

- Identify current practices in Europe; and
- Propose methods that can be applied in a uniformed manner.

The challenges facing States include respecting the guarantees set out in the Convention on the Rights of the Child, ratified by all EU States, while at the same time ensuring that there is a formal procedure to receive these children in a manner that enables them to distinguish between "*real*" and "*fake*" minors.

[1] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (cited: 'Convention on the rights of the Child' or 'CRC').
[2] Commission, 'EU strategy on the rights of the child' COM/2021/142 final, 11.
[3] Commission, 'EU strategy on the rights of the child' COM/2021/142 final, 11.
[4] EASO, 'Practical guide of age assessment' (2nd edn, 2018) 35.

A. Work of the unaccompanied minors committee of the EU Bars Federation (EBF)

In light of the above, the Committee has carried out a comparative law analysis of the following two aspects:

1) States' procedures for unaccompanied minors, from their arrival through their possible deportation; and
2) States' direct and indirect application of the Convention on the Rights of the Child.

This document provides a global overview of issues identified in the following States: **France, Germany, Italy, Spain and Switzerland**.

It is accompanied by annexes that provide the reader with an in-depth analysis of the problems identified in each of the following EU States:

- Annex A: current legal framework and rights upon arrival of unaccompanied minors (Germany);
- Annex B: current legal framework and rights upon arrival of unaccompanied minors (Switzerland);
- Annex C: current legal framework and rights upon arrival of unaccompanied minors (France);
- Annex D: application of the CRC (France);
- Annex E: application of the CRC (Switzerland);
- Annex F: application of the CRC (Italy); and
- Annex G: application of the CRC (Spain).

B. Current legal framework and rights on arrival

1. Age assessment

1.1. Current practices

Currently, in order to receive care, unaccompanied minors in Europe generally must undergo an interview with an administrative authority after arriving in the host State.

Due to the lack of identity papers or official documents, all EU administrative authorities carry out an assessment of the age of the person concerned.

The EU Asylum Support Office's ("EASO") recommended practice is to proceed in multiple stages, the first stage being a **psychosocial and multidisciplinary** interview with the person concerned, and the last stage being, only if necessary, a medical exam.[5] In principle, invasive methods (e.g. medical exams, X-rays) only should be used as a last resort.

Some States use psychosocial and multidisciplinary interviews to assess the age of the person concerned and only use medical exams if doubts remain.[6]

In reality, the content and form of the interview varies between States, but it rarely is a multidisciplinary interview, satisfying the EASO's recommendation.[7]

This especially is the case in Switzerland. Until the beginning of 2021, the administrative authorities relied exclusively on the medical exam carried out during the age assessment to which minors were subjected.[8]

[5] EASO, 'Practical guide of age assessment' (2nd edn, 2018) 35.
[6] Annex A, p 18 – 19; Annex C, p 2; and Annex F, p 5.
[7] EASO, 'Practical guide of age assessment' (2nd edn, 2018).

From that date onwards, Switzerland has had a procedure for assessing age based on a single psychosocial interview with an administrative authority.

The Committee identified the following problems with regard to interviews taking place in EU States:

- The young person usually is not provided with legal counsel and/or an adequate translation (or full translation) into their native language;
- The interview almost never is conducted by professionals (e.g. psychologists, doctors, etc.), but rather by a single person in charge of an overall assessment of the person concerned;
- There are no common guidelines, meaning that the questions and the topics addressed vary between States and, sometimes, even between different regions of a State;[9]
- Age assessments, of which the carrying out and reliability is controversial in medical circles, nevertheless, are considered sufficient evidence by host States to deem an individual to be an adult;
- The availability of administrative authorities for this type of interview generally is limited. Reception hours are restricted to a few hours per day or per week and there is no duty officer in the majority of States.[10]

Pending the outcome of the age assessment, most States offer free accommodation.[11] This ensures that the young person does not have to sleep on the streets, although the accommodation provided rarely is adequate. However, since February 2022, France, has forbidden the housing of unaccompanied minors in hotels from February 2024.[12] In the meantime, this reception cannot in principle go beyond two months. This principle resulting from the law of February 7, 2022 on the protection of children is not, in practice, effective.

In Switzerland, it was not until the beginning of 2020, that the administrative authorities took responsibility in this respect.

These disparities between States often lead to situations where children run off until the authorities have made a decision regarding their age.

1.2. Best practices

The interviews conducted as part of the age assessment procedure should be multidisciplinary and include the elements below:

- A psychological interview in the presence of an ethno-psychologist, so that the young person's statements regarding their culture of origin are taken into consideration. Germany is the State that comes closest to such an approach, with an interview conducted by two child specialists (four-eye principle);[13]
- A psychosocial interview with a child specialist should occur systematically during the age assessment in order to highlight key issues related to the child's emotional maturity;
- An accredited interpreter should be provided to ensure that the young person has a complete and detailed understanding of the interview and the questions being asked. This is important, because the minor’s understanding is a prerequisite for a conclusive outcome of the age assessment;
- Legal advice to ensure a "*control check*" (e.g. that the interview complies with the procedural safeguards from which the minor benefits and to ensure that their statements have been properly transcribed);

[8] Annex B, p 30 – 32.
[9] Annex C, p 42.
[10] Annex B, p 29 – 30; and Annex C, p 42.
[11] Annex A, p 17; and Annex F, p 7.
[12] Annex C, p 42 – 43.
[13] Annex A, p 18.

- A trusted adult to act as guardian. This person (the guardian) should be appointed to assist and accompany the minor in all administrative and judicial procedures until a final decision has been made;[14]
- Intrusive medical exams only should carry out at the request of the young person and should not be a condition for obtaining care.

In addition, the young person should benefit from a presumption of minority until a final judicial decision has been issued.[15]

Pending the outcome of the age assessment, host States should be required to provide the young person with temporary care (e.g. accommodation and meals) in the State in which they are located. Hotel accommodation should be prohibited, as is the case in France.[16] The Committee notes that States that offer this rapid care also tend to conduct the age assessment faster.[17]

However, since the Law of February, 7, 2022, France has forbidden the housing of unaccompanied minors in hotels from February 2024, with the exception of emergency situations or sheltering minors for a period not exceeding two months.

2. Decision of the competent authority

2.1. Current practices

The competent authorities must opt for a certain type of procedure in order to issue a decision that is part of a legal framework.

In principle, there are two types of legal frameworks in which decisions concerning unaccompanied minors are issued:

1) Asylum applications; and
2) Permit applications (humanitarian).

In some States, the authorities prefer to use the asylum procedure for young persons identified as unaccompanied minors.[18] It should be noted that it is always possible for unaccompanied minors to submit an asylum application by their own volition.

The decisions are handed down by the administrative authority that evaluated the young person on their arrival in the State.

The decision establishing the age of the child has a decisive impact on the care they receive.[19] In general, a young person deemed to be an adult by the authorities does not have a right to a permit or to asylum (unless the criteria fixed under national and international law are fulfilled). Consequently, the young person would have no right to any specific care. Thus, this decision is of fundamental importance for a young person without identity documents.

In all EU States, the decision of the authority can be appealed, under different conditions, in particular:

- Access to a lawyer is not guaranteed; and
- The time limit for appealing this decision generally is very short (between five and 30 days).

[14] Annex A, p. 17 ; and Annex B, p. 30.
[15] Article 8 §2 CRC.
[16] Annex C, p 42 – 43.
[17] Annex A, p 18.
[18] Annex A, p 21; and Annex B, p 30 – 32.
[19] Annex A, p 21; Annex B; p 32 – 33; and Annex C, p 42 – 43.

2.2. Best practices

The Committee notes that the **time limit** to appeal decisions establishing an individual's age varies greatly between States; it ranges from five to 30 days.[20]

The time limit should be at least 30 days, as is the case in Germany,[21] in order to allow for adequate notification of the young person's team (e.g. guardian, lawyer, legal representatives), as well as a full understanding by the young person of the implications of the decision.

The minor's **access to a lawyer** (not solely legal advice), as well as interpretation of the decision into their native language, must be guaranteed in all judicial and administrative procedures. In addition, they must be able to be accompanied by a support person as from their arrival in the host State.[22]

It is indispensable that the subject of the decision be informed of the decision and of its content in a language that they understand, with the possibility to access an **interpreter**.

3. Consequences of the decision

The decision as to whether or not an individual is recognised as a minor has a considerable impact on their stay in the host State.

Effectively, being recognised as a minor by the administrative authorities allows the young person to stay in the host State and to benefit from better care (e.g. access to education), while not being recognised as such could lead to the initiation of a deportation procedure.

3.1. Current practices

In principle, all young persons recognised as minors are entitled to care (e.g. accommodation, food, access to education) until they reach the age of majority. They also should receive administrative assistance to regularise their presence in the host State.[23]

At the same time, the administrative authority attempts to contact the minor's parents in their State of origin.[24]

It is difficult to identify a consistent practice of administrative authorities for individuals recognised as minors, because such decisions are rare and minority is only recognised in a small number of cases. Practices differ largely between States.

For instance, in Switzerland, when a young person is recognised as an unaccompanied minor, that individual does not necessarily receive a residence permit. Nevertheless, that individual is cared for by the State (e.g. accommodation, food, etc.). Further, only two young individuals identified by the Committee were recognised as unaccompanied minors and only one of them was enrolled in school. Outside of these cases, none of the unaccompanied minors who arrived in Geneva, including those who were part of the wave of arrivals in 2019, was enrolled in school. The Swiss administrative authorities preferred investing in repressive measures and deportation procedures, rather than providing these young persons with education while their cases were pending or until they reached the age of majority.[25]

In Germany, children are first taken into custody after their recognition of minority. Then, they are distributed to residential groups (i.e. parent-child facilities or homeless shelters as well as emergency shelters are mentioned in isolated cases).

[20] Annex A, p 19 – 20; Annex C, p 45; and Annex B, p 36.
[21] Annex A, p 19 – 20.
[22] Annex B, p 32.
[23] See the CRC.
[24] Annex A, p 20 – 21; Annex B, p 33; and Annex C, p 42 – 44.
[25] Annex B, p 33.

Consequently, most unaccompanied minors are accommodated in stationary facilities or assisted living facilities. Among the other accommodation options, accommodation in a hotel with pedagogical support or rented apartments in combination with outpatient care.

After this “distribution”, the youth welfare office to which the minors have been assigned is responsible for their long-term placement. Subsequently, the application for guardianship, further medical examinations, the determination of educational needs and a clarification of the residence status are arranged.

Regarding the residence status, a decision is made as to whether an application for asylum will be filed. If an asylum procedure is not promising, the responsible foreign authority can also issue a toleration to reside in Germany.[26]

In France, in particular, a differentiation must be made between minors who arrive in the State before the age of 16 and those who arrive after.[27]

If a young person arrives in France before they are 16, they have a right to be granted a residence permit, providing they respect the public order and continue their education. These individuals also can obtain French nationality if they are taken in charge by the French authorities since their 15 years old.[28]

If a young person arrives in France after the age of 16, they are not entitled to a residence permit. Effectively, a new assessment is carried out by the prefectural services, under the aegis of the Interior Minister, and the minor's identity documents are examined anew. The Interior Minister can issue a deportation decision, which can be appealed by the minor.[29] If accepted, the minor may be granted a student permit, work permit or temporary work permit. It should be noted that during the assessment carried out of the prefectural services, the young person does not receive a temporary residence permit allowing them to work, which in practice, results in an interruption of rights.[30]

3.2. Best practices

In the event that an individual is recognised as a minor, the Committee identified the following practices as practices that should be applied more regularly.

- Access to compulsory education, it is was found that despite Article 28 CRC, guaranteeing a right to education, young persons recognised as minors by the administrative authorities are not guaranteed access to mainstream schools. In effect, unaccompanied minors often are *"educated"* through programmes established by associations, as these young persons often do not speak the language of the host State. This does not assist their integration in the host State and sometimes leads to them dropping out of the education system, or even going back into hiding.
- Effective social care for the young person, in particular, to re-establish contact between that individual and their family and to help them understand opportunities for development in the host State (e.g. education, traineeship, volunteer opportunities, etc.).

  This care varies from State to State and is largely absent in many EU States, despite being a principle enshrined in the CRC.[31]
- The administrative authorities regularly, without an in-depth search, give up on trying to contact unaccompanied minors' families, given the lack of cooperation of a certain number of unaccompanied minors in this respect.

  A systematic investigation by the host State (either by sending a delegation onsite or effective mutual assistance between States) would help address this issue.

[26] Annex A, p 19.
[27] Annex C, p 43 – 44.
[28] Annex C, p 43 – 44.
[29] Annex C, p 44 – 45.
[30] Annex C, p 44 – 45.
[31] Article 22 §2 and 37 let c CRC.

- The Committee notes that the legal status of unaccompanied minors in host States, is not clear, despite having been recognised as unaccompanied minors.

  Thus, it is recommended to have a clear residence status that permits the young person to know what their rights and obligations are in the host State. The intermediary status given to young persons who are recognised as minors, but who do not have a residence permit, is insufficient.

  The risk in not doing so is that young persons without a residence permit will end up going back into hiding, due to their lack of perspectives in the host State.

4. In case of non-recognition of minority: deportation proceedings

4.1. Current practices

Overview

In practice, a young person not recognised as a minor is generally not granted a residence permit and will receive a deportation decision.[32]

Their care immediately ends. The minor is alone and without housing. This usually results in that individual being housed in a homeless shelter for undocumented individuals, which usually, is not appropriate for minors and young adults.[33]

In such situations, young persons end up unsupervised and in the streets.[34]

In principle, the care from which the child benefited prior to the issuance of the decision establishing their age does not need to be reimbursed even though, in the end, the child was deemed to be an adult.[35]

However, in Switzerland, the Geneva Office of the Prosecutor, ordered a young person to reimburse the aid that they had received after arriving in Switzerland. This decision was issued under the pretext that the individual had lied about their age to the administrative authorities and thus had violated Article 148a of the Swiss Criminal Code,[36] which states that "*[a]ny person who misleads a another by providing false or incomplete information, failing to disclose information or in any other way or who compounds an existing error so that he or an associate obtains social insurance or social assistance benefits to which he or his associate is not entitled shall be liable to a custodial sentence not exceeding one year or to monetary penalty*".[37] This decision was confirmed on appeal before the criminal appeals court for the Canton of Geneva. An appeal is pending before the Swiss Federal Supreme Court.

Legal recourses against a decision of non-minority

In all States surveyed, these decisions can be appealed.[38]

However, the appeals do not have a suspensive effect in respect of the decisions.[39] In addition, and in view of the short time limits in the domain, it is rare that the young person has access to a lawyer.

When there are appeals, they generally concern an arbitrary finding of facts.

[32] Annex A, p 21 – 22; Annex B, p 32 – 33; and Annex C, p 45.
[33] Annex C, p 45; Annex A, p 21 – 22.
[34] Annex C, p 45; Annex B, p 32 – 33; and Annex A, p 21 – 22.
[35] Annex A, p 22 – 23.
[36] Swiss Criminal Code of 21 December 1937 (cited: 'Swiss Criminal Code').
[37] Annex B, p 32 – 33.
[38] See Section *ii*, best practices concerning time limits for appeals.
[39] Annex B, p 33; and Annex C, p 44 – 45.

As unaccompanied minors usually do not have identity documents, the appeals generally are in relation to the administrative authority establishing the facts in an arbitrary manner or in a manner contrary to law.

If the young person has not undergone an in-depth medical exam yet, it is at this point that one is carried out.[40]

Generally, not respecting the procedural guarantees enshrined in the ECHR[41] and the CRC does not result in EU States considering the decision to be null.

4.2. Best practices

In light of the above, the Committee has established the following best practices.

- If a young person is recognised as an adult by the authorities, the reimbursement of aid received prior to their age being established only should allowed under certain very restrictive conditions. Effectively, the young person generally already is in an extremely precarious situation and it already is accepted in asylum law, that entering a territory to seek protection is not a criminal offence.[42]

  The "*unlawful claim of social assistance benefits*" by unaccompanied minors should not be subject to criminal proceedings, even if reimbursement is requested by the administrative authorities after the young person has been deemed to be an adult.
- Given the uncertainty of age assessment procedures and the extreme precariousness in which unaccompanied minors are living, suspensive effect should be given if an appeal is introduced against a deportation or criminal expulsion decision.
- Given the short appeal deadline and the complex nature of the legal issues, the implementation of duty lawyers specialising in this field would enable the young person to be assisted by legal counsel as soon as a deportation or expulsion decision is issued against them (case of mandatory defence).
- Given that often, unaccompanied minors only have a birth certificate as proof of their age, but that such documents are not taken into account by the authorities, this document should be given probative force, provided that its veracity is not contested and no other documents with higher probative force establish the contrary.[43]
- Forbid reassessing whether the unaccompanied minor is a minor after that individual has been recognised as such.[44] As the age assessment is carried out using a psychosocial approach, the results can vary based on the date on which the interviews were carried out, as well as the benchmark indices used.

  There is a risk that the young person will be re-examined at regular intervals and that their status will differ depending on the outcome of these re-examinations, putting them in a particularly insecure position.

[40] Annex C, p 44 – 45.
[41] Convention for the Protection of Human Rights and Fundamental Freedoms (EU Convention on Human Rights, as amended) (cited: 'ECHR').
[42] Article 31 of the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (cited: '1951 Refugee Convention').
[43] Annex C, p 45 – 46.
[44] Annex C, p 45 – 46.

C. Application of the CRC

1. Convention on the rights of the child

On 20 November 1989, the United Nations General Assembly adopted the CRC. For the first time, all children worldwide were recognised as having certain rights, in particular, the right to survival, development, protection and participation.

The CRC defines fundamental values on how to treat children, which are applicable throughout the world, regardless of social, cultural, ethnic or religious differences.

This convention is an integral part of the legal order and is directly applicable, as the EU States and Switzerland are monist.[45]

Article 20 CRC states that *"[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State*".

Thus, unaccompanied minors in States having ratified the CRC have the same right to protection as any other child. Further, these States are bound by obligations arising from the CRC with regard to all children present in their territory, including unaccompanied minors.

However, there is significant disparity between States' practices with regard to the application of the CRC. Therefore, given the different practices, it is difficult for the Committee to establish a "*general practice*" in Europe.

In order to be exhaustive, a short summary, based on of the Committee's work, is included in this section.

2. Presumption of minority (Article 3 CRC)

2.1. Current practices

For States Parties to the CRC, the presumption of minority can be derived from Article 3 CRC, since in order to ensure that the best interests of the child are a "*primary consideration*", States must respect the guarantees provided for under the CRC for as long as it is not possible to establish that the individual has reached the age of majority.[46] Nevertheless, the State in question must consider Article 3 CRC to be directly applicable, which is not the case, for instance, in Switzerland.

The existence, or not, of a national legal basis providing from such as presumption in the States represented in the Committee is examined below.

In Switzerland, there is no legal basis explicitly enshrining the presumption of minority.[47]

In France, there also is no national legal basis concerning the presumption of minority. Nevertheless, this principle should be applied by French courts by virtue of the applicability of Article 3 CRC.[48]

In Italy, the presumption of minority is an enshrined right under Italian law.[49] Further, multiple decisions handed down by Italian courts directly invoke the application of the CRC with regard to the presumption of minority.[50]

[45] Jean Zermatten, 'Grandir en 2010 : Entre protection et participation. Regards croisés sur la Convention des droits de l'enfant' (2010) RJJ.
[46] Annex E, p 59.
[47] Annex E, p 59.
[48] Annex D, p 50 – 52.
[49] Annex F, p 65 – 66.
[50] Annex F, p 69 – 70.

In Spain, the presumption of minority also is enshrined in national law.[51] However, in practice, the administrative authorities regularly violate this legal basis; the Spanish Supreme Court has ruled as much.[52] Moreover, Spain has been condemned multiple times by the Committee on the Rights of the Child to this effect. Despite this, the administrative authorities continue to violate the principle of presumption of minority.[53]

2.2. Best practices

For the Committee, in order to ensure the applicability of the principle of presumption of innocence, it is imperative that every State has an express legal basis enshrining the principle of presumption of minority in its national law, as is the case in Spain and Italy.

Failing this, States should recognise the direct applicability of Article 3 CRC. One way to do this would be through the creation of a specific legal basis at the national level in this respect.

3. Right to an education (articles 28 and 29 CRC)

The CRC, especially Article 28, creates a right to education. As provided for under the CRC, States have a particular duty of care with regard to minors, which includes the obligation to ensure their educational integration.[54]

The existence of a national legal basis enshrining this right in the States represented in the Committee is examined below.

3.1. Current practices

In Switzerland,[55] the right to free basic education is enshrined in Article 19 of the Swiss Constitution.[56] This legal basis gives a right to free basic education not only to citizens, but also to children without legal status and to children who have been ordered to leave the State.[57]

There is no express national legal basis giving unaccompanied minors a fundamental right to access basic education.

However, in principle, school is compulsory until the age of 15 or 16 throughout Switzerland. In Switzerland, practices differ from canton to canton. In the Canton of Geneva, the government has concluded an agreement with an association called "*Paidos*" to carry out this obligation. This association takes in unaccompanied minors and provides them with minimal schooling, including French classes. However, the courses provided do not follow the regular school curriculum and unaccompanied minors are not integrated with Swiss students, which, in the view of the Committee, contravenes the framers' intention, which was to give a right to a "*school for everyone".*

In France,[58] there is a similar problem. The fundamental right for unaccompanied minors to receive an education is based on the CRC and, in general, is not respected.

Unaccompanied minors receive a few hours of schooling, without being able to follow a regular school curriculum. Associations make up for the State's shortcomings by offering a few hours of support courses, which enable unaccompanied minors to obtain a French language diploma and thus, increases their chance of being able to be educated in a mainstream school.

[51] Annex G, p 72 – 73.
[52] Annex G, p 73 – 74.
[53] Annex G, p 73 – 74.
[54] Annex E, p 60 – 62 and the sources cited.
[55] Annex E, p 60 – 62.
[56] Federal Constitution of 18 April 1999 of the Swiss Confederation (cited: 'Swiss Constitution').
[57] Annex E, p 60 – 61.
[58] Annex D, p 51 – 52.

However, placing unaccompanied minors in mainstream schools remains the exception, even when they speak the national language and have the knowledge needed to follow the curriculum of a mainstream school.

In Italy,[59] a specific legal basis substantially incorporates the guarantees enshrined in the CRC. This legal basis provides for a duty to care for the children as a matter of priority and to ensure their integration into the school system throughout the identification procedure, in particular the age assessment.

Therefore, in principle, immediate care is provided in a structure specially designed to receive and integrate unaccompanied minors. The ordinary system operates as a backup in the event that there is a lack of space in the structure dedicated to unaccompanied minors.

In Spain,[60] under national law, school is compulsory until the age of 16. Unaccompanied minors are not integrated into mainstream schools. The State does not particularly ensure unaccompanied minors' educational integration.

3.2. Best practices

In our view, in order to respect the rights consecrated in the CRC, the right to education should take the following form:

- Schooling for the young person as soon as they are taken into care by the host State and throughout the age assessment procedure. As the age assessment procedure can last several months, it is essential that school integration commence as soon as the young person arrives;
- School integration should be much more extensive. Unaccompanied minors with the requisite language skills should be assigned immediately to a school to allow them to become better integrated in the host State.

  Providing education "*in parallel*" with provided mainstream schools generally is insufficient and only exacerbates the lack of integration of unaccompanied minors in the host State. This indirectly increases the risk of these young persons committing minor offences, as they already have left school by the time they arrive in the host State. It is for this reason, in particular, that for 2020, independent of the migratory flow, the EU Union set a threshold of 10% with respect to young persons aged 18 to 24 leaving the school system without a diploma or without training.[61]

4. Right to accommodation (article 27 CRC)

The CRC, in particular Article 27, recognises that all children have the right to benefit from a level of life permitting their physical, mental, spiritual, emotional, moral and social development. In particular, this includes being able to benefit from adequate accommodations. As provided for under the CRC, States have an obligation to take appropriate measures to ensure that this right is respected.

The existence or not of a national legal basis enshrining this right in the States represented in the Committee is examined below.

4.1. Current practices

In Switzerland, Under Article 41 of the Swiss Constitution, the State commits to ensuring that anyone seeking accommodation can find suitable accommodation that they can afford.[62]

[59] Annex F, p 68 – 69.
[60] Annex G, p 72 – 73.
[61] Le ministre de l'Éducation nationale, de la Jeunesse et des Sports, 'La lutte contre les sorites précoces dans l'Union européenne' - https://www.education.gouv.fr/la-lutte-contre-les-sorties-precoces-dans-l-union-europeenne-10787#:~:text=La%20strat%C3%A9gie%20de%20l'Union,4%2C4%20points%20depuis%202003 - accessed 5 May 2022.
[62] Annex E, p 60 – 61.

However, there is no explicit national legal basis providing unaccompanied minors with a fundamental right to access such accommodation. According to the case law of the Canton of Neuchâtel, if there is doubt concerning the minority of an unaccompanied minor that individual must be placed in a structure specifically designated for minors.[63]

In France, there are no specific right of an accommodation for unaccompanied minor, even if the right to housing is recognized by the preamble of the 1946 Constitution as having constitutional value, but they have the possibility to seize a judge about their situation to claim their right of an accommodation with regard to the right of human dignity. The accommodation is regularly but not constantly recognized. It depends on the situation of the minor. The process is driven by the department so the result can change in function of the place where the unaccompanied minor is situated.[64]

Some cases are actually pending in front of the European Court which will have to decide if the unaccompanied minors have an unconditional right of an accommodation in France on behalf of the presumption of minority.

A new law (Law of February 7, 2022), which provides that the reception of protected minors and young adults in hotels will be totally prohibited by 2024, has been recently adopted.[65]

In Italy, Article 18 of Legislative Decree n°142/2015 expressly provides for the implementation of conditions adequate for minors and references the CRC, which includes access to accommodation.[66] In practice, they are accommodated in government housing put in place for minors. If that is not available, the minors are take into care by the public authorities in the commune in which they are located.[67]

In Spain, there is no legal basis guaranteeing a specific right to accommodation from which unaccompanied minors can benefit. However, this right is enshrined in Article 47 of the Spanish Constitution of 1978 and, in principle, must be applied to all individuals on Spanish territory, independent of their legal status.[68]

4.2. Best practices

In our view, to respect the rights conferred under the CRC, the right to adequate accommodation should take the following form:

- Access to accommodation dedicated to unaccompanied minors upon arrival though the age of majority, assisted by child specialist, with specific training allowing them to understand the cultural origins of the unaccompanied minor taken into care;
- Access to accommodation during the entirety of the age determination process in case of doubts concerning the age of the unaccompanied minor.

D. Conclusion and suggestions

In conclusion, this document provides a global overview of the approach adopted by EU States concerning unaccompanied minors.

Effectively, given the number of fundamental rights enshrined in different international conventions signed by EU States, these States are required to provide a similar foundation for unaccompanied minors.

Nevertheless, this body of legal rules, which generally contains vague and abstract notions, is interpreted by each State in its own manner, which creates inequalities and poor application of the legal standards of protection.

[63] Annex E, p 61 – 62.
[64] Annex D, p 53 – 54.
[65] Annex D, p 55.
[66] Annex F, p 68.
[67] Annex F, p 68.
[68] Annex G, p 72 – 73.

Unaccompanied minors are a population unrespected by States., Due to the important guarantees conferred to them under international law, States have an obligation provide them with adequate care, which represents a significant cost.

This is one of reason that EU States adopt a restrictive approach when it comes to recognising unaccompanied minors as minors. Against this background, unaccompanied minors are subject to a strict entry process, so as not to send out a strong welcome message beyond the borders of the host State, which would considerably increase the migration flow.

Due to the need to identify unaccompanied minors, who generally do not have identity documents, the question of their temporary care during the identification procedure arises.

This "*interim care*" is often minimalist and contravenes the minimal standard of living that should be afforded to children.

States generally ensure that "*minimal*" care is provided during the process, which is not sufficient under the CRC, as it aims to provide children with special, increased care.

As the presumption of minority is not applied during the identification process, unaccompanied minors do not benefit from all the guarantees provided for under the CRC.

Furthermore, in recent years, a political will to limit immigration has been expressed on several occasions in many EU States (i.e. popular initiatives in Switzerland, Brexit and the rise of extreme right-wing parties in several EU States) and has had a considerable impact on the migration policy of various EU States. In this respect, nowadays, it is frowned upon for politicians to welcome the arrival of unaccompanied minors in their territory.

In view of the above, the Committee considers that this "*thrifty*" line of thinking is wrong and is not the most "*cost-effective*" way for host States to proceed.

Therefore, the Committee proposes the following recommendations below:

- An extensive integration of unaccompanied minors in the host State would promote their well-being and thus reduces the rate of criminal offences committed by this population. It also would allow the unaccompanied minors to contribute to the host State and not just be a financial burden;
- Taking appropriate measures, which also makes it possible to reduce costs. An understanding of the culture and values of the State of origin would make it easier for host countries to understand the goals of unaccompanied minors and to ensure their return to their State of origin under dignified conditions, which would increase the acceptance rate of deportation or expulsion decisions;
- In addition, a more child-centric approach would speed up the process and increase the acceptance of decisions taken by host States;
- Focusing solely on speeding up the deportation process does not result in these young persons returning home, but rather drives them underground. In principle, these young persons are still in Europe, but they are not/no longer receiving care. In this case, the host State has not gotten "*rid*" of them, as it would like to have done and often will have to take them back into care in one form or another.

Annex A

Current legal framework and rights upon arrival of unaccompanied minors (Germany)

Members of the sub-committee

Jonas Erkan (DE)
Barbara Wisling (DE)

Mahault Frei de Clavière (CH)
Milena Peeva (CH)
Kathryn Kruglak (CH)

Mélanie Duverney Pret (FR)
Delphine Lassailly (FR)

A. Current legal framework and status of the law with specific concerns to unaccompanied minors

With regards to unaccompanied minors, the following laws are the most important:

- § 2 BGB: This norm determines the age of majority;
- § 58 Abs. 1a *Aufenthaltsgesetz*: Prior to the deportation of an unaccompanied minor, the authority shall ensure that the minor is handed over to a member of his or her family, a person authorised to take care of him or her or a suitable reception facility in the country of return;
- § 36 Abs. 1 *Aufenthaltsgesetz*: The parents of a foreign minor who holds a residence permit shall be granted a residence permit by way of derogation from section 5(1)(1) and section 29(1)(2) if no parent entitled to custody is staying in the federal territory;
- § 42 *Sozialgesetzbuch* VIII: Determines the taking into custody of an unaccompanied minor by the Youth Welfare Office;
- § 42a *Sozialgesetzbuch* VIII: The Youth Welfare Office is entitled and obliged to take temporary custody of a foreign child or young person as soon as his or her unaccompanied entry into Germany is established;
- § 35 *AufenthG*: This norm facilitates obtaining permanent residence in Germany if the person entered as a minor;
- § 25 a *AufenthG*: this norm gives a young person up to the age of 21, with good integration, the possibility to receive a residence permit independent of the asylum procedure;
- § 60 c *AufenthG*: this norm is often used for minors, because it allows a toleration access to education during their stay in Germany;

- § 19 d *AufenthG*: this norm gives persons the possibility to obtain a permanent residence after having completed their education and having taken up employment.

B. Current legal practice: procedures from arrival to departure

The following section describes the current legal practice in the treatment of unaccompanied minors from their arrival until their eventual deportation or departure[1].

1. Process upon arrival and age assessment

If a minor is found to have entered Germany unaccompanied, the Youth Welfare Office must order provisional custody at the place of actual residence (§§ 42a, 88a Para. 1 SGB VIII).

The foreign minor is taken into care by the Youth Welfare Office (§§ 42, 42a SGB VIII).

Doubts about the minors age must be resolved by the Youth Welfare Office in the "*official age assessment procedure*" (§ 42 f Book VIII of the Social Code). This ensures the primacy of youth welfare and includes responsibility for the identification, initial care and placement of unaccompanied minors.

Border or immigration authorities who pick up unaccompanied minors must therefore **immediately forward the young people to the local Youth Welfare Office**. In cases of doubt, it must first be assumed that the person concerned is a minor; protective measures must be taken until the age is finally clarified.

After the examination, he or she will be assigned a legal guardian.

The Family Court must initiate these proceedings as soon as it becomes aware of the case (§ 1774 BGB).

The law requires the Youth Welfare Office to inform the Family Court of these facts only one month after the minor has entered the country (section 42d subsection 3, section 42 subsection 3 in conjunction with section 42b subsection 4 SGB VIII). However, within the framework of taking into care (§ 42 SGB VIII), the Youth Welfare Office must then arrange for the appointment of a legal representative without delay, i.e. within a few (usually 3) working days.

The appointment of a guardian is made by the Family Court. The guardianship can be assigned to one person, but also to several persons, the Youth Welfare office or to an association. The guardian is entitled to legally represent the minor and is exclusively obliged to the welfare of the ward (partiality).

If, for example, a person informs the arrival center that he or she is a minor and unaccompanied, the person is directly taken to the In-custody group, so that he or she does not spend a single night in the arrival center. In this In-custody group, a conversation takes place at least after 2 to 3 working days with a staff member of the Youth Welfare Office. Within 7 days it must also be clarified whether the minor has relatives in the area, or for health reasons does not go to the federal redistribution, but remains in the current district.

[1] Bundesfachverband muF; https://b-umf.de/p/alterseinschaetzung/.

1.1. Age determination

§ 42 f SGB VIII provides a specific order of priority for the concrete examination of age:

Identification papers and primacy of self-disclosure

First, minors must be identified by inspecting identification **documents** (§ 42f (1) S. 1 SGB VIII). Not only identity papers in the conventional sense are taken into consideration, but also other documents are possible. However, documents from other EU countries based on self-disclosure or estimates by the respective authorities, as well as documents generated by databases such as EURODAC, do not have such evidentiary value. In any case, the Youth Welfare Office is not bound by information from other domestic and foreign authorities and may not accept it unchecked.

Instead, the self-disclosure takes on central importance (**primacy of self-disclosure**); it may only be challenged in justified exceptional cases. A contradictory statement alone is not sufficient to justify doubts about the minor.

Qualified inspection

If even the self-disclosure cannot eliminate existing doubts, the so-called qualified inspection is carried out. This inspection starts with an interview on the developmental status of the minor.

The assessment of the overall impression is decisive for the qualified inspection. In addition to the external appearance, the information obtained during the interview on the developmental status as well as further information and relevant information are also taken into account.

Within the framework of the qualified visual inspection, at least two specially trained pedagogical specialists (so-called four-eyes principle) conduct a **detailed interview**. With the help of language mediation and, in part, psychological support, in which the developmental status of the person concerned is assessed with the help of questions, e.g. about the family, previous school attendance and the escape route as well as other biographical data. If the young person expresses contradictory statements or if age-related concerns arise for the professionals during the interview, he/she must be confronted with these during the interview. Contradictions do not justify the conclusion of a false age statement. Rather, it also depends on how the young person reacts to such statements. Even quiet obvious contradictions and a childlike way of dealing with them can indicate a "lack of maturity".

In this context, the specialists decide on the question of whether the young person is a minor or whether he or she is obviously of age, i.e. not on a specific age/date of birth. The result reached in this context and the overall assessment made must be documented in a comprehensible and verifiable manner and be transparent in its individual steps of justification.

Medical examination for the purpose of age assessment

If existing doubts cannot be dispelled neither in one direction nor in the other, the Youth Welfare Office must arrange a medical examination for the purpose of age assessment**.** If a medical examination is ordered, it must be carried out using the gentlest and, as far as possible, most reliable methods by qualified medical professionals. This excludes, for example, genital examinations.

Even in the context of medical age assessment, it is only an estimate, since the age of a person cannot currently be determined unambiguously and reliably. "*Established*" in the absence of identity papers can therefore always be only an age range, within which the determination of a fictitious age takes place. In the known year of birth, the latest birthday, i.e. 31.12., must then always be assumed (§ 12 VwVfG). Fictitious birth dates dated 1.1. contradict the protection of minors and must therefore be corrected (BVerwG/Federal Administrative Court 31.7.1984 - 9 C 156/83).

Difficulties in age determination

The forensic age determination is quite controversial. (see Teeth and Truth? Age Identities of Migrants in the Making, Sabine Netz, 24.03.2020[2]). Through a study of the technologies of assessment, this paper shows that the making of age identity is relational and ambiguous, and not a truth that is fixed in one´s body as "*biological age*". This challenges one of the promises of biometrics, an ability to measure "the body" objectively.

1.2. The consequences of minority recognition

After being taken into custody, the Unaccompanied minors (UM) are distributed to residential groups. Most UM are accommodated in stationary facilities or assisted living facilities. Among the other accommodation options, accommodation in a hotel with pedagogical support, rented apartments in combination with outpatient care, various forms of residential groups, parent-child facilities or homeless shelters as well as emergency shelters are mentioned in isolated cases.

After this distribution, the Youth Welfare Office to which the minors have been assigned is responsible for their further placement. Subsequently, the application for guardianship, further medical examinations, the determination of educational needs and a clarification of the residence status are arranged.

A guardian or custodian must be appointed for unaccompanied minors. Who ultimately takes over the guardianship is decided by the Family Court. As a general rule, a guardianship exists until the child reaches the age of majority.

In the subsequent clearing procedure, further steps are taken in the area of Youth Welfare Law or residence law. It includes, among other things, the clarification of the residence status. On the basis of this, a decision is made as to whether an application for asylum will be filed.

If an asylum procedure is not promising, the responsible foreigner's authority can also issue a toleration.

Within the asylum procedure, national regulations apply for determining the age of majority. This means that unaccompanied minors must file their asylum application themselves when they reach the age of 18, because they are considered to be of age - regardless of the law in their country of origin. In this case, however, the guardian can continue to accompany the asylum procedure.

Asylum seekers under the age of 18 are not considered capable of acting in the asylum procedure. This means that unaccompanied minors cannot submit an asylum application to the Federal Office on their own. In these cases, the asylum application must be submitted in writing by the Youth Welfare Office or the guardian. If it is submitted by a guardian, a so-called certificate of appointment must be sent. (see §§ 12, 14 AsylG)

As unaccompanied minors are considered a particularly vulnerable group of persons with special guarantees for their asylum procedure, their asylum cases are supervised by special officers who have been trained to adopt a sensitive approach. In practice, this usually works well.

1.3. Right to defence and legal time limits

The young people have the right to be involved in all decisions concerning them, both during the temporary taking into custody and in the age assessment procedure. This implies informing the young people about existing rights (§ 8 SGB VIII) in **understandable language as well as with the help of interpreters**. The young people and their legal representation also have the right to request a medical examination for the purpose of age assessment in cases of doubt.

[2] https://www.tandfonline.com/doi/abs/10.1080/00141844.2020.1736594?forwardService=showFullText&tokenAccess=ZDMP6FUTWDGDE9IDPEWP&tokenDomain=eprints&doi=10.1080%2F00141844.2020.1736594&doi=10.1080%2F00141844.2020.1736594&doi=10.1080%2F00141844.2020.1736594&target=10.1080%2F00141844.2020.1736594&journalCode=retn20

Before a medical examination for the purpose of age assessment, the young person and his or her legal representative must be comprehensively informed about the specific examination methods and the consequences of age assessment (Section 42f (2) SGB VIII). They must also consent to the medical examination. (Section 42f (2) sentence 2 SGB VIII). This must be documented in a comprehensible manner, as the Youth Welfare Office bears the burden of proof and presentation in the event of a legal dispute due to a lack of information.

Within the framework of (provisional) taking into custody

From a legal point of view, the age assessment within the framework of the provisional taking into custody is not an independent administrative act, but merely serves to prepare an administrative act (namely the provisional taking into custody itself).

The age assessment is therefore not independently contestable. Legal protection can only be obtained against the negative decision on provisional taking into custody. From the age of 15, the young person can also appeal against the refusal, termination or revocation of the (temporary) taking into custody (§ 36 SGB I, § 62 para. 1 no. 2 VwGO). An objection to the refusal to take the child into care on the grounds of age and an action to enforce the obligation can be filed (Section 42f. Paragraph 3 of Book VIII of the Social Code).

If state law provides an objection procedure, this must be filed in writing, electronically or in text form at the competent Youth Welfare Office within one month after notification of the decision. If the objection is not granted, an action must be brought before the Administrative Court **within one month** after the objection has been served. Objections against the refusal of temporary custody do not have a suspensive effect, so that this may have to be applied for separately. (Section 80 (1) VwGO).

Challenges regarding remedies

An online survey by the BumF ("*Bundesfachverband unbegleitete minderjährige Flüchtlinge*") on the living situation of umF from 2019 came to the conclusion that **it is considered impossible on the part of the young people to appeal against the result of the age assessment within the framework of the youth welfare proceedings.** This may be due on the **one hand to the fact that the legal representation and the ordering authority or specialist department are still frequently identical at this point.** The legislature recognized this conflict of interests in the UMÄndG 2015, but nevertheless considered independent legal representation during temporary custody to be adequately ensured through personnel and organizational division of duties within the Youth Welfare Office.

On the other hand, the cause is also likely to be found in the uncertainty of the professionals themselves, **who are confronted with different age assessments by different authorities, simply take over information from other authorities and may themselves not know whether and how action can be taken against the individual measures based on an incorrect age assessment.**

In addition, the consequence of an estimated age of majority is usually the **disappearance of any support structures, so that those affected are left to fend for themselves. At the same time, in many cases young people do not receive any advice on further assistance or legal remedies once they have been judged to be of age. It is therefore all the more important that counselling centers outside the structures of youth welfare support young people in asserting their rights.** There are certainly ways to defend oneself against results that are based on an incorrect age assessment. (BumF, Age assessment, legal framework, professional standards and tips for practice, Nerea Conzales Mendez de Vigo/Irmela Wiesinger, July 2019).

2. End of Youth Welfare Custody

The Youth Welfare Custody will end in the following situations:

- child reaches the age of 18. (However, assistance can be maintained until the child reaches the age of 21. (§ 41 SGB VIII) in justified cases, assistance may even be granted beyond this age.);
- a parent/or the parents come to Germany;
- Youth Welfare can finally end in the rare case that the minor is deported from Germany.

C. Formal decision of the competent authority

The following passage presents the procedural steps in the asylum procedure of an unaccompanied minor asylum seeker.

1. Asylum procedure

After hearing the minor, the guardian makes the decision whether to apply for asylum or also, for example, to re-establish contact with the parents in the home country if the child wants to return home.

According to Art. 25 of Directive 2013/32/EU, Member States shall ensure that a representative or a lawyer is present at this interview and is given the opportunity to ask questions and make comments.

In practice, Youth Welfare Offices only appoint lawyers to represent minors in asylum proceedings in individual cases. This has financial reasons, as the costs for legal representation has to be taken by the cities and municipalities. Therefore, in the vast majority of cases, representation in the asylum procedure is more or less taken over by the guardian.

The application for asylum is applied at the BAMF ("*Bundesamt for migration and refugees*"). Dublin III procedures are not carried out for minors in view of the case law of the European Court of Justice. (EuGH vom 6. Juni 2013 (C – 648/11)) The asylum application is therefore decided in the country in which the minor is currently residing.

Before the decision on asylum is taken, the unaccompanied minor has a hearing at the BAMF. The legal guardian or a lawyer accompanies the UMA the hearing.

After being recognised as refugee within the meaning of the Geneva Refugee Convention, the parents of the UMA are granted a residence permit. (§ 36 of the Residence Act.) In practice, however, the Foreign Office and the German embassies delay parents' applications. In addition, legal hurdles are set up, in particular, which documents have to be submitted and that for example only the parents, but not the brothers and sisters of the minor are allowed to come to Germany.

2. Right to a defence and legal time-limits

There are no special features regarding the appeal against a negative or incomplete asylum decision to the regulations for adult asylum seekers.

There are various decisions that the Federal Office for Migration and Refugees can issue.

Decision within the framework of Dublin III

As already stated, in the case of minors applying for asylum, according to the 2013 EuGH ruling, if the asylum procedure is carried out in Germany, the minor should not be transferred again to another Dublin country.

Decision on the non-acceptability of the asylum appeal, since a protection status already exists in another Dublin state. Legal actions do not have a suspensive effect. It is necessary to submit an application for determination of the suspensive effect. The deadline is one week.

All others "*normal*" negative decisions of the Bundesamt for Migration and Refugees gives a possibility to submit a complaint at the Administrative Court. The deadline is two weeks and the application has a suspensive effect. The hearing and the decision of the court takes 2 to 3 years. That is a long time, but it gives the minors time to integrate in the german society. If the court makes finally a negative decision after some years, the minor often has learned German, finished school and makes an apprenticeship.

A minor can be recognized as a refugee according to the Geneva Convention on Refugees and § 4 of the Asylum Act, be granted subsidiary protection status or be prohibited from deportation according to § 60 (5) and (7) of the Residence Act by a decision of the Federal Office for Migration and Refugees (BAMF) or by a decision of the court. The foreigners authority (*Ausländerbehörde*) then issues a residence permit.

In addition, there is the possibility of obtaining a residence permit in Germany through **integration**, especially if the asylum procedure has been decided negatively.

The main integration-regulations concerning minors are §§ 19 d, 25 a, 35, 60 c *AufenthG*-residential Act:

According to § 25 a of the Residence Act, a residence permit should be granted to a young person or adolescent if he or she has been in Germany for 4 years, has attended school for 4 years or has completed a german language course and can be expected to integrate into the living conditions in Germany. The precondition is that there is no ongoing asylum procedure and the person has not yet reached the age of 21. The practical problem is that the young person is still in judicial asylum proceedings, which secures his residence status. (*Aufenthaltsgestattung*) Before filing an application according to § 25 a *AufenthG*, he has to finish the judicial proceedings, so the secureness is not guaranteed. Hopefully the foreigners authority will decide positively on the application according to § 25 a *AufenthG*.

According to § 60 c of the Residence Act a foreigner receives a toleration if he or she has started **apprenticeship.** After finishing the apprenticeship, and when he starts working in his profession, he is entitled to a residence permit according to **§ 19 d Residence Act.**

3. Consequences of the non-recognition of minority

Insofar as benefits were paid to the Youth Welfare Office on the basis of the assumed minority, a reimbursement is not to be demanded from the only assumed unaccompanied minor after an eventual discovery of his or her majority.

Thus the Administrative Court Frankfurt a.M., judgement of 17.11.2009 - 7 K 2562/08.F (V), "the reimbursement of the unlawfully granted assistance for upbringing, which in fact indirectly accrued to the plaintiff in the form that she was accommodated and fully cared for at the expense of the defendant in the youth village ... from 01.11.2004 to 07.10.2005, is not to be claimed from the unaccompanied minor. and received further educational, upbringing and financial benefits in addition, cannot be claimed from the plaintiff under § 50.1 of the Social Code, Book X. The plaintiff is liable for the reimbursement. **The debtor of the claim for reimbursement is the person who is named as the beneficiary in the favourable administrative act; in this case, this is the youth welfare office of the defendant**. A third party who is not the addressee of the favourable administrative act can only

be the party liable for reimbursement under § 50.1 SGB X if he is already named as the beneficiary in the favourable administrative act or if the addressee is obliged therein to pass on the benefit to the third party."

However, it may also happen that the Youth Welfare Office itself claims repayments against the now adult. An asylum procedure can also be (continued) in this case.

4. Deportation/expulsion/removal from the state

The requirements for the possibility of deportation of unaccompanied minors, are regulated in § 58 para. 1 a Residence Act (*AufenthG*). This provision requires that, in the event of deportation, **the minor can be handed over to a suitable institution or to a person with custody in the country of destination.** The requirements for this proof are **very high for reasons of protection of minors**. In practice, they can hardly be met. The proof must be provided by the immigration authority. It cannot transfer the proof to the guardian of the unaccompanied minor(s). This was clarified by the Federal Administrative Court in its ruling of June 13, 2013 based on the EU Return Directive. According to the current legal situation, it is therefore necessary to be convinced that the actual transfer of an unaccompanied minor to a suitable person or institution specified in the provision is not only possible, but will actually take place. (BVerwG 13.6.2013 - 10 C 13.12 marginal no. 18).

If an asylum application is not (yet) filed, UMA are entitled to the issuance of a *Duldung* (suspension of deportation)[3].

In a decision against the Netherlands, the European Court of Justice (ECJ) on January 14, 2021 - C-441/19 -[4] establishes that no return decision may be taken with respect to unaccompanied minors if their deportation is not possible. In particular, with reference to the best interests of the child, which must be taken into account at all steps of the procedure, the ECJ stated that it is mandatory to examine the possibility of deportation before taking a return decision. If deportation is not possible, then no return decision may be issued. This is because the return decision would put the minor in great uncertainty, which is contrary to the best interests of the child, if the deportation cannot even be carried out in a timely manner. "*Such a situation would be contrary to the requirement in Article 5(a) of Directive 2008/115 and Article 24(2) of the Charter that the best interests of the child be taken into account at all stages of the proceedings*." (§ 54)

5. Criminal charges

Providing incorrect or incomplete information in the asylum procedure is not a punishable offence under section 95 of the Residence Act. In rare cases, criminal liability under Section 263 of the Criminal Code is possible due to the receipt of benefits based on a feigned minority.

There is an interest in deportation if an offence under section 54 of the Residence Act exists. This means that a criminal conviction can justify a deportation and a residence permit can be refused. The offence must be particularly serious.

D. Racial profiling/ expulsion/ human trafficking

The following chapter describes racial profiling, everyday racism, expulsion and human trafficking unaccompanied minors can face in Germany.

[3] https://www.nds-fluerat.org/themen/kinder-jugendliche-und-umf/abschiebung-und-unbegleitete-minderjaehrige/

[4] https://curia.europa.eu/juris/document/document.jsf;jsessionid=874184BEC8836FDBC0DDE1EFA6F64548?text=&docid=236422&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=23472846

The child and Youth Welfare Service tries to prevent the exploitation of UMA. The aim of child and Youth Welfare is not only to place them in accordance with the best interests of the child, but also to **integrate them into society**. This works primarily through social participation. In this context, local sports clubs play a particularly important role. The integration efforts made by the local sports clubs must be positively emphasized at this point. Other leisure activities, which are usually organized by volunteers, as in the case of sports clubs, also offer UMA opportunities for social participation and integration.

There are few scientific studies and reports that explicitly deal with the experiences of racism of unaccompanied refugee minors in Germany. Most of these studies focus on the experiences of racism of refugees in Germany in general. In this respect, they also include unaccompanied minor refugees.

At least four refugees have died as a result of police operations only in Lower Saxony in the past two years alone: Aman Alizada in August 2019 in the district of Stade, Mamadou Alpha Diallo in June 2020 in the district of Emsland, Qosay K. in March 2021 in Delmenhorst and Kamal I. in October 2021 in the district of Stade[5].

Another nationally known victim of police violence is **Oury Jalloh**. The refugee was found dead in a detention cell in the basement of the Dessau-Roßlau police station in Saxony-Anhalt. The cause of death has not been clarified to date. The victim is said to have set himself on fire, although there is still considerable doubt about this cause of death. There are also other reports of police violence against refugees. However, there is no scientific analysis of these cases to draw conclusions and/or consequences for unaccompanied minors. Again, this does not mean that there is no racial profiling of unaccompanied minors.

1. Racial profiling and criminalisation of UMs

Unprovoked checks on persons solely on the basis of their phenotypical appearance violate the Basic Law (Art. 3 para. 3 GG), the General Equal Treatment Act (AGG), as well as the prohibition of racial discrimination, laid down in the European Convention on Human Rights and the International Convention against Racism.

According to international human rights organisations, civil society - especially anti-racist - initiatives and organisations, as well as experience and research reports, stereotypical and racist stigmatisation and criminalisation of persons and groups classified by society as "*different*" occurs in everyday police practice. The first court cases also indicate that "*external*" characteristics such as skin colour are used as an essential reason for controlling entry. With regard to the designation of so-called "*dangerous places*", it is argued that especially migrant or migrantised people and people of colour from precarious milieus as well as migrant or migrantised sex workers are targeted by the controls.

The reporters do not have exact data on racial profiling of unaccompanied minors. However, it can be assumed that the practice described above also applies to unaccompanied underage foreigners, especially since they are mostly in the (conflict-ridden) age of puberty.

The fact that young people are (very) often burdened by experiences with (everyday) racism is stated by the surveyed professionals with 41.8% - in the previous year, 34% of the respondents named burdens due to experiences of racism. In the course of interviews and workshops with young people by the *Bundesfachverband* (BumF), it repeatedly becomes clear that young people often do not turn to professionals when they experience discrimination and racism.

Accordingly, it can be assumed that the young people are under greater stress than the figures available reflect.

On the topics of **health care**, asylum procedures and distribution procedures, experiences of racism or fears of being increasingly exposed to it are named.

[5] https://www.nds-fluerat.org/51232/aktuelles/migrantische-erfahrungen-mit-polizeigewalt-forderungen-an-die-nds-landesregierung/

In the context of health care, discriminatory and prejudiced treatment by medical staff are frequently described by minors. During asylum hearings, racist, intimidating remarks and remarks relativizing the causes of flight occurred. As in the previous year's survey, in the context of the distribution procedure under Youth Welfare Law, young people reported fears of regions or federal states in which racist structures were suspected to be particularly pronounced. With regard to the situation of young adults, racism in the housing market is reported. Experiences of racism and discrimination shape the different areas of the young people's lives, impair psychosocial stabilization processes, learning successes and everyday pedagogical life.

With regard to experiences with (everyday) racism, there are differences between the federal states. Professionals from Hamburg (71.4%), Berlin (59.2%), Brandenburg (57.1%), Bremen (53.3%) and Saxony (51.6%) state particularly frequently that the young people are (very) often impaired by experiences with racism in their everyday lives (national average: 41.7%; 2019: 34.0%).

Experiences with institutional racism are named by 38.5% of respondents as a stressful situation for young people. Professionals from Berlin (60.0%), Bremen (60.0%), Brandenburg (57.1%), Hamburg (57.1%), Mecklenburg-Western Pomerania (50.0%) and Saxony (46.6%) state particularly frequently that the young people are often affected by experiences with institutional racism in their everyday life (national average: 38.5%; 2019: 34.0%). With these figures, it should be noted that they do not necessarily say anything about the actual conditions, but the possibilities to recognize and name experiences of racism also correlates with regional offer structures and racism sensitivity on the part of the professionals[6].

Most professional associations report that UMA also experience violence in Germany, although this is usually verbal or psychological violence. Many of the physical experiences of violence are not related to being foreigners. These violent conflicts take place within the group. The professional associations report that it is striking that cases of racism are more frequent in sparsely populated areas.

In large cities, on the other hand, involvement in criminal structures is a major problem for young people. Cases were also reported in which young women, according to their own statements, agreed to marriages only because of helplessness[7].

In order to nevertheless protect minors from imminent danger, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth has initiated the implementation of the cooperation concept "*Protection and Assistance in the Event of Trafficking in and Exploitation of Children.*"

The following forms of exploitation have been criminalized as trafficking in human beings in Germany since the law transposing Directive 2011/36/EU was passed in the fall of 2016:

Exploitation in the course of prostitution or other forms of sexual exploitation, labor exploitation, exploitation in the course of begging, in the commission of criminal acts, slavery or practices similar to slavery, servitude, trafficking for the purpose of organ removal.

There are special regulations for the police to prevent danger in human trafficking (to the detriment of children), in order to be allowed to enter premises and to establish and check personal details during patrol activities and checks. This enables the police to take preventive action to avert danger. The sensitive handling of minors is regulated in the same way in all federal states.

The **Guidelines for Criminal and Penalty Proceedings (RiStBV), Section 19**, are binding for the questioning of children and juveniles. These stipulate precisely the conditions under which children and juveniles are to be questioned. In addition, a minor who has the right to refuse to testify and who has not yet sufficiently understood the meaning of the right to refuse to testify due to lack of maturity may only be questioned if the minor is willing to testify and the legal representative consents to the questioning (Section 52 of the Code of Criminal Procedure). Parents, teachers, educators or other caregivers can also be involved and, if necessary, the Youth Welfare Office. With regard to credibility, experts with special knowledge and experience in the field of child psychology may also be called in.

[6] Cf. *The Situation of unaccompanied young people in Germany, Johanna Karpenstein and Daniela Rohleder. 2020, Bundesfachverband unbegleiteter minderjährige Flüchtlinge, p. 17ff.*

[7] Cf. "*Report of the Federal Government on the Act to Improve the Accommodation, Care and Support of Foreign Children and Adolescents pursuant to Section 42e of Book VIII of the Social Code - The Situation of Unaccompanied Minors in Germany*" 2019, p. 30.

2. Human trafficking, expulsion

Victims of human trafficking are witnesses with the right to file a supplementary complaint and as such are entitled to a victim advocate (§ 397a, 406h StPO).

Children and adolescents are particularly in need of protection during the entire criminal proceedings (§ 48 StPO). They are thus entitled to special rights (among other things § 247 StPO).

Annex B

Current legal framework and rights upon arrival of unaccompanied minors (Switzerland)

Members of the sub-committee

Jonas Erkan (DE)
Barbara Wisling (DE)

Mahault Frei de Clavière (CH)
Milena Peeva (CH)
Kathryn Kruglak (CH)

Mélanie Duverney Pret (FR)
Delphine Lassailly (FR)

A. Current legal framework and status of the law

1. Introduction

In Switzerland, a person who has not reached the age of 18 is considered a minor (art. 14 of the Swiss Civil Code). Furthermore, if a minor arrives in Switzerland without parents or an adult family member who is responsible for him/her in the country of origin, or without a designated legal representative, he/she is considered to be an "*unaccompanied minor*" ("UM").[1]

The situation of UMs must be examined from both an **administrative** and **criminal** law standpoint. Since criminal and administrative proceedings regularly overlap, it is important to distinguish between the different decisions taken against UMs, which are presented below, and their different effects.

One important distinction needs to be made is between a **decision of removal (deportation)** and a **decision of expulsion** (ATF 145 II 313) (see section B.2.2.1 below). These two measures are decided in separate, independent proceedings, but can be cumulated.

The article focuses on the situation of unaccompanied minors **in Geneva**.

2. Legal situation in Switzerland: national and cantonal laws

Switzerland is a federal democracy. As such, federal, cantonal and, occasionally, communal laws may apply. The scope of this article is limited to federal laws.

[1] HERTIG RANDALL Maya et al (eds), The Rights of Unaccompanied Young Migrants, Geneva 2020, p.28.

With regard to unaccompanied minors, the following laws are the most important:

In general

- Federal Constitution of the Swiss Confederation of 18 April 1999.

Immigration law

- Federal Asylum Act of 26 June 1998;
- Federal Act on Foreign Nationals and Integration of 16 December 2005;
- Federal Ordinance on the Enforcement of the Deportation and Expulsion of Foreigners of 11 August 1999.

Criminal law

- Swiss Criminal Code of 21 December 1937;
- Swiss Criminal Procedure Code of 5 October 2007;
- Federal Act on Juvenile Criminal Law of 20 June 2003;
- Federal Act on the Criminal Procedure Applicable to Juveniles of 20 March 2009.

3. International conventions

Switzerland is a monoist State, meaning that once conventions are ratified, they automatically become part of Swiss law and do not require a separate implementing instrument.

Further, Switzerland is not a member of either the European Union ("EU") or the European Economic Area ("EEA"). However, it is a member of the United Nations ("UN") and the Counsel of Europe ("CoE").

Switzerland is party to some EU agreements, so some EU law does apply in Switzerland. In particular, the Schengen and Dublin conventions.

With regard to unaccompanied minors, the following conventions, treaties and agreements are the most important:

UN

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85;
- Convention on the Rights of the Child, 1577 UNTS 3;
- Convention Relating to the Status of Refugees, 189 UNTS 137;
- Protocol Relating to the Status of Refugees, 606 UNTS 267;
- International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3;
- International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

CoE

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, "ECHR");
- Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117).

EU

- Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] L 53/3;
- Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] L 160;
- Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis - Final Act - Joint Declarations - Declarations - Agreement in the form of an exchange of letters [2008] L 53, 27.

B. Current legal practice: procedures from arrival to departure from the given state

1. Evaluation upon arrival

1.1. Evaluation of the UMs

Under the Swiss Federal Constitution (Articles 11 and 12 Cst.), children and young people have the right to special protection of their integrity and to the encouragement of their development. In principle, individuals who are in a situation of distress and are unable to support themselves have the right to be helped and assisted and to receive the means necessary to lead a life in accordance with human dignity.

Under the Convention on the Rights of the Child (Article 27), the "*States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development"* (par. 1). "*Parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development"* (par. 2).

Thus, "*States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide, where needed, material assistance and support programmes, particularly with regard to nutrition, clothing and housing"* (par. 3).

"*States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from his or her parents or other persons having financial responsibility for the child, both within the State part and from abroad. In particular, where the person having financial responsibility for the child lives in a State other than that of the child, States Parties shall promote the accession to or conclusion of such agreements, as well as the making of other appropriate arrangements"* (par. 4).

Unaccompanied minors have been present in Switzerland since at least 2015.

The *Service de protection des mineurs*[2] (SPMi) is the authority in charge of all minors in the Canton of Geneva.

However, in 2019, Geneva faced the arrival of a large number of UMs who were not adequately taken in charge by the authorities. Thus, in November 2019, a legal advice service for unaccompanied minors and unaccompanied minor asylumseekers (*Permanence mineur.e.s non accompagné.e.s (MNA)/ Requérants d'asiles mineur.e.s non-accompagné.e.s (RMNA)*, hereafter: "the Permanence") was set up by several lawyers (admitted to the Geneva Bar) and several legal experts to respond to this need for legal assistance.

The Permanence seeks to provide the many unaccompanied young migrants with free and accessible legal advice and legal representation before judicial and administrative authorities.[3]

Previously, upon their arrival, UMs were referred to the SPMi in Geneva to be identified and for their situation to be assessed by a social worker. A guardian representing the interests of the child was to be named for each minor.

The SPMi was open for one hour per week (13.00 - 14.30). During their very short interrogations, UMs were questioned about their country of origin and asked to present an identity document attesting their minority.

- **UMs who did not manage to present themselves during this time** (lack of information in a language they understood, arrival after the reception hours, too many UMs to take care of within an hour, etc.) had to wait until the next appointment and simply were left on the streets.

  Several of them sought refuge in shelters for adults in precarious situations and/or without documents, but were turned away because of their minority (such facilities do not accept in minors, because they are not adapted to their needs). Some of the UMs were granted refuge by activists for UMs. However, in Switzerland, the act of hosting an undocumented individual constitutes an infringement of Federal Act on Foreign Nationals and Integration (Federal Act on Foreigners and Integration (LEI), Article 116), since it is considered as facilitating the stay of undocumented foreigners.

- **If UMs could justify their minority with an identity document attesting to his/her minority or sometimes, if the social worker felt they clearly appeared to be minor,** he/she was placed in one of the existing shelters accepting minors or in a hostel. At that point in time (i.e. 2019), allegedly, there were not enough places in the existing structures to house all the newly arrived UMs.

  Thus, hostels were mandated by the SPMi to host UMs, without having the adequate conditions to do so properly. The hostel managers were paid by the SPMi for the use of their hostels as a shelter. The facilities were not adapted for minors. Many UMs have reported being subject to numerous acts of violence, discrimination, and racism. For instance, if a minor did not respect the hostel rules (e.g. invited another UM into his hostel room, smoked cigarettes, etc.), he/she was expelled by the hostel manager and ended up in the street.

  Thus, in many cases, the right to housing and adequate care and food was not guaranteed (cf. Convention on the Rights of Rhildren group's work). Lawyers had to intervene with the SPMi to request that the UM the be readmitted to a shelter / hostel.
  Some UMs were registered with an association (PAIDOS) that offered classes (mainly French) and activities. There only were 15 available places.

[2] Child protective state service/care in Switzerland.
[3] The Permanence holds a legal advice clinic once a week to treat individual requests, calls upon the State Council of the Republic and Canton of Geneva to comply with its national and international obligations to protect the rights of the UMs and UMAs and regularly expresses views and provides analysis in the local press.

Several months later, after numerous requests to the government from lawyers and activists, as well as press coverage of the matter, a specific shelter for minors (*Foyer de la SeyMNAz*) was set up to host arriving UMs. The shelter offered 20 places, which evidently was not enough to welcome the numerous UMs.

1.2. Right to a defence and legal time limits

In principle, lawyers are not involved with the above-mentioned arrival process, unless they have been requested through the Permanence or through social workers in the field.

Further, in principle, the SPMi does not issue formal decisions subject to appeal (e.g. whether the minor is admitted into a shelter).

1.3. Formal decision of the competent authority

Section 3 "*Procedures to remove and keep people away*" of the Federal Act on Foreign Nationals and Integration (hereafter: **FNIA**),[4] (Article 64 *et seq*.) permits allows the removal of minors under certain restrictive conditions. However, this procedure is described briefly.

For instance, during the regular procedure, as well as the one applicable under the Dublin Association Agreements, the competent cantonal authorities shall appoint immediately a representative for any unaccompanied minor foreign national to safeguard the minor's interests during the removal proceedings *(Article 64 par. 4 FNIA).* **Concerning ordering and deportation of foreign nationals**, the competent authority shall ensure before the deportation of unaccompanied foreign minors that he or she will be returned in the State of return to a family member, a nominated guardian or reception facilities that guarantee the protection of the child (Article 69 par 4 FNIA).

Article 88a par. 1 of the Ordinance on the admission, residence, and exercise of a gainful activity[5] specifies that during the removal procedure, **the authorities may use scientific methods to determine, whether the age indicated by the person concerned corresponds to his or her actual age**. Also, if it is not possible to establish guardianship immediately for an unaccompanied minor, the competent cantonal authority shall appoint without delay a person of trust for the duration of the removal procedure, although this person's mandate shall end when a guardian is appointed or when the person concerned comes of age (par.2).

Finally, Article 102 *et seq.* FNIA allows the authorities to collect data for purposes of identification and age determination. When examining the conditions of entry, or during proceedings under the FNIA, on a case-by-case basis, the competent authority may collect and record foreigners' biometric data for identification purposes. The collecting and registration can be systematic for certain categories of persons, which are determined and regulated by the Federal Council. If there are indications that a foreigner who allegedly is a minor has reached the age of majority, **the competent authorities may request an expert opinion to determine his age**.

Since the beginning of 2021, an administrative removal/deportation process has been put into place to facilitate the removal of UMs. More recently, the administrative authorities have made use of the administrative removal/deportation procedure contained in the FNIA.

Collaborating with the police, the administrative authorities have set up a specific "*process*", which is not subject to any public regulation or directive, to determine each UM's identity, namely whether they are minors, their origin and the route they took to get to Switzerland and to decide if they can be deported from Switzerland based on of the aforementioned procedure.

This process is the one used nowadays in the canton of Geneva.

[4] https://www.fedlex.admin.ch/eli/cc/2007/758/en
[5] https://www.fedlex.admin.ch/eli/cc/2007/759/fr

In practice, this process can be described as follows:

- Through SPMi, the administrative authorities send summons to all UMs in the shelters for minors to present themselves to the asylum seekers' unit of the police (in French: *Cellule requérant d'asile*, hereafter: ASU), where their fingerprints are taken. As part of this process, the police launch an investigation, which involves searching various databases (e.g. Schengen, etc.) and collaborating with certain other States. It has been reported that regular exchanges of information occur with North African states.
- Once the ASU stage is over, the UMs must appear for an interview at the Migration Unit, located in the main Geneva police station. From this moment on, the specific process to which UM's are subjected is not set forth in a federal or cantonal law or regulation.

  UMs undergo an interrogation that lasts several hours (sometimes up to eight hours with only short breaks), in the presence of agents of the administrative authorities, police officers and a "*support person*", who has been named by the State (in practice, a legal expert with the association CARITAS), to accompany them through the procedure. The UM only meets their support person once before the interrogation and possibly once after, for a follow up. It is only after this process that the UM would be formally informed of an administrative deportation decision. **There's no obligation for the state that requires a lawyer to assist the UM during this interrogation.**

  According to the results of the investigation, as interpreted by the administrative authorities, it may be decided that some UMs are adults (mainly based on the dates of birth given at the European borders, or when crossing between Schengen States; it should be noted that UMs often give other identities and/or dates of birth in order not to be traced or to be allowed to cross from countries they only are passing through). To our knowledge, no official age assessment/medical exam has yet to be ordered as part of this process.
- At the end of the process, a detailed formal decision of removal/deportation (under Article 64 *and seq*. FNIA) is notified to the UMs, either via their shelter (if they are still in the shelter), to their support person (and not to the UM), or to the UM personally.

1.4. Consequences of the non-recognition of minority

1.4.1. Removal/expulsion from the state

It should here be noted that, as explained above (see section A.), a deportation decision should be distinguished from an expulsion decision. More specifically, the distinction is as follows:

- A **deportation decision** is an administrative decision rendered by administrative authorities based on the Federal Act on Foreign Nationals and Integration (FNIA, Article 64 *et seq*.) or the Asylum Act (AslyA, Article 44 and 45) and linked whether or not the individual concerned has a residence permit;
- An **expulsion decision** is a criminal law decision based on the Swiss criminal code (SCC, Article 66a). It is rendered by the criminal authorities and also bans re-entry into Switzerland; it is linked to the commission of criminal offences, regardless of whether the person has a residence permit.

It should be emphasised that an expulsion decision cannot be issued for a UM[6]. Article 66a SCC is not applicable to minors by virtue of Article 3 of the Federal Act on the Criminal Status of Minors (PSM) and Article 1 par. 2 PSM *a contrario*. We fear that this rule could lead the authorities to favourise considering that a person is an adult rather than a minor.

The UMs considered to be adults immediately are expelled from the shelters and left on the streets. They only can seek refuge in shelters for adults and with charitable associations for undocumented foreigners.

[6] Directives and comments of the State Secretariat for Migration (SEM) on the LEI, FDJP, 1st January 2021, weisungen-aug-e.pdf, p.206.

In practice, as soon as there is an administrative decision, solely based on the administrative authority's subjective assessment of the collected information during the interview, stating that the UM is an adult, the criminal authorities are informed immediately.

A criminal procedure is initiated for violation of Article 148a of the Swiss Criminal Code (hereafter: SCC), which prohibits the unlawful obtaining of social assistance benefits, if the young person has benefited from the assistance from the SPMi for a certain amount of time.

This offense is punishable by compulsory expulsion from Switzerland under the SCC (Article 66a par. 1 let. e). Undocumented individuals accused of this offense systematically are detained for several months while awaiting their trial.

In reality, the benefits received from the SPMi are nothing more than food and a bed in a shelter, often in shared room (i.e. what could easily be qualified as the minimum subsistence guaranteed to all persons within the meaning of Article 12 FCSC, as well as Articles 3 and 8 of the EHCR). In our view, these are therefore not "*undue*" and in any case are justified on the grounds of state of necessity (Article 17 SCC).

1.5. Consequences of the recognition of minority

UMs recognised as minors remain sheltered.

However, in practice, as allowed under the FNIA, the administrative authorities try to establish contact with the UMs parents or relatives in their country of origin. The State can send delegations to the given county to investigate the family situation and then try to organise the removal of the minor in accordance with Article 69 par. 4 FNIA.

Currently, only two minors have been recognised as such under the above-mentioned administrative procedure. Only one of them has been enrolled in school (in the programme ACCESS II) and this only is from September 2021. Besides this case, none of the UMs who have arrived in Geneva, including those that were part of the large wave that arrived in 2019, have been enrolled in school.

The authorities have invested recourses into repressive means and removal procedures, instead of schooling the minors, at least until they reach majority.

1.6. Legal remedies available (recourse / appeal)

1.6.1. Right to a defence and legal time-limits

An appeal against **the administrative decision of removal** is possible within an extremely short period of five days (Article 64 par. FNIA). **The appeal has no suspensive effect and therefore is enforceable notwithstanding appeal (Article 64 par. 3 FNIA**). The authorities fix a deadline for immediate departure from the country; it can be set between seven and 30 days, but usually is not more than seven days (Article 64d par. 1 FNIA).

At this stage, the UMs only are given a meeting with their support person (i.e. the legal expert from CARITAS), who is supposed to present them with their legal rights and options, including launching an appeal and accompany them through the appeal procedure.

It should be noted here that the **administrative detention of minors** (15 to 18 years old) awaiting deportation is possible once a formal removal decision has been rendered; it can be ordered for a maximum of six months. If allowed by the cantonal judicial authority, this detention of minors can be extended by up to a maximum of six months for minors between 15 and 18 years old if they do not cooperate with the competent authorities or if it takes additional time to obtain the legal documents necessary (i.e. passport) for deportation to a State that is not part of the Schengen territory (Article 78 and Article 79 par. 2 let. a and b FNIA).

If unaccompanied minor asylum-seekers are detained, the support person appointed in accordance with Article 64a par. 3bis FNIA and Article 17 par. 3 of the Asylum Act (AsylA) must be informed in advance (Article 80a par. 6 FNIA). The form of detention must take into account the specific requirements of persons in need of protection, UMs and families with children (Article 83 al. 3 FNIA)

- Given the number of UM's and the very short deadline for filing appeal, it seems difficult to put all the work one person;
- The intervention of lawyers specialised in immigration law is essential to drafting such an appeal and follow up on the procedure before Courts. Given the notification of the decision to the support person and the mandate given to this person, rapid intervention by a lawyer rarely is possible.

2. Racial profiling and criminalization of UMs

2.1. Racial profiling and police checks

The problem of racial profiling in Switzerland has been noted in multiple reports, including reports by the European Commission against Racism and Intolerance[7] ("ECRI") and Swiss Service for Combating Racism.[8]

In particular, the 2020 ECRI Report states that "*institutional and structural racism continues to be a problem in the police, manifested in racial profiling and identity checks* […]"[9] and the "*ECRI notes numerous reports drawing attention to allegations of police abuses, including racial profiling and brutality*".[10] Further, the 202 ECRI Report "*recommends further training for the police on the issue of racial profiling and on the use of the reasonable suspicion standard*".[11]

Although racial profiling formally is prohibited in Switzerland[12] and the police must have suspicion to stop an individual, the level of suspicion required for the police to stop and individual is quite low in Switzerland. In one case, the Swiss Federal Supreme Court considered the fact that an individual had avoided making eye contact with the police to be adequate suspicion.[13]

Unaccompanied minors often are profiled and subject to Identity checks by the Swiss police.

In 2020, a new police unit was created in Geneva under the name *Groupe vols et agressions de rue* ("GVAR").[14] According to statements made to local media, unaccompanied minors were targeted by this unit, in particular, those from Northern Africa.[15] This was also noted in an open letter from the *Permanence pour les mineur-e-s non accompagné-e-s et les requérant-e-s d'asile non accompagné-e-s*[16] ("Permanence") addressed to the Geneva State Council deploring the treatment of unaccompanied minors in Geneva, in particular, with regard to treatment by the GVAR.[17] It also was noted in the Permanence's report to the Committee on the Elimination of Racial Discrimination ("CERD").

Consequently, unaccompanied minors have more contact with the Swiss police than other individuals in Switzerland. This results in more arrests for suspicion of having committed crimes and misdemeanours like theft or use of prohibited substances.

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[7] ECRI, 'ECRI Report on Switzerland (sixth monitoring cycle)' (Council of Europe, March 2020) (cited: 2020 ECRI Report).
[8] Service for Combating Racism, '2020 Report of the Service for Combating Racism' (Federal Department of Home Affairs, Bern September 2021).
[9] 2020 ECRI Report, p 7.
[10] 2020 ECRI Report, p 30.
[11] 2020 ECRI Report, p 30.
[12] ATF 109 Ia 146, consid. 4b; TF, 1P.585/2002 of 2 July 2003, consid. 3.5 and Timishev v Russia app nos 55762/00 and 55974/00 (ECtHR, 13 December 2005).
[13] TF, 6B_1174/2017 of 7 March 2018.
[14] This roughly translates into English as Street Crime Unit.
[15] See Chams Iaz, 'Délinquance juvénile et mineurs vulnérables : risque d'amalgame' Le Temps (28 July 2020) https://www.letemps.ch/suisse/delinquance-juvenile-mineurs-vulnerables-risque-damalgame accessed 3 December 2021
[16] This roughly translates into English as Law Clinic for Unaccompanied Minors and Unaccompanied Minor Asylum Seekers.
[17] Permanence juridique MNA/RMNA | Lettre ouverte au Conseil d'État genevois (21 January 2021) https://asile.ch/2021/01/27/permanence-juridique-mna-rmna-lettre-ouverte-au-conseil-detat-genevois> accessed 3 December 2021

It also means more identity checks. For instance, one police report simply states "*we proceeded to stop two individuals of Maghrebin origin*"[18] without further explanation or indication that they suspected that the individuals had infringed a law.

As many unaccompanied minors in Switzerland are undocumented, their very presence in Switzerland often is a violation of Swiss law. Thus, as a result of profiling and police checks, unaccompanied minors often wind up in the criminal justice system due solely to their presence on Swiss soil.

Moreover, after being stopped and/or arrested, unaccompanied minors often face worse treatment at the hands of the police. For instance, there are reports of police officers using racist language towards unaccompanied minors, such as "dirty Arab", "you are only fit to take care of sheep with your Arabic dabble" and "Arabic parasites"[19] and of unaccompanied minors being subjected to unwarranted use of handcuffs and intimidating behaviour from police officers, as well as gestures that amount to physical violence.[20]

Additionally, in some instances, we have seen a general attempt by the authorities to criminalise individuals in precarious situations. For instance, in one case, an administrative exclusion order[21] prohibiting an individual from entering into the Canton of Geneva was at least partly motivated by the individual's precarious situation, as the authorities felt this would make them more likely to represent a threat to public security and order,[22] as they would need to steal or commit other crimes to survive. This reasoning was upheld by the Swiss Federal Supreme Court.[23]

The use of measures such as administrative prohibitions also increase encounters between unaccompanied minors and the Swiss criminal justice system, as a violation of an exclusion order is a criminal act.[24]

2.2. Juvenile courts VS adult courts

Based on Article 3 of the Criminal law for minors, and Articles 1, 3 and 39 from the Criminal procedure for minors, the juvenile judge can ask UMs to prove their minority to establish their ability to judge the case.

To determine his/her competence, the juvenile judge may ask UMs for evidence, such as a birth certificate or testimonies from social workers or foster families with whom they previously have been in contact.

If, despite these documents and testimonies, the judge still is unable to determine the UM's age, as a last resort, he/she may order a medical exam. The UM then is obliged to undergo a medical exam.

Procedurally, if the juvenile judge considers that he/she is not competent to deal with the case, he/she cannot withdraw from the case and transfer it to the adult justice system.

In this respect, based on Articles 40 par. 1 and 41 par 1 of the Swiss criminal procedure code, jurisdictional disputes between criminal authorities in the same canton must be settled head prosecutor or prosecutor, or, if was not done, by the appeal authority for that canton. The parties may challenge the jurisdiction decided by prosecutor before the competent authority within ten days.[25]

[18] Extract of a confidential police report from the GVAR (20 January 2021).
[19] 'Communication of the Permanence juridique MNA/RMNA to the Committee on the Elimination of Racial Discrimination (CERD) on the situation of unaccompanied minors (UM) in Switzerland' (15 November 2021), p 4.
[20] 'Communication of the Permanence juridique MNA/RMNA to the Committee on the Elimination of Racial Discrimination (CERD) on the situation of unaccompanied minors (UM) in Switzerland' (15 November 2021), p 5.
[21] Article 74 of the Federal Act on Foreign Nationals and Integration.
[22] Article 74 par 1 *lit* a of the Federal Act on Foreign Nationals and Integration.
[23] TF, 2C_884/2020 of 5 August 2021, consid. 3.3.
[24] Article 119 of the Federal Act on Foreign Nationals and Integration and Article 291 of the Swiss Criminal Code.
[25] ATF 145 IV 228, para. 2.2, pp. 231 *et seq*.; Case law 1B_199/2021, 4 May 2021, para. 2.1 and 2.2 *et seq*.

- In many cases concerning UMs, the juvenile court has withdrawn automatically from cases in favour of the ordinary justice system (for adults), without justifying with evidence the individual's alleged majority and without going through the proper legal process, namely submitting the case to the prosecutor for a decision on regarding jurisdiction, which is a violation of cantonal and federal law;
- It also should be noted that UMs often go through juvenile procedures without a lawyer, due to the non-serious nature of the charges often being faced. However, they do not understand the legal system or the factual or legal elements that they could raise in their favour. In particular, this is true when having to defend themselves against their case being transferred automatically to the adult justice system, where the penalties for the same charges are considerably higher and where their expulsion from the country can be ordered. We also believe that the justice system proceeds in this way precisely to be able to issue expulsion decisions against UMs.

2.2.1 Medical expertise

As mentioned above, the FNIA allows the authorities to order a medical exam in order to establish the minority/majority of UMs. However, to our knowledge, no medical exam has yet to be ordered in this context.

However, several medical exams have been ordered by the criminal authorities.

According to Article 182 SPC, the prosecutor and the courts shall request the services of an expert witness if they themselves do not have the specialist knowledge and skills required to determine or assess the fact of a case.

The medical exam must be conducted by a doctor. It includes an X-ray of the minor's left hand, an examination of his/her body (genitals, breasts, hair) and an analysis of his/her teeth.

The expert delivers a report, which is subject to appeal.

Given their invasive nature, their relative and biased results and the violation of basic human rights that they represent, these medical exams have been denounced by the Swiss Paediatric Society and international human rights bodies. Following the initiative of doctors' associations, there is a consensus in some Swiss cantons not to order such medical exams. In Geneva, they still are ordered.

According to case law, it is sufficient for a court to decide that a person is an adult, and not a minor, based on a medical exam that dos no reach a precise conclusion regarding the individual's age and only fixes a range of ages, even if it also mentions that it cannot be excluded that the person concerned could be a minor[26].

In any event, it should be noted that academic literature agrees that currently, there is no way to determine scientifically the exact chronological age of a human being[27].

2.3. Special criminal proceedings: penalty orders vs regular criminal proceedings

In Switzerland, more minor criminal infractions are dealt with through summary penalty orders, rather than regular criminal proceedings.

Summary penalty orders can be issued when the accused has accepted responsibility for the offence in the preliminary proceedings or if their responsibility has otherwise been satisfactorily established,

[26] Geneva Court of Appeal, ACPR/20/2021 of 13 January 2021, c. 2.5.
[27] ROMANO Gian Paolo, Legal opinion on the determination of the age of persons declaring themselves to be minors outside asylum procedures, http://archive-ouverte.unige.ch/unige:135062, Geneva, 2020 p.6.

provided the sentence does not exceed a fine, a monetary penalty of no more than 180 daily penalty units or a custodial sentence of no more than six months[28].

Summary penalty orders are issued by the prosecutor rather than a judge, which poses a problem with regard to the due process rights contained in Article 6 ECHR and Articles 29a and 30 of the Swiss Federal Constitution, in particular the right to a fair hearing before an independent and impartial tribunal.

To remedy this problem, the accused may contest the summary penalty order within ten days[29]. The prosecutor then can either stand by the summary penalty order, abandon the proceedings, issue a new summary penalty order (which in turn can be contested) or introduce charges in the court of first instance. In the event that the prosecutor stands by the summary penalty order, it automatically is transmitted to the court of first instance. Thus, in theory, judicial review still is guaranteed.

However, unaccompanied minors often are unaware of their right to contest a summary penalty order (see 4.4 below) or fear that doing so may result in harsher penalties, as the principle prohibiting *reformatio in peius* does not apply at this stage.

2.3.1 Art. 148a SCC and criminal expulsion

Article 148a of the Swiss Criminal Code (SCC) provides that "*[a]nyone who, by making false or incomplete statements, by concealing facts or in any other way, misleads or confuses a person and thereby obtains for himself or herself or for a third party undue benefits from a social insurance scheme or from social assistance, shall be liable to a custodial sentence of up to one year or to a pecuniary punishment. In minor cases, the penalty is a fine".*

The perpetrator must have made false or incomplete statements, concealed facts or in any other way misled someone to unduly obtain for another person or for himself social insurance or social assistance benefits. The benefit must be paid or transferred, as a mere agreement is not sufficient.[30] The offence presupposes intention by the perpetrator to commit the offence (*i.e.* that the perpetrator acted consciously and willingly) (Art. 12 para. 2 SCC), or that the perpetrator was aware that the offence could be committed and accepted that possibility[31].

In Geneva, the Criminal Court of First Instance already has convicted a minor under Article 148a SCC, because he had received accommodation and meal services (amounting to CHF 11,460) from the SPMi (child protective services/care) that he would not have received had he said that he was not a minor; further, according to the court, he must have been aware of this[32].

In practice, we also have observed that at least some prosecutors (in Geneva) are of the view that minors who they allege are not minors should be convicted for having "wrongly" received benefits from the SPMi by falsely claiming to be minors (Article 148a SCC)[33]. It should be noted that in one case the accused argued that the assistance was essential to his survival, and that Article 148a SCC did not apply in the light of the principles set forth in the ECHR. This raised the question of whether the subjective element of the offence had been met. We however doubt that the Criminal Court will follow this approach.

It should be noted that the canton of Geneva offers social assistance to migrants (aid to migrants) if they have requested a permit, even in cases where such request has no chance of success. Therefore, an adult in this same situation (undocumented, homeless, etc.) would be eligible to receive social assistance from a state institution.

[28] Article 352 par 1 of the Swiss Criminal Procedure Code.
[29] Article 354 of the Swiss Criminal Procedure Code.
[30] CAPUS Nadja, Escroquerie, fraude et blanchiment de fraude fiscale, *in*: Dupont Anne-Sylvie/Kuhn André (eds.), Droit pénal - Evolutions en 2018, Basel, Neuchâtel 2017, p. 46.
[31] FF 2013 5373, p.5433.
[32] Criminal Court of first instance decision of 18 May 2021, c. 1.2.
[33] Decision of the Criminal Court of Appeal in Geneva of 18 March 2021, ACPR/181/2021, c. 2.2. In this case, the amount received by the accused was CHF 43'950.-.

Given the above and as mentioned before, we fear that the authorities would be more inclined to consider a person as an adult since he can then be convicted under Article 148a SCC, which he cannot if, in the contrary, it is confirmed that he is a minor.

2.4. Right to a defence and legal time-limits

Right to a defence

The accused has a right to appoint a defence attorney[34].

In certain cases, the accused is required to have a defence attorney. These include cases where pre-trial detention has continued for more than 10 days, the offence concerned carries a custodial sentence of more than a year or a custodial measure or may result in expulsion from Switzerland or the accused is unable to safeguard their interests in the proceedings adequately due to their physical or mental condition or for other reasons[35].

When the accused is not required to have a defence attorney and cannot afford a defence attorney, they can request that one be appointed if they lack the necessary financial means and require a defence attorney to safeguard their interests,[36] which is defined a non-minor case involving factual or legal issues that the accused is not qualified to deal with alone[37].

However, in cases not requiring the appointment of a defence attorney, the police often strongly encourage unaccompanied minors to sign away their right to request that a defence attorney be appointed. However, these individual often do not understand the potential stakes, may feel pressured, may not realise that they have a choice to not sign the document waiving their right to a defence attorney or may believe that complying with the police at this stage will increase their chances of a favourable outcome. This is especially true as many of the unaccompanied minors are unfamiliar with the Swiss justice system, have a history of negative encounters with the police and may come from countries without the same judicial guarantees.

Further, when deciding whether the accused is required to have a defence attorney, the director of proceedings typically does not examine whether unaccompanied minors are able to safeguard their interests, in particular, due to their age and lack of familiarity with the Swiss justice system.

Another barrier to a defence is a lack of translation and interpretation. Even though both the ECHR and Swiss Criminal Procedure Code[38] guarantee the right to translation and interpretation, this does not always occur in practice.

The police often encourage the accused to waive this right, even though their command of the local language may not be sufficient, especially when it comes to understanding complex legal terms.

Further, the police may not properly account for cases where the accused is illiterate. For instance, in one case involving a young adult who was illiterate and had little command of the French language, the accused did not realise they could contest a summary penalty order, because this right was explained to them orally in French and in writing in Arab.

Thus, the summary penalty order entered into force without the accused realising they had waived their right to a hearing before an independent and impartial tribunal. When they latter challenged this situation, the director of proceedings and lower courts held that they should have asked a friend to translate the document for them. This case still is pending before the Swiss Federal Supreme Court.

[34] Article 127 par 1 of the Swiss Criminal Procedure Code.
[35] Article 130 of the Swiss Criminal Procedure Code.
[36] Article 132 par 1 *lit* b of the Swiss Criminal Procedure Code.
[37] Article 132 par 2 of the Swiss Criminal Procedure Code.
[38] Article 68 of the Swiss Criminal Procedure Code.

Time limits

As mentioned above, the accused has ten days to contest a summary penalty order. When the accused does not have a defence attorney, this time period often is too short.

Appeals can be brought against judgments of courts of first instance that conclude the proceedings in their entirety or in part[39]. The accused has ten days to notify the court that they will be bringing an appeal[40] and 20 days to file the appeal after receiving the full written judgement[41].

Further, objections can be brought against: rulings and procedural acts of the police, prosecutor and authorities responsible for prosecuting contraventions; rulings, decrees and procedural acts of courts of first instance, with the exception of procedural decisions; and decisions of the compulsory measures court in the cases provided for by the Swiss Criminal Code.[42] The accused has 10 days to raise an objection[43].

Moreover, special rules apply to pre-trial detention. In the case of pre-trial detention, the accused often has less than a day prepare for an audience or submit their observations regarding the prosecutor's request for pre-trial detention[44]. The accused is accorded three days to respond to a request to prolong their pre-trial detention[45].

Lastly, the accused might file an appeal with the Swiss Federal Supreme Court. They have 30 days to do so[46].

3. Current efforts

The Permanence[47] recently submitted a report on the situation of UMs in Switzerland for the Committee on the Elimination of Racial Discrimination's ("CERD") State Party review of Switzerland,[48] that took place during the 105th Session (15 November 2021 to 03 December 2021), mainly highlighting issues with regard to police violence and repression, racial profiling, hate speech among authorities (police, Courts, etc.), political parties and State official towards UMs.

The University of Geneva's law clinic also submitted such report to the CERD for the State Party review of Switzerland, stating in detail the situation of the UMs in Switzerland concerning their basic human rights in the various domains[49].

Both reports had similar conclusions to these expressed in the present document.[50]

The CERD has recently made public its final observations on the situation, taking into account some of the conclusions concerning UMs.

[39] Article 398 par 1 of the Swiss Criminal Procedure Code.
[40] Article 399 par 1 of the Swiss Criminal Procedure Code.
[41] Article 399 par 3 of the Swiss Criminal Procedure Code.
[42] Article 393 of the Swiss Criminal Procedure Code.
[43] Article 396 par 1 of the Swiss Criminal Procedure Code.
[44] Article 225 of the Swiss Criminal Procedure Code.
[45] Article 227 par 3 of the Swiss Criminal Procedure Code.
[46] Article 100 par 1 of the Swiss Federal Act on the Swiss Federal Supreme Court.
[47] This roughly translates into English as Law Clinic for Unaccompanied Minors and Unaccompanied Minor Asylum Seekers.
[48] 'Communication of *the Permanence juridique MNA/RMNA* to the Committee on the Elimination of Racial Discrimination (CERD) on the situation of unaccompanied minors (UM) in Switzerland' (15 November 2021).
[49] https://www.unige.ch/droit/lawclinic/fr/publications/brochures/droits-jeunes-migrants/
[50] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2484&Lang=en

Annex C
Current legal framework and rights upon arrival of unaccompanied minors (France)

Members of the sub-committee

Jonas Erkan (DE)
Barbara Wisling (DE)

Mahault Frei de Clavière (CH)
Milena Peeva (CH)
Kathryn Kruglak (CH)

Mélanie Duverney Pret (FR)
Delphine Lassailly (FR)

A. Current legal framework and state of the law

Law n ° 2016-297 of March 14, 2016 relating to the protection of the child recalled the notion of *"minor deprived temporarily or permanently of the protection of his family"* with article L. 221-2-2 of the Social Action and Families Code (CASF).

***Arrêté* of November 20, 2019** (article R 221-11 of the code of social action and families), on the procedures for assessing persons presenting themselves as minors and temporarily or permanently deprived of the protection of their family.

The joint dispatch DACG-DPJJ and DACS of July, 11 2016 recalls that an unaccompanied minor is either a minor who entered French territory without being accompanied by an adult and temporarily or permanently deprived of the protection of his family, or a minor left alone on French territory.

Decree No. 2019-57 of January 30, 2019 creates the Minority Assessment Support (AEM), file which collects the fingerprints and civil status of the minor.

Law n° 2022-140 of February 7, 2022 relating to the protection of the children

Article 375-5 of the Civil Code

"On a provisional basis but subject to appeal, the judge may, during the proceedings, either order the provisional surrender of the minor to a reception or observation center, or take one of the measures provided for in articles 375- 3 and 375-4.

In case of emergency, the public prosecutor of the place where the minor was found has the same power, on condition to seize within eight days the competent judge, who will maintain, modify or revoke the measure. If the child's situation allows it, the public prosecutor fixes the nature and frequency of the parents' right of correspondence, visitation and accommodation, except to reserve them if the interests of the child so require.

When a child welfare service reports the situation of a minor deprived temporarily or permanently of the protection of his family, as the case may be, the public prosecutor or the children's judge asks the Ministry of justice to communicate to him, for each department, the information allowing the orientation of the minor concerned.

“The public prosecutor or the children's judge takes his decision in strict consideration of the interests of the child, which he assesses in particular on the basis of the elements thus transmitted to guarantee suitable reception arrangements."

Article 388 of the Civil Code

“A minor is an individual of either sex who has not yet reached the age of eighteen.

Bone radiological examinations for the purpose of determining age, in the absence of valid identity documents and when the alleged age is not probable, can only be carried out by decision of the judicial authority and after collection. of the consent of the interested party.

The conclusions of these examinations, which must specify the margin of error, cannot by themselves make it possible to determine whether the person concerned is a minor. Doubt benefits the person concerned.

In case of doubt about the minority of the person concerned, it is not possible to proceed to an evaluation of his age on the basis of an examination of the pubertal development of the primary and secondary sexual characteristics.”

B. Current legal practice

Administrative evaluation phase provided by the department

1. Evaluation on arrival

1.1. The evaluation

The evaluation is carried out through an administrative authority (the Department) at the end of an appointment performed by a social worker.

The text provides that the social assessment of minority and isolation by professionals must focus on 6 points in a multidisciplinary approach:

- civil status;
- family composition;
- living conditions in the country of origin;
- a statement of the reasons for leaving the country of origin;
- presentation of the person's migratory journey until entering French territory;
- living conditions since arriving in France;
- the person's project in France.

Three possibilities at the end maintenance:

1) **The clearly minor young person** = immediate admission. The young person is supported by Social Assistance for Children (ASE) until his majority (18 years), or even until he is 21 years old in case of a request for a young adult contract is made for the continuation of his studies. Or because the young person's situation is special and requires protection beyond the minority (disability, medical problems etc.);
2) **The young person who is not clearly a minor** = he is required to do a second interview, in principle after 5 days. He is hosted for 5 days;
3) **The obviously major person** = reoriented towards major devices. In practice, he is often found in the street (emergency accommodation services saturated and problematic of identity: is not recognized as a minor but he is not of legal age according to his documents of identity).

The young person who is evaluated is also listed on the AEM file (*fichier d'appui à l'évaluation de la minorité*[1]) with its fingerprints (except in various departments including in Paris, Seine-Saint-Denis, Val de Marne, etc.). The new legislation (the law of February 7, 2022) has generalized the practice of files for the assessment of the minority and sanction the departments that do not adhere to this file by removing the financial contribution of the State.

Good practices

- Multi-disciplinary assessment by professionals and adult specialists in the presence of an interpreter;
- Five days of accommodation during the assessment.

There is a gap between theory and practice.

1.2. Right to a defense and legal time limits during the first minority assessment: phase by a social worker

- Children's lawyers are not present during this first phase of evaluation administrative;
- Young people bring us back then difficulties in particular at the level of interpretation; the assessment is carried out in the majority of cases by a single person whereas in principle, according to the texts, evaluation should be multi-disciplinary;
- During the evaluation, the young people are hosted in hotels (in practice one night because the five-day deadline is often not respected);
- Despite criteria set for the evaluation of the minority, the evaluation practices between the different departments are not uniform.

2. Decision by the authority competent

The assessor draws up an assessment report accompanied by a reasoned opinion on the minority or the majority of the young person, his isolation and possibly any doubts that may remain in the context of the assessment.

[1] Minority assessment support file.

2.1. Possible decision

Three possible decisions:

1) **An admission decision**: the minor will be oriented towards a reception place adapted to their needs in terms of child protection;
2) **Decision of refusal of admission**;
3) **A request for additional information** is made by the assessor: only if a doubt persists at the end of the social assessment and the possible documentary verification, the president of the departmental council can also tell to the judicial authority, a bone radiological examination, which consists of a forensic assessment of the minority, in application of article 388 of the civil code.

Good practice

Prohibition of reassessment of minority by the law of February 7, 2022.

2.2. Right to defense and legal time limits

The unaccompanied minor (UM) who was not recognized as a minor by the competent authority upon arrival on French territory can appeal against this decision firstly before the juvenile judge, then before the court of appeal if the juvenile judge's decision is not satisfactory.

During these phases of appeal, the UM will be assisted by a lawyer.

There is no deadline to appeal to the juvenile judge, the only limit is the majority; On the other hand, in the event of a negative decision by the juvenile judge (the young person is not recognized as a minor), the young person must exercise his appeal before the court of appeal in fifteen days from the notification of the judgment of the juvenile judge stating.

2.3. The consequences of minority recognition

Either by the administrative authority or by the judicial authority: The recognition of the minority allows in principle a better protection against the risk of expulsion for the majority of unaccompanied minors.

In principle, the minor is taken in charge by the Department with the Social Assistance for Children as a French minor placed, he will benefit from accommodation adapted to his age and will be educated.

Good practice

According to the law of February 7 2022, it is possible to obtain protective device after 18 years old.

A minor placed by Social Assistance for Children can in principle more easily obtain a residence permit allowing him or her to remain in France once he or she reaches the age of majority.

Beforehand, it will be recalled that a foreign minor is not required to have a residence permit in France: during his minority, the young person cannot be expelled from the national territory but it is still necessary that he proves its minority.

It is necessary to distinguish according to whether the minor was entrusted to the services of the Social Assistance to the childhood before or after 16 years. The particular case of the asylum is analysed below.

- **If the young person was entrusted before the age of 16**: a residence permit bearing the mention "*private and family life* " is generally issued to him or her automatically for a period of one year (and in principle easily renewable) on the following conditions[2]:

  - He/She does not constitute a threat to the public order;
  - He/She pursues a serious formation;
  - He/She has family ties in France;
  - He/She receive a positive opinion on its integration into french society from the reception structure.

  ## *Good practice*

  Young people who were recognized as minors and were placed in the child welfare service before their 15th birthday can apply for French citizenship just before his/her majority (article 21-12 of the Civil code).

- **If the young person was entrusted after the age of 16**: he's not entitled to obtain a residence permit bearing the mention "*private and family life*" but he/she may obtain, under several strict conditions (listed below) a residence permit. This is an exceptional admission to stay. These are the conditions:

  - He/She does not constitute a threat to public order;
  - He/She has justified his presence on the territory, for at least six months;
  - He/She pursues a serious formation;
  - He/She has family ties in France.

The nature of his ties to his country of origin are also examined.

In this case a "*residence permit employee* " or a "*temporary worker permit* " will be issued for a period of one year to the UM in the year preceding his/her 19th birthday. He will have to justify the continuation of the execution of a work (employment contract or apprenticeship contract for the renewal of this residence permit) to obtain its renewal. A student permit can also be issued.

In practice

- For all residence permits, including for the application for French naturalization (when the young person was taken care of at the age of fifteen), the prefecture (Ministry of the Interior) will carry out a new verification of the civil status and nationality of the UM by reviewing various files (VISABIO in particular from fingerprints) and by carrying out a new analysis of the identity documents. In general, this analysis has already been carried out by the juvenile judge;
- This new phase of expertise carried out by the prefectural services creates risks for the UM of being denied the right to stay in France, especially if the identity documents (from the country of origin) are ultimately not considered as authentic. An appeal is possible when an expulsion decision is issued. The appeal must be filed within a short period (generally 1 month) and does not have suspensive effect.

[2] https://www.service-public.fr/particuliers/vosdroits/F2209#:~:text=Vous%20pouvez%20obtenir%20la%20carte,depuis%20au%20moins%201%20an

Special case of asylum

In principle, any minor can submit an asylum application if he meets the criteria set by the Geneva Convention (risk of persecution, death in the event of return to his country of origin) and thus obtain a 10-year residence permit marked ***"refugee"***: the Dublin agreements do not apply in this case.

Good practice

The UM can apply for asylum in France even if he arrived through another European country.

In practice

To examine the asylum request of the unaccompanied minor, the public prosecutor must appoint an ad hoc administrator, which he does not do until the minority is recognized by the children's judge. It is a major problem in behalf of the fundamental rights.

2.4. The non-recognition of the minority facilitates expulsion and results in a situation of wandering for long months

An unaccompanied minor who has not been recognized as a minor during his minority has no right to a residence permit. He's therefore exposed to many dangers, in particular human trafficking and arrests. In case he's arrested, he will be judged as an adult, be subject to an obligation to leave French territory and placed in a detention center for a period of 90 days. If legal remedies exist, they must be exercised promptly, as they do not suspend the expulsion.

3. Appeal against the administrative decision of non-recognition of the minority

3.1. The appeal before the juvenile judge

A young person who is not recognized as a minor by the Department can appeal before the juvenile's Judge. He is assisted by a lawyer. There's no legal time limit provided for this appeal. The only limit being when the UM reaches majority.

The judge must verify the identity, the minority and the personal situation of the UM by all means.

The unaccompanied minor must provide proofs of his minority by means of:

- Identity and civil status documents (birth certificate, consular card, identity card, etc.) which are subject to analysis by the border police;
- Medical examination of bone age in the absence of any other element or expertise of physiological age (pubertal examinations have been removed). The medical examination can only be ordered if the person does not have valid identity documents and indicates an age which appears as controversial.

The medical examination must be decided by a judicial authority (public prosecutor's office or judge), which must first check that the conditions for resorting to this examination are met.

Moreover, it can only be done after agreement with the UM to be examined.

At the end of this phase (ordered by the juvenile judge: expertise of identity documents and bone test) there are two possible decisions:

1) **Either the minority is recognized** and the unaccompanied minor is placed: the juvenile's judge can activate the national distribution unit for UM. The UM can go to another district than the one where the process has been made;
2) **Either the minority is not recognized** by the juvenile judge: an appeal may be filed before court of Appeal.

3.2. Possible appeal against the juvenile judge's decision

The appeal must be done within fifteen days following the notification of the juvenile judge's decision. The UM is assisted by a lawyer before the Court of appeal

In practice

The delays before the court of appeal are very long, which creates a double problem. First, during this time, the UM is not sheltered by the stade. Then, the appeal often becomes not applicable because the UM reached the age of majority.

C. Next evolution law

1. Emerging trends

The presumption of minority is not the applicable principle in French law, which in practice makes very difficult to prove the minority. It would be necessary to take from the article 8 the Convention of New-York the presumption of minority. It should be done by a direct and immediate application of this presumption in France.

2. Evolution of the law

The new law n° 2022-140 of February 7, 2022 relating to the protection of the children concerns about the effective protection of unaccompanied minors.

Annex D
Application of the CRC (France)

Members of the sub-committee

Sara Gini (IT)
Béatrice Rigotti (IT)

Jessica Depré (CH)

Josine Bitton (FR)
Anita Bouix (FR)

Andres de Ceballos (ES)

A. Current legal framework and state of the law

1. Legal situation in France: national laws

France is a semi-presidential republic, governed by the Constitution of the French Fifth Republic, adopted on 4 October 1958.

France is a member of the European Union and therefore, subject to the application of the European legislation.

With regard to unaccompanied minors, the following laws are the most important:

In general

- The Constitution of French Fifth Republic of 4 October 1958;
- International Convention on the Rights of the Child: Resolution n°44/25 of the UN General Assembly, dated 20 November 1989 and signed in New York on 26 January 1990;
- Hague Convention of 5 October 1961: Concerning the competence of the authorities and the applicable law with regard to the protection of minors.

In Europe

- Statement of good practice of the program for separated children in Europe: International Save the Children Alliance and United Nations High Commissioner for Refugees;
- EU Council Resolution of 26 January 1997: Sets guidelines for dealing with unaccompanied minors;
- European Convention on the Exercise of Children's Rights of 25 January 1996: Relating to the rights and best interests of children and their ability to exercise these rights;

- Directive 2008/115/EC of December 16, 2008: On common standards and procedures applicable in Member States regarding the return of third-country nationals without a right to be there (OJEU No. L 348 of December 24, 2008);
- Council Directive 2003/9/EC of 27 January 2003: On minimum standards for the reception of asylum seekers in Member States;
- Franco-Romanian agreement signed on 1 February 2007, in the process of being ratified: Relating to cooperation to protect unaccompanied Romanian minors in France, and their return to their country of origin;
- France-Romania agreement of 4 October 2002: Relating to cooperation to protect Romanian minors in difficulty in France, their return to their country of origin, and fight against exploitation networks;
- Opinion of the Committee of the Regions of 12 October 2006, ratified on 6 March 2007: Concerning the role and proposals of local and regional authorities with regard to third-country unaccompanied minors;
- European Directive 2011/95/EU of the European Parliament and of the Council of Europe: Designating an unaccompanied minor as a child aged zero to 18, who enters the territory of a Member State without being accompanied by an adult responsible for them under the law or practice of that Member State.

Bilateral agreements

- Circular of February 8, 2021: Relating to the procedure with regard to the care of Moroccan unaccompanied minors (NOR:JUS/F/21/04189/C).

National texts

- Article 388 of the Civil Code defining the minority;
- Article 375 of the Civil Code on children in danger;
- Article L 122-3 of the Code of social action and families;
- The Code for the Entry and Residence of Foreigners and the Right to Asylum Decree of 17 November 2016 on Unaccompanied Minors (*l'arrêté du 17 novembre 2016 sur l'isolement*).

2. Legal situation in (France/Switzerland/Spain/Italy/ Austria): international Conventions

According to the French Constitution, international treaties must be enacted into law to be enforceable.

3. National laws in violation or in accordance with the convention on the rights of the child

The Convention on the Rights of the Child was ratified by France on 7 August 1990. It is part of French legislation and it is cited in most laws concerning the "*the best interests of the child".*

B. Presumption of minority: the age determination of unaccompanied minors in France

1. Legislative and regulatory provisions

Law n ° 2016-297 of 14 March 2016 relating to the protection of the child cites the notion of “minor deprived temporarily or permanently of the protection of his family”, as mention in Article L. 221-2-2 of the Social Action and Families Code (CASF).

The joint dispatch DACG-DPJJ and DACS of 11 July 2016 states that an unaccompanied minor is (*i*) a minor who entered the French territory without being accompanied by an adult and temporarily or permanently is deprived of the protection of their family, or (*ii*) a minor left alone on French territory.

Decree n° 2019-57 of 30 January 2019 creates the Support of the Assessment of the Minority (AEM) file, which contains the minor’s fingerprints and civil status.

Article 375-5 of the French Civil Code

“On an interim basis, but subject to appeal, the judge may, either order the provisional handing over of the minor to a rest or observation centre, or take one of the measures provided for in Articles 375-3 and 375-4.

In case of emergency, the prosecutor for the place where the child was found shall have the same power, an obligation to refer the matter to the competent judge within eight days, who shall maintain, vary or revoke the measure.

If the condition of the child allows it, the prosecutor fixes the nature and frequency of the parents’ right to correspond and visit with, and have custody of, the child, subject to revision if the interests of the child require it.

When a child welfare service reports the situation of a minor deprived temporarily or permanently of the protection of their family, the prosecutor or the juvenile court judge asks the Ministry of justice to communicate, for each Department, concerned pertinent information regarding minor concerned.
The prosecutor or the juvenile court judge makes their decision in strict consideration of guaranteeing suitable reception arrangements in the interests of the child, which they assess, in particular, on the basis of the transmitted elements.”

Article 388 of the French Civil Code

“A minor is an individual of either sex who has not yet reached the full age of eighteen years.

Bone x-rays for the purpose of determining age, in the absence of valid identity documents and where the alleged age is not probable, may be carried out only by decision of a judicial authority and after obtaining the consent of the person concerned.

The conclusions of these examinations, which must specify the margin of error, alone cannot be used to determine whether the person concerned is a minor The benefit of the doubt goes to the person concerned.

In the case of doubt about the minority of the person concerned, an age assessment cannot be carried out on the basis of an examination of the pubertal development of primary and secondary sexual characteristics.”

2. Administrative evaluation phase provided by the department

2.1. Evaluation

Evaluation by the Department, conducted as a summary interview carried out by a social worker.

Three possibilities at the end of this initial interview:

1) **The young person is clearly a minor** = immediate admission;
2) **It is not clear whether the young person is a minor** = they must attend an assessment interview, in principle, within five days;
3) **The young person clearly is not a minor** = reoriented towards adult systems. They are given an orientation sheet explaining common legal measures

The social evaluation of minority and accompaniment must deal with at least the following seven points:

1) Civil status;
2) Family composition;
3) Living conditions in the country of origin;
4) The stated reasons for leaving the country of origin;
5) Presentation of the person's migratory journey through entry into France;
6) Living conditions since arriving in France;
7) The person's projects in France.

The young person who is evaluated also is listed on the AEM file with their fingerprints (except in Paris).

2.2. Decision

The assessor writes an evaluation report accompanied by a reasoned opinion on the minority or the majority of the young person, whether they are unaccompanied, and any possible doubts that may remain in the context of the evaluation.

This method allows a global re-reading of the body of evidence by the Department.

Three possible decisions:

1) An admission decision: Appointment by the Department to allow the young person to be directed to a reception centre adapted to their needs as a child;
2) A decision to refuse admission: This decision includes a mention that the young person can appeal the decision to refuse admission or make a request for protection before a juvenile court judge;
3) Request of additional information from the assessor.

If, and only if, doubts persist at the end of the social evaluation and documentary verification, the president of the departmental council also can refer the matter to a judicial authority, who may order a bone x-ray, which consists of a medico-legal evaluation of minority, in under Article 388 of the French Civil Code.

3. Judicial phase before the juvenile court judge

A young person who is not recognised as a minor by the Department can appeal to the juvenile court judge.

The judge may use all means available to attempt to verify the identity, minority and accompaniment of the young person.

The unaccompanied minors prove their minority by means of:

- Identity and civil status documents (birth certificate, consular card, identity card, etc.,) which can be the subject of a documentary analysis by the border police; or
- Bone x-ray or physiological age assessment; no public exam.

This must be decided by a judicial authority (prosecutor's office or judge), which first must verify that the conditions for carrying out a medical exam are met.

The medical exam only may be carried out with the consent of the individual to be examined.

Finally, the medical exam only may be ordered if the individual does not have valid identity documents and indicates an age which is not plausible.

Body of evidence: original documents relating to young people (vaccination record, school reports, etc.) to confirm age.

Observation

There is no presumption of minority in French law, which makes it very difficult in practice, despite the means made available under French law, to prove minority.

Presumption of minority should be derived from the NY Convention, which is directly applicable in France (and all signatory States), as Article 8 which recognises children's right to identity.

During the investigation period, the young person should be considered and treated as a minor.

C. Right to education unaccompanied minors under the CRC in France

1. Introduction

The International Convention on the Rights of the Child, ratified by France, recognises a right to education for every child, defined in France as anyone under the age of 18.

The Education Code provides for compulsory schooling for children aged three to 16, regardless of nationality. National education must be adapted to their level of French and their level of schooling. However, unaccompanied minors (UAM) with little formal education, and possibility even close to illiteracy, are not provided with education or only have or only have access to a few hours of schooling.

This practice does not respect the fundamental right to education. In this context, the National Consultative Commission on Human Rights, in an opinion of 26 June 2014 issued a reminder that "unaccompanied foreign minors must be guaranteed effective access to common training courses and not inferior education".

Today, many young people are waiting for court decisions and during this waiting time, they are not supported by child protection services, are not in school and do not have housing. Therefore, the presumption of minority is not respected.

2. The presumption of minority not respected

The minority assessment determines whether the unaccompanied minor will benefit from protection.

These evaluations are not very reliable and certain associations, including Cimade, have warned of their unreliability. Social evaluation is often carried out under conditions that do not allow for an adequate examination; they rarely are carried out by a multidisciplinary team and may be conducted without an interpreter. The evaluation is often based on fullly subjective elements. Minors who have not had a quality assessment can find themselves on the street unfairly, without protection or access to education.

When a young person is not recognised as a minor, they have the right to appeal the decision. During this period, the presumption of minority is law. The Committee on the Rights of the Child reminds that "*it is therefore imperative that there is a fair procedure to determine the age of a person, and that there is the possibility of appealing the result through legal proceedings. While this process is ongoing, the person should be given the benefit of the doubt and treated as a child*" (CRC/C/81/D/16/2017, §12.3).

3. Protect and educate: the state must take its responsibilities

Therefore, even in the event of an initial non-recognition of minority, the State should take charge of the protection and education of a presumed minor until the courts have made a decision.

Despite the hope of one day seeing the State assume its duty to integrate these minors into the national education system, currently, they ae supported associations helping them access schooling and prepare for the French language test, and by an academic center for the education of newly arrived allophone pupils (CASNAV).

This test measures the level of newly arrived allophone pupils, both in their language of origin and in French, which makes it possible to offer them educational paths that best match their knowledge and skills, and to be assigned to a school.

However, in practice, it is far from systematic that these individuals are assigned to a school.

4. What the law says

Many cases law[1] reminds that a doubt about minority is not a sufficient grounds to refuse schooling to a minor. The education of unaccompanied minors must be respected, even in the event of refusal of care by the ASE (*Aide sociale à l'enfance*). Unaccompanied minors over the age of 16 with very low educational levels often have a difficult, or impossible, time accessing education. As most departments do not have a CASNAV, the tests often are carried out by information and orientation centers, which not trained in assessing the level of foreign arrivals. However, a minor who has passed a language and knowledge test must be enrolled in school, regardless of their nationality or administrative situation. It also is noted that the fact that schooling only is compulsory up to the age of 16 in France, should not be an obstacle to schooling beyond this age, even in the event of refusal of care (Paris Administrative Court of Appeals, 14 May 2019) Council of State, **24 January 2022, req. n° 432718**.

[1] https://www.gisti.org/spip.php?article6125

Article L. 122-2 of the Education Code provides that "*any pupil who, at the end of compulsory schooling, has not reached a recognised level of training must be able to continue their studies in order to reach such a level. The State shall provide the necessary means, through the exercise of its powers, for the resulting prolongation of schooling*". The interministerial circular of 25 January 2016 noted that the national education services ensure the schooling of pupils aged 16 to 18, even if they are no longer subject to compulsory schooling, taking into account their degree of mastery of the French language and their school level.

It should be added that the question of schooling is a major component of the care of unaccompanied minors, since it determines whether they obtain a residence permit, in particular for minors arriving after the age of 16, who represent the majority of unaccompanied minors entrusted to the department.

5. The inaction of certain departments

Even in the event of recognition of minority, the Department's duty to care for these minors sometimes undermined. The 2019 report of the Unaccompanied Minor Mission, under the DPJJ (Directorate of Judicial Protection of Youth) highlighted the departmental disparities in reception practices for unaccompanied minors. It is recognised that, in certain cases, the Departments do not respect judicial decisions ordering the placement of the minor, which leads to litigation regarding the non-respect of fundamental rights, most often lack of education and shelter.

These issues are particularly alarming in the Department of Mayotte. The Defender of Rights recently issued a report (*Etablir Mayotte dans ses droits 2020*) noting the lack of commitment of the French State to enforce the right to education on its territory.

6. Proposition

These States respect the right to education, the principle of non-discrimination and the presumption of minority by implementing the effective and immediate protection and schooling of all young people who are minors or presumed minors, without delay and without waiting for a court decision, which may take several months to be rendered.

D. Housing

1. The duty of protection of the county council and the state (on a subsidiary basis)

The County Council where the young person first was spotted or presented themself is required to provide provisional emergency reception, which generally lasts five days.

At or before the expiry of this period, the PCD (departmental public service of social action) hands the case to the prosecutor for the purpose of opening an educational assistance measure (Article L 123- 2 of the Code of Social Action and Families). In this is done, the APU is extended until there is a court decision.

The State financially supports this phase of assessment and the provision of housing.

Due to the administrative and financial burdens of providing emergency housing to unaccompanied minors, the Department is not always inclined, or able, to fulfil its duty to provide housing during the evaluation phase or its duty of care, once the minor has been entrusted to the ASE. Therefore, it is a

welcome development that the Council of State has accepted that the person claiming to be a minor can assert their right to emergency housing before a judge, despite their legal incapacity to do so[1].

When the Department, or an agency mandated by it, has refused temporary emergency housing and the assessment provided for by article R. 221 -11 CASF to a person claiming to be a minor[2].

Although it is of note that a judge can intervene in these cases where the young person has not been provided effective protection, may young people who are not assisted in the process do not know that it is possible to file an appeal with regard to housing. Also, the judge intervening is subject to certain conditions. First, in the event of a refusal of access to the housing and evaluation when there is opposition from the PCD, the judge will not intervene when the young person does not "obviously satisfy the condition of minority".

Also, the judge assesses whether the refusal of access likely will result in "*serious consequences*", characterised as a serious and manifestly illegal infringement of a fundamental freedom according to the diligence carried out by the administration, taking into account the means it provides, as well as the age, state of health and family situation of the person concerned.

The refusal of access to the accommodation and an assessment system constitutes such as situation when it results in the young person being homeless.

Indeed, "*the constraints inherent in the organisation of this assessment cannot justify the Department shirking its reception duty provided for by the legislator*"[3].

Thus, the burden of the positive obligation to protect unaccompanied minors is, above all, on the Departments. This duty is enforced in a sense by the judge (as they can sanction ineffective measures), whether or not the UAM has been entrusted to the ASE by a judicial decision. The Department only can be exonerated from this duty if it can prove that the unaccompanied minor has, through their attitude, obstructed it from providing housing, or that the protective measures that would have to be taken would exceed its capacities. Therefore, the protection duty nevertheless has a limited scope.

2. A duty of protection through limited housing

Questions about an individual's minority during the assessment phase leads a restricting of the scope of the duty of protection. This scope also is reduced due to the fact that the services to be provided are minimal and can be curbed, both during the assessment and sheltering phases, as well as during in the actual support phase. In case of doubts about the minority, sheltering may not be carried out.

In case of doubts about an individual's minority, housing may not be offered.

The adoption of a decision to refuse support puts an immediate end to the young person's housing. It is then possible for the young person directly to seize directly a juvenile judge to obtain social assistance. However, this does not have a suspensive effect. The implementation of the interim measures provided for in Article 375-5, as well as in Articles 375-3 and 4, of the French Civil Code, whereby the juvenile judge can require support from child welfare services, are optional and, in practice, few judges grant them.

This results in the Department being released from its duty of protection and unaccompanied minors being prevented from accessing the rights attached to this duty, even before the juvenile judge has made a decision with regard to their minority. Even in cases where the matter was pending before a juvenile, but no decision has been made, the interruption of the care following a negative decision from the PCD does not constitute a serious and manifestly illegal attack on the right to accommodation and educational care for a minor child with regard to the case law of the Council of State[4].

[1] CE, ord., 10 February 2012, Fofana, application n 356456, AJDA, 2012. 295, obs Brondel; AJDA 2012. 716, note Duranthon; JCP Adm. n 2059, note Le Bot; D. 2012. 555.
[2] CE, ref., 13 July 2017, n° 412134.
[3] CE, ref., 25 January 2019, no. 426949, no. 427169, no. 427170, no. 427167 and no. 426950.
[4] CE, ref., July 28, 2016, no. 401626, AJDA 2016. 160 1; RDSS 2016. 975, obs. F. Faberon.

The situation of young people who have been assessed as adults and who have directly appealed to the juvenile judge is particularly precarious, since they do not have access to structures reserved for adults. If they declare themselves to be adults in order to benefit from emergency accommodation reserved for adults, the administration will use this 'arrangement' to support its case in the event of a dispute. Young people therefore often find themselves on the street, living in squats or being housed by private citizens.

The Court recently ordered interim measures in another case involving a minor who was living on the streets in the midst of the Covid pandemic after having been refused admission to the ASE and going before a juvenile judge[5].

While the granting of interim measures does not prejudge the position that the Court will take on the merits, it nevertheless means that it considers it necessary to prevent a risk of serious and irreparable harm with regard to the rights enshrined in the ECHR.

According to the Committee on the Rights of the Child, which insists on the presumption of minority, the initial assessment process for unaccompanied minors "*must […] be carried out with due respect for human dignity and, in the event of persistent uncertainty, the benefit of the doubt must be given to the person concerned, who should be treated as a child if the possibility exists that he is indeed a minor*"[6].

Recently, the Committee on the Rights of the Child issued a strongly-worded reminder of the importance of respecting the presumption of minority. In this context, the United Nations Committee on the Rights of the Child very clearly enshrined the presumption of minority in its decisions of 31 May 2019 in cases involving Spain[7] in which it stated:

"determination of the age of a young person who claims to be a minor is of fundamental importance, as its outcome determines whether or not that person will benefit from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights set out in the Convention flows from this determination. ***Therefore, it is therefore imperative that there is a fair procedure for determining the age of a person, and that there is the possibility of contesting the result obtained through an appeal procedure. While this process is ongoing, the person should be given the benefit of the doubt and treated like a child****."*[8]

This is currently not the case in France.

The Departmental Councils host UM over 15 years old in hotels, without any substantial educational follow-up and without effective control of the quality of accommodation.

However, as from 7 February 2022, the law now provides that the housing of minors and young adults in hotels will be totally prohibited by 2024. Until the entry into force of this ban, no minor may be housed in a hotel for more than two months and physical security and educational conditions must be improved.

However, the effectiveness of this two-month limitation seems to vary.

The protection of children taken in by the ASE can continue beyond the age of majority, up to the age of 21.

Up to the age of 21, any emancipated minor or minor experiencing serious social integration difficulties has the option of asking a juvenile judge for an extension, or the organisation of, a judicial protection measure[9]. Adults under the age of 21, who experience social integration difficulties due to a lack of resources or sufficient family support may be taken into temporary care by the service responsible for ASE[10].

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[5] Decision of 31 March 2020, application no. 15457/20, http://www.infomie.net/spip.php? article5835.
[6] CRC, 1 September 2005, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, § 20).
[7] Case. CRC/C/81/D/22/2017 and CRC/C/81/D/16/2017.
[8] CRC/C/81/D/16/2017, §12.3.
[9] Art 1 of Decree No. 75-95 of 18 February 1975 setting the terms and conditions for the implementation of legal protection action in favor of young adults.
[10] Art L 222-5, paragraph 6, of the CASF.

The 7 February 2022 law provides that this no longer is optional, in order to avoid sudden exits from the system at the age of 18 and reduces the risk of these individuals ending up on the street.

From now on, *"[a]dults under the age of twenty-one and emancipated minors who do not benefit from sufficient resources or family support, who were under the supervision of child welfare services prior to their majority"* should continue to receive support.

These measures remain option with regard to young people aged 18 to 21, who were not under the supervision of child welfare services prior to their majority, but find themselves without resources. It will be for the Departmental Councils to ensure the effectiveness of these rights.

Although the case law of the Council of State exempts the Department from the obligation to protect unaccompanied minors in the event of doubts about their minority, it does require them to ensure protection up to the age of 21, when a young adult previously benefiting from child welfare services is enrolled in education, including if it is not a qualifying degree or diploma preparation program. Hence the importance of the recognition of the minority that, in addition to permitting access to rights guaranteed to children, also makes it possible to benefit from support after majority.

Unaccompanied minors' access to the rights guaranteed to them as children essentially is a lottery based on where they are (in particular, which Department). Access also depends on whether there is a challenge to the minority. Doubts about minority can lead to the Council of State relieving the Department of its duty to protect, which results in depriving young people of access to their rights as children if their minority is disputed by the Department or if they have a case pending before a juvenile judge, and could give rise to a condemnation of France for violation of Articles 3 and 13 of the ECHR.

Annex E
Application of CRC (Switzerland)

Members of the sub-committee

Sara Gini (IT)
Béatrice Rigotti (IT)

Jessica Depré (CH)

Josine Bitton (FR)
Anita Bouix (FR)
Carole Sulli (FR)

Andres de Ceballos (ES)

A. Current legal framework and status of the law

1. Legal situation in Switzerland

Switzerland is a federal democracy. As such, federal, cantonal and, occasionally, communal laws may apply. The scope of this article is limited to federal laws.

With regard to unaccompanied minors, the following laws are the most important:

In general

- Federal Constitution of the Swiss Confederation of 18 April 1999.

Immigration law

- Federal Asylum Act of 26 June 1998;
- Federal Act on Foreign Nationals and Integration of 16 December 2005;
- Federal Ordinance on the Enforcement of the Deportation and Expulsion of Foreigners of 11 August 1999.

Criminal law

- Swiss Criminal Code of 21 December 1937;
- Swiss Criminal Procedure Code of 5 October 2007;
- Federal Act on Juvenile Criminal Law of 20 June 2003;
- Federal Act on the Criminal Procedure Applicable to Juveniles of 20 March 2009.

2. Legal situation in (France/Switzerland/Spain/Italy/ Austria): international Conventions

Switzerland is a monist State, meaning that once conventions are ratified, they automatically become part of Swiss law and do not require a separate implementing instrument.

Further, Switzerland is not a member of either the European Union ("EU") or the European Economic Area ("EEA"). However, it is a member of the United Nations ("UN") and the Counsel of Europe ("CoE").

That said, Switzerland is party to some EU agreements, so some EU law does apply in Switzerland. In particular, the Schengen and Dublin agreements apply in Switzerland.

With regard to unaccompanied minors, the following conventions, treaties and agreements are the most important:

UN

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85;
- Convention on the Rights of the Child, 1577 UNTS 3;
- Convention Relating to the Status of Refugees, 189 UNTS 137;
- Protocol Relating to the Status of Refugees, 606 UNTS 267;
- International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3;
- International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

CoE

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, "ECHR");
- Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117).

EU

- Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] L 53/3;
- Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] L 160;
- Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis - Final Act - Joint Declarations - Declarations - Agreement in the form of an exchange of letters [2008] L 53, 27.].

CH

- Asylum Act of 26 June 1998 (AsylA) [RS 142.31] and related ordinances. The State Secretariat for Migration (SEM) issued the Asylum and Return Manual C9 on unaccompanied minor asylum seekers on 10 February 2020 (hereinafter "Asylum and Return Manual C9"). The purpose of this manual is to recall the legal bases and the relevant jurisprudence on the distinction between accompanied and unaccompanied minors, the representation of unaccompanied minors, the course of the procedure and the issue of removal. However, access to accommodation and education are not covered in the manual;
- Cantonal laws.

The Swiss law defines an unaccompanied minor as a child under the age of 18, which arrives in Switzerland without any person (biological or adoptive parent or third party) holding parental authority[1].

In certain circumstances, a minor foreigner who joins another close relative in Switzerland or who is accompanied by a relative who does not have parental authority may be considered as accompanied. These circumstances must be examined on a case-by-case basis[2].

3. National laws in violation or in accordance with the convention on the rights of the child

The United Nations Convention on the Rights of the Child of 20 November 1989 (CRC) was adopted by the Swiss Federal Assembly on 20 November 1959 and entered into force in Switzerland on 26 March 1997.

The jurisprudence of the Federal Court is generally restrictive as to whether or not this Convention is directly applicable.

A directly applicable effect has been recognized in particular for Articles 7 § 1 CRC (right to registration of birth, a name, a nationality, to know one's parents and to be brought up by them) [3] and 12 CRC (right to be heard)[4]. On the other hand, Article 3 § 1 (best interests of the child) is not considered directly applicable by the case law of Swiss courts[5].

However, it should be noted that the judge must still take into account provisions that are not directly applicable.

3.1. Presumption of minority

3.1.1 Legal basis

According to Article 17(3bis) of the Asylum Act, if there are indications that an applicant who is allegedly a minor has reached the age of majority, the State Secretariat for Migration (SEM) may order an expert opinion to determine his or her age, in particular by using scientific methods (Article 7 (1) of the Asylum Ordinance 1 on the procedure of 11 August 1999 (Ordinance 1 on Asylum, OA 1)).

Under Article 26(2) of the Asylum Act, the SEM collects the applicant's personal data; as a rule, it takes fingerprints and photographs. It may also collect other biometric data concerning the applicant, establish an expert opinion to determine his or her age, check means of proof, travel documents and identity papers, and take measures to investigate the applicant's origin and identity.

[1] Asylum and Return Manual C9, p. 5 et 6; art. 3 Vaud law on assistance to asylum seekers and certain categories of foreigners of 7 March 2006 (LARA).
[2] Asylum and Return Manual C9, p. 5 et 6.
[3] ATF 125 I 257 recitals 3c; ATF 128 I 63 recitals 3.2.2.
[4] ATF 124 III 90 recitals 3a.
[5] ATF 144 II 56 recitals 5.2.

Finally, in the context of any administrative procedure, such as an asylum application, the authority may carry out expert assessments to administrate the evidence necessary to establish the facts (Art. 12 let. e of the Federal Act on Administrative Procedure of 20 December 1968 (APA)).

3.1.2 Procedure

During the first interview, detailed information is gathered on the unaccompanied minor and his or her family (full identity, age, address in the country of origin, schooling, profession, employment, any military training, civil status, financial situation, etc.) [6].

This first interview allows the appropriate measures to be taken, particularly in the context of assessing the alleged minority. The burden of proof of minority lies with the applicant from the beginning of the asylum procedure.

According to the "principle of serious evidence", the Swiss authorities assess the evidence both in favour and against the declared age. The degree of probative value of each of the clues is as follows:

- Strong evidence:
  - Production of authentic identity documents;
  - Assessment of statements on advanced age (implausibility clues: behaviour inconsistent with the alleged age, contradictory statements on the question of age, incorrect information on other components of identity, production of false identity documents, educational/professional background inconsistent with the declared age, serious doubts about the documents used during the journey, divergent statements in criminal proceedings, etc.);
  - Assessment of statements on the reasons for not producing identity documents;
  - The so-called "three-pillar" scientific method carried out by a forensic institute involves an X-ray examination (bone age), odontological examination (dental age) and physiognomic examination (body composition and sexual maturity).
- Low index: assessment of the result of a basic bone X-ray[7].
- Very low index: assessment of the applicant's physical appearance.

3.2. Housing and Education

Swiss law does not contain specific provisions providing and regulating the right to education and housing of unaccompanied minors. The cantons are competent to legislate on social assistance, emergency assistance and public education (schooling), so disparities exist.

The right to free education is enshrined in Article 19 of the Federal Constitution8, which provides for the right to free and adequate basic education, including children without legal status and those who have to leave Switzerland[9].

The International social service of Switzerland differentiates, on the one hand, young people with a good educational background whose objective is, with follow-up and personal support, to integrate the Swiss education system, and on the other hand, young people with an interrupted or non-existent school who are in need of specific programmes to be able to integrate professionally[10].

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[6] Asylum and Return Manual C9, p. 9 and ss.
[7] This medical analysis has been criticized and is tending to be replaced by the scientific method known as the "three pillars".
[8] RS 101.
[9] https://www.ssi-suisse.org/sites/default/files/2017-07/MANUEL_FR_WEB.pdf, p. 84.
[10] https://www.ssi-suisse.org/sites/default/files/2017-07/MANUEL_FR_WEB.pdf, p. 84.

With regard to accommodation, Article 42 of the Asylum Act provides that anyone who files an asylum application in Switzerland may stay there until the procedure is completed. According to Articles 80a and 81 of the Asylum Act, social assistance or emergency assistance is provided to persons who are staying in Switzerland under this law and who cannot support themselves by their own means by the canton to which they have been allocated. Art. 82 para. 1 sentence 1 of the Asylum Act specifies that the granting of social assistance and emergency aid is governed by cantonal law. Finally, according to Article 83(3bis) of the Asylum Act, the special needs of unaccompanied minor asylum seekers must be taken into account "*as far as possible*" in their accommodation.

However, the reality is different and unaccompanied minors do not always have access to training or suitable accommodation[11].

On 4 February 2015, the UN Committee on the Rights of the Child (Committee) published its concluding observations on the implementation of the rights of the child in Switzerland and noted, in particular, cantonal disparities in the conditions of reception, care and education for unaccompanied minor asylum seekers (UMA). It recommends that Switzerland apply minimum standards in terms of reception and care, and that it guarantees access to education and professional training for unaccompanied minor asylum seekers[12].

A motion was tabled in 2015 by a member of parliament to ensure the supervision and training of unaccompanied minors. This motion was rejected by the Federal Council on the grounds that *"social assistance is the responsibility of the cantons, including accommodation and supervision. In the event of presumed inadequacies in social protection, the minor may, with the help of the designated trustworthy person, take the matter to court. The Conference of Cantonal Directors of Social Affairs (CDAS) is in the process of drawing up recommendations to the cantons on this matter"*[13].

The federal law therefore does not provide for strict conditions for the accommodation and education of unaccompanied minors, and delegates this competence to the cantons, which currently only have recommendations. According to the jurisprudence of the canton of Neuchâtel, as long as there is any doubt about the age of the unaccompanied minor, he or she must be placed in a structure specially designed for minors[14].

There has been much criticism of the housing of unaccompanied minors with adults and of the failure to comply with the Convention on the Rights of the Child.

The canton of Geneva, in particular, has drawn up an action plan to improve the care and, more specifically, the accommodation of unaccompanied minors. Indeed, a motion was tabled on 21 January 2020[15], inviting the legislative power to suspend all deportations of unaccompanied migrant minors, whether or not they have applied for asylum, until they have reached the age of 25, to recognise that these minors and young adults have the same rights and duties at cantonal and communal level as minors and young adults officially residing in Geneva, **in particular with regard to education and social benefits**. Swiss authorities should issue and give to the said minors and young adults who request it an individual identification document, bearing a photograph, which will enable them to prove their identity to the cantonal and communal administrations of the canton. This motion is currently being examined, and clearly demonstrates that Switzerland must improve its legal system for protecting and receiving unaccompanied minors.

3.3. Access to an administrative assistant

3.3.1 Right to apply for asylum

Any applicant who is a minor and capable of discernment may apply for asylum, either personally or through a representative[16].

[11] https://www.humanrights.ch/fr/pfi/droits-humains/enfants/requerants-asile-mineurs-non-accompagnes-suisse.
[12] https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153127.
[13] https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153127.
[14] CDAP, 04.01.2010, https://entscheidsuche.ch/kantone/vd_vwvfger/PS.2009.0061.html.
[15] https://ge.ch/grandconseil/data/texte/M02770.pdf.
[16] Asylum and Return Manual C9, p. 7.

3.3.2 Legal representative / support person

The interests of the minor applicant, whether or not he/she is capable of discernment, are defended for the duration of the procedure:

- In a federal center or at the airport: by the designated legal representative, as a person of trust (support person); this legal representative ensures coordination with the competent cantonal authorities (Article 17(3)(a) Asylum Act);
- After the unaccompanied minor has been assigned to a canton: by a support third party immediately appointed by the competent cantonal authorities (Article 17(3)(b) of the Asylum Act). The support third party will continue to represent the minor until the formal appointment of a curator or guardian (Art. 7 para. 2c OA 1).

The support person must have knowledge of asylum law, the law relating to the Dublin procedure and the rights of the child, and must have experience of working with minors. He or she guides and supports the unaccompanied minor throughout the asylum or Dublin procedure and in particular performs the tasks of counselling before and during hearings, support in providing and obtaining evidence, and assistance, particularly in communicating with the authorities and health care institutions (Art. 6 para. 3 OA 1).

3.3.3 The exemption from advance payment of costs

In its decision of 16 October 2017, the Federal Court considered that in the context of appeals lodged by unaccompanied minor asylum seekers, the collection of advances of costs should, as a general rule, be waived. The collection of advance fees in such situations inadmissibly restricts access to justice[17].

B. Current legal practice vs applicability of the convention on the rights of the child

1. National case laws in violation or in accordance with the convention on the rights of the child

1.1. Presumption of minority

Decision of 4 January 2010 of the Court of Administrative and Public Law of the Cantonal Court of the Canton of Vaud, n° PS.2009.0061.[18]

In this case, an unaccompanied minor was placed in adult accommodation when there was doubt about his age.

As mentioned above, the federal law therefore does not provide for strict conditions for the accommodation and education of unaccompanied minors, and delegates this competence to the cantons, which currently only have recommendations. According to the case law of the canton of Vaud, an unaccompanied minor is entitled to special assistance and is accommodated in a dedicated collective accommodation facility.

[17] ATF 144 II 56, recital 5.3.
[18] https://entscheidsuche.ch/kantone/vd_vwvfger/PS.2009.0061.html.

The Department of the Interior of the canton of Vaud issued a directive (assistance guide) which came into force on 1 January 2009, according to which accommodation is organised according to the length of stay in the canton, the status of the asylum procedure and the ability of the persons concerned to take charge of themselves in their host society. For the first six months after arrival, the applicant is placed in a collective accommodation structure; from the seventh month onwards, he or she is placed either in a collective accommodation structure (hostels) or in individual housing (flats). The competent authority may order a change in the place and manner of accommodation, although applicants are not given the opportunity to visit their allocated accommodation beforehand and are not normally involved in the choice of accommodation. However, the authority tries to take into account the personal situation of the beneficiary.

With regard to unaccompanied minors in particular, the Vaud law of 7 March 2006 on assistance to asylum seekers and certain categories of foreign nationals (LARA; RSV 142.21) and the law of 4 May 2004 on the protection of minors (LProMin; RSV 850.41) stipulate that, in accordance with the International Convention on the Rights of the Child, structures adapted to the care of unaccompanied minors must be set up.

As long as there is doubt about the age of the person concerned, placement in a facility not intended for minors cannot be considered. In the present case, since the appellant maintained that he was a minor and that a procedure relating to his age was pending, the respondent authority could not simply find that his minority had not been established; it had to investigate the matter or await the ODM's formal decision, in accordance with the inquisitorial principle. Appeal allowed.

1.2. Housing and Education

- Housing

  See above: Decision of 4 January 2010 of the Court of Administrative and Public Law of the Cantonal Court of the Canton of Vaud, n° PS.2009.0061[19]

- Education: N/A

1.3. Access to an administrative assistant

- Access to an administrative assistant: N/A
- Advances of costs: decision of the Federal Court of 16 October 2017 - ATF 144 II 56

As mentioned above, the Federal Supreme Court does not, as a rule, levy advances of costs in the context of appeals lodged by unaccompanied minor asylum seekers. The collection of advance fees in such situations unacceptably restricts access to justice.

[19] https://entscheidsuche.ch/kantone/vd_vwvfger/PS.2009.0061.html.

Annex F
Application of the CRC (Italy)

Members of the sub-committee

Sara Gini (IT)
Béatrice Rigotti (IT)

Jessica Depré (CH)

Josine Bitton (FR)
Anita Bouix (FR)
Carole Sulli (FR)

Andres de Ceballos (ES)

A. Current legal framework and status of the law

1. Legal situation in Italy: national laws

Italy is a parliamentary republic. It is divided in regions, which have legislative capacity for certain aspects of public life. The scope of this article is limited to national laws.

Italy is a member State of the European Union and therefore is subject to the application of the European legislation.

With regard to unaccompanied minors, the following laws are the most important:

In general

- The Constitution of Italian Republic 27/12/1947.

Immigration law

- Legislative Decree 25/07/1998 n. 286;
- Decree of the President of the Republic 392/1999;
- Law 7/04/2017 n. 47;
- Legislative Decree 18/08/2015 n. 142; (EU Directive 2013/33/UE);
- Decree 10/11/2016 n. 234;
- Law 4/3/2014 n. 24;
- Legislative Decree 251/2008; (EU Directive 2004/83/CE);
- Legislative Decree 25/2007; (EU Directive 2005/85/CE).

Criminal law

- Italian Criminal Code of 18/10/1930;
- Decree n. 488/1988.

2. Legal situation in Italy: international conventions

According to the Italian Constitution, international treaties have to be made enforceable by law.

UN

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Law 498/1988;
- Convention on the Rights of the Child, Law 176/1991;
- Convention Relating to the Status of Refugees, Law 722/1954;
- Protocol Relating to the Status of Refugees, 26/01/1972;
- International Covenant on Economic, Social and Cultural Rights, Law 881/1977;
- International Convention on the Elimination of All Forms of Racial Discrimination, Law 654/75.

CoE

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, "ECHR").

3. National laws in violation or in accordance with the convention on the rights of the child

The Convention on the Rights of the Child entered into force in Italy with the Law n.176/1991. It is part of Italian legislation and it is recalled in most of the law concerning the protection of minors. Art. 28 ot D. Lgs 286/98 par. 3: "*in all administrative and jurisdictional proceedings [...] concerning minors, the best interests of children must be taken into consideration as a priority, in accordance with the provisions of art. 3 paragraph 1 CRC".*

Following the establishment, as a result of art. 9, l. 47/2017, of the National Information System of unaccompanied foreign minors – SIM - at the Ministry of Labor and Social Policies, Italy has now the possibility to process the flow data relating to the presence of unaccompanied foreign minors, with particular reference to the entry and possible removal of the same during a given year.

During the first half of 2021, the competent authorities reported to the Management General of Immigration and Integration Policies of the Ministry of Labor and Policies the tracing of 5.639 non accompanied minors on the Italian territory. During the same period 3.281 minors on the Italian territory reached majority. The reception phenomenon in the first half of 2021 was characterized, as it happened in the year 2020, from the ongoing health emergency and from the application of the anti-Sars-Cov-2 regulations (COVID-19). The minors just landed or found for the first time on the national territory have been placed in *ad hoc* structures in order to spend the quarantine period and then be transferred to the dedicated reception facilities.

3.1. Presumption of minority

- The Law n. 47 of 7 April 2017 relating to the protective measures for unaccompanied minors. This is the first Italian law completely dedicated to non-accompanied minors. Before its adoption their treatment was partially established in different laws, with many uncovered areas (i.e. the age determination system);
- The Law n. 142 of 18 August 2015: transposition of the Directive 2013/33 UE relating the standards of the reception of asylum seekers – article 19bis is dedicated to unaccompanied minors: *"If there are doubts about the age, the unaccompanied minor may, at any stage of the procedure, be subjected, with the consent of the minor or his legal representative, to non-invasive medical and health checks in order to ascertain his age. It should be noted that the lack of consent "does not constitute a reason to prevent the acceptance of the application ...",* where, of course, the conditions exist;
- Art. 19 bis par. 8 - If, after the exams, there are still doubts over the minor or non-minor age, the minority is presumed;
- The Law 24 of 4 March 2014: transposition of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;
- Decree 234 of 10 November 2016: sets the procedure for age determination of unaccompanied minors' victims of trafficking – is the implementation of art. 4 par. 2 l. 24/2014;
- Decree 25 of 28 January 2008: transposition of the Directive minimum standards on procedures in Member States for granting and withdrawing refugee status. Art 19 concerns the guarantees for unaccompanied minors;
- Decree n. 488 on 1988: approval of the provisions on the criminal trial against minors. Pursuant to art. 8, Presidential Decree no. 448 of 22.9.1988, approval of the provisions on criminal proceedings against juvenile defendants, under the heading "*ascertaining the age of the minor*", it is provided that in the event of uncertainty regarding the minor's age, the judge shall order, even *ex officio*, an expert's report. If *"even after the expert opinion, doubts remain as to the minor's age, the latter shall be presumed for all legal purposes".* **This is a fundamental principle, that of the presumption of minority in case of doubt, which applies to all legal effects, and not only in the juvenile criminal trial**;
- Legislative Decree 286/98, article 28, paragraph 3, according to which *"In all administrative and jurisdictional proceedings [...] regarding minors, the best interests of the child must be given priority, in accordance with the provisions of art. 3, paragraph 1, of the Convention on the Rights of the Child of November 20, 1989, ratified and implemented pursuant to Law no. 176 of May 27, 1991".*

Regulatory provisions on age determination

- Protocol for the identification and the age multidisciplinary holistic assessment for unaccompanied minors. Conference of Regions on 2016;
- Opinion of The Superior Health Council of 2009 *"Age determination of unaccompanied minors"*;
- 2014 UNHCR Recommendations: Age determination of unaccompanied minors.

4. The procedure

4.1. Identification

The role of the voluntary legal guardian:

Critical aspects

- Timing of the appointment;
- Training and knowledge of the voluntary guardian;
- Awareness of the procedure by the medical staff and public security forces;
- Respect of the principle of minor age.

4.2. Reception measures

If a UM is found on the Italian territory, he/she him need to be taken in charge by the social service. After the first needs are satisfied, the social workers have to make a general evaluation through interviews: civil status, family composition – general situation in the Country of Origin – migratory journey. After this first assessment the Chief's office has the duty to report to the public prosecutor at the Juvenile Court if there are reasonable doubts concerning the minor age of the person. The Social Service has the duty to inform the minor and his/her voluntary legal guardian on his personal condition.

Critical aspect

It has been referred that sometimes the underage person goes on his own to the Police point where immediately he is subjected to identification procedures, without all the guarantee provided to minors, the respect of the principle of presumption of minor age is not guarantee.

4.3. Age determination procedure

- If there are doubts on the age, it can be determined on the basis of the official documentation given by the public authorities, also with the collaboration of the diplomatic authorities of the Country of origin;
- It is important that the social service and the voluntary legal guardian are aware of the fact that if the minor is an asylum seeker it is forbidden/dangerous to make contact with his diplomatic authorities in Italy;
- Are considered to be valid documents for age determination the passport, or other identity documents not valid if they have photographs on it. Documents without pictures are a presumption of minor age.

Critical aspects

Generally, people run away from their home country without documents. Once they arrive in Europe having documents from home could be a very long procedure. If the age determination procedure does not take into consideration this delay the principle of presumption of minor age could be not respected.

The age determination procedure is activated only if there are founded doubts on the age: art. 19 bis decree 142/2015 (transmuted by the lae 47/2017).

Critical aspects

Which are the founded doubts? Is, for example, the general physical aspects enough? Cultural, physical and economic differences have a major impact on the standard of growth perceived by the average individual. There is a lack of control over the decision to activate the age determination procedure.

This procedure can be asked by the public authorities, by the social service or by the minor himself in case he is identified as a major. The procedure is a multidisciplinary and holistic one. It is made by the public authorities with the help of cultural mediators, at the presence of the legal guardian and only after that an adequate humanitarian help is provided to the minor.

The first step is the consultation of the national information system on non-accompanied minors at the Labour Ministry, and other public data bases. If other well-founded doubts remain. Age determination procedure is authorized by the Juvenile Court Public Prosecutor (also on the phone) through social sanitary methods.

- There is the necessity to have the informed consent of the minor during the whole procedure. All the documents and the certificates have to be relevant for the procedure (medical documents, external consultancies, registry certificate);
- Method for the assessment: personal interview on his personal condition, life experiences, family condition, migratory journey, pediatric visit, neurological evaluation, psychiatric evaluation, progressive pervasiveness criterion. Only if doubts remain on the age it is possible to go to the next step of the assessment. A single examination/assessment is not considered valid to exclude the minor age of the subject, while a single assessment is considered to be enough to determine the minor age. This procedure give respect to the principle of presumption of minor age.

The outcome of the examination must always indicate the margin of error, the scientific methods used, and the estimated age with the indication of the minimum and maximum value of the attributable age.

If, after the exams there are still doubts over the minority, the minority is presumed (art. 19Bis par. 8 decree 142/2015).

Critical aspects

- Non-compliance with multidisciplinary, holistic and progressive methodology;
- Prevalence of instrumental assessments over those based on psychological and social assessments;
- Failure to involve the guardian and the minor by obtaining their informed consent;
- Lack of presence of a cultural mediator appropriate to age and origin;
- Prevalence in some places of the methodology of assessment with radiological examination in general large discrepancies throughout the territory;
- The method most commonly used to determine growth (the Greulich-Pyle radiological tables) is calibrated on reports of Anglo-Saxon adolescents of the 50s and therefore is not reliable for the assessment of the chronological age of young migrants from Asia and Africa. The margin of error is plus/minus two years, plus 6 months of operator margin of error;
- The decision to assign the age is communicated to the minor who has the right to oppose it before the Tribunal. He has the right to file all documents coming from the country of origin.
- Timing of the decision communication: often the decision came after the majority, since the procedure is longer than the 20 days prescribed by the law;
- It happens that the age determination is written in the radiological exam and not in a formal decision of the judge without margin of error;

- During the period of investigation, the person must always be considered and treated as a minor.

4.4. Housing and education

Legislative Decree n. 142/2015 art. 18 provides measures for housing and education. Paragraph 1 art. 18 provides that *"in applying the reception measures provided for in this decree, the best interests of the child take priority in order to ensure adequate living conditions for the minor, with regard to the protection, well-being and social development of the minor, in accordance with the established by art. 3 by the UN Convention on the rights of the child of 20 November 1989 ratified by law 27 May 1991 n. 176".*

Par 4 sets that *"in the preparation of the reception measures referred to in this decree, services intended for the needs of minors are ensured, including recreational ones".*

Article 19 is dedicated to the reception measures of non-accompanied minors. They are welcomed in governmental reception facilities intended for them, for the time strictly necessary for identification which must be completed within 10 days and in any case not exceeding thirty days. They are welcomed in the so-called *Sistema di accoglienza e integrazione* (SAI). By choosing the place, the needs and characteristics of the minor are taken into account resulting from the informative interview carried out after entering the facility. The law provides for a minimum standard of reception of UASCs in compliance with art. 117 of the Constitution 2 letter m. If these facilities are not available, the minor is welcomed by the public authority of the municipality in which he is located.

4.5. Access to an administrative assistant

Art. 19 par. 5 Legislative Decree 142/2015: the public security authority gives immediate notice of the presence of the minor to the public prosecutor at the juvenile court for the opening of the guardianship and the appointment of the guardian pursuant to art. 343 of the Civil Code and for the ratification of the reception measures set up. The Ministry of Labor is also notified anonymously to ensure the census and monitoring of the presence of unaccompanied minor.

Law 47/2017 provides for the establishment of a list of voluntary guardians to which private citizens can be enrolled, selected and trained by the guarantors for childhood and adolescence. regions and provinces.

The role of the voluntary legal guardian:

Critical aspects

- Timing of the appointment, often it comes several weeks after the arrival of the minor – lack of effectiveness;
- Training and knowledge of the voluntary guardian: this role is sometimes very complicated. It would be necessary that the voluntary guardian have experience in applying asylum and Dublin law, and that he/she is aware of the rights of the child, being capable of working with social services, Juvenile court, and public authorities, considering also al the medical problems that could come into consideration.

B. Current legal practice vs applicability of the convention on the rights of the child

5. National case laws in violation or in accordance with the convention on the rights of the child

5.1. Presumption of minority

- *Tribunale di Torino* 27/10/2014: the case was a criminal case concerning false declarations concerning the age: the principle of the best interest of the child regarding the presumption of minor age. The court expressly recalls the CRC Convention;
- *Juvenile Court di Venezia* 2016: the case is concerning an appeal against the age determination decision: no explicit referral to the Convention, but general reference to the principles of presumption of minority;
- *Consiglio di Stato* (Superior administrative Court) 29/12/2017 n. 6191: the case was about a request of permit of stay for minor age, on the basis of the presumption of minor age: explicit reference to the general principles of the CRC Convention and its art. 3, and all the legislative frame of the Constitutional and national Italian legislation;
- *Corte di Cassazione* 919/2021: the Minor asylum seeker – appeal against the decision concerning his refugee protection decision – vulnerability: general reference to the main principles concerning the defense of minors;
- *Corte di Cassazione* 6520/2020: the case is concerning an appeal against the age determination decision - age determination: direct reference in the interpretation of the Italian legislation to the general international principles of the European and international legislation;
- *Corte di Cassazione* 5936/2020: the case concerns an appeal against a age determination decision. The Court applies the law and its general fundamental principles. The Italian laws concerning unaccompanied minor are based upon the principle of best interest of the child and in general, principles set in the CRC;
- *Corte di Cassazione*, sez. VI *civile*, 6 April 2022, n. 11232: with regard to the identification of unaccompanied foreign minors, the age assessment cannot be considered valid when the results of the health checks prevail over the personal data certified by the passport or other identity document. Furthermore, the personal data document, also in copy, presumptively supports the minor age in the composite judgment to which the judge of merit is called. The decision which does not take into consideration the extract of the birth certificate produced by the interested party (which shows that he is a minor) and decides on the age on the base of the results of the social investigations is therefore annulled.

5.2. Access to an administrative assistant

- *Corte di Cassazione* 686/2017: need to have a fast indication of the administrative assistant;
- *Corte di Cassazione* 26442/2016: the unaccompanied foreign minor who illegally disembarks in the territory of the State receives the first reception measures in accordance with the provisions of Legislative Decree no. 142 of 2005 and, in order to exercise the right to request the "status" of international protection or the issue of a residence permit, it needs, as soon as possible, legal representation, to be carried out through the appointment of a guardian from part of the tutelary judge of the place where the territorial reception structure is located.

Annex G
Application of the CRC (Spain)

Members of the sub-committee

Sara Gini (IT)
Béatrice Rigotti (IT)

Jessica Depré (CH)

Josine Bitton (FR)
Anita Bouix (FR)
Carole Sulli (FR)

Andres de Ceballos (ES)

A. Current legal framework and status of the law

1. Legal situation in Spain: national laws

Spain is a regionalised state closed to a federal one. In the area of migration, the competence is of the national institutions. In the area of minors there is a double legislative competence of the national and autonomic (regional) governments. The executive competence on minors is shared between the regional and local authorities.

With regard to unaccompanied minors, the following laws are the most important:

In general

- Spanish Constitution of December 27th, 1978.

Immigration law

- Organic Law 4/2000 of January 11th, about the rights and liberties of foreigners in Spain and their social integration;
- Royal Decree 240/2011 of April 20th with approves Regulation of the Law 4/2000, about the rights and liberties of foreigners in Spain and their social integration.

Criminal law

- Spanish Criminal Code approved by Organic Law 10/1995 of November 23rd;
- Spanish Criminal Procedure Law approved by Royal Decree of September 14th, 1882;
- Organic Law 5/2000 of January 12th about the criminal responsibility of minors;

- Organic Law 1/1996 of January 15th about Minor Legal Protection.

2. International conventions

Spain is a monist State, meaning that once conventions are ratified, they automatically become part of National law and do not require a separate implementing instrument. It is necessary only the ratification according to the nature of the Treaty and its publication in the Official Bulletin (BOE).

Spain is a member of the European Union ("EU") and therefore of the European Economic Area ("EEA"). It is a member of the United Nations ("UN") and the Counsel of Europe ("CoE").

EU law is totally applied in Spain and its international agreements. Spain is part of the Schengen area and also the Dublin Convention acquis applies in Spain.

With regard to unaccompanied minors, the following conventions, treaties and agreements are the most important.

UN

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85;
- Convention on the Rights of the Child, 1577 UNTS 3;
- Convention Relating to the Status of Refugees, 189 UNTS 137;
- Protocol Relating to the Status of Refugees, 606 UNTS 267;
- International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3;
- International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

CoE

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, "ECHR");
- Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117).

EU

- Directive (UE) 2016/800 of European Parliament and Council of May 11th, 2016, in relation about the processual guarantees of minors suspicious and accused int criminal proceedings.

International Agreements

- Convention between Spain and Morocco on May 30th, 1997 about legal assistance on the right of custody of minors;
- Agreement between Spain and Morocco, March 6th, 2007, about non accompanied minors, their protection, and return;
- International Agreements with Belarus, Senegal, Peru, Rumania.

3. National laws in violation or in accordance with the convention on the rights of the child

3.1. Presumption of minority

Article 12.4 of Organic Law 1/1996 of January 15th about Minor Legal Protection establishes that when the age cannot be determined the person will be considered as a minor of age, meanwhile its age is determined.

Article 12 also establishes the principles for the system to determinate if a person is a minor. These principles are dignity, celerity and the consent of the person.

3.2. Housing and Education

In relation with education, the Spanish education Law declares education compulsory until the age of 16. This principle should be considered despite of the legal situation of the minor.

There is no special regulation in relation with the housing of minors, a part of the general principle of a right of everybody to a proper housing of article 47 of the Constitution.

3.3. Access to an administrative assistant

Articles 14 to 19 of Organic Law 1/1996 establish the obligation of the authorities to intervene in the case of unaccompanied minors, minors in situation of uprooting or in situation of danger.

They establish the duty of the authorities to intervene in those situations. The actions are usually taken by the departments of the Autonomous Communities (Regions). The guardianship of these minors will be exercised by a department of the Regions.

B. Current legal practice vs applicability of the convention on the rights of the child

4. National case laws in violation or in accordance with the convention on the rights of the child

The Spanish Administration has not been very sensitive in relation with the Rights of the children. This fact has created a case law by the Courts and specially a great amount of complains before the Committee of the Rights of the Children of the United Nations. As a matter of fact, Spain is the state with more convictions before the Committee.

4.1. Presumption of minority

The Administration practice has created some doubts about the minority of age of a minor, even when there is documented by a third country (mainly passports from African countries). This practice has been overruled by the Supreme Court. Sentences: 307/2020 of June, 16th, 2021 ECLI:ES:TS:2020: 2198 and 796/2021 November 22th, ECLI: ES:TS:2021:4266.

This case law is a change after some Decisions of the Committee of the Rights of Children, which has ruled against Spain in some case as example we can mention:

- Decision 76/2019 of the Committee of the Rights of children of February 4th, 2021, about presumption of minority of age, R.Y.S, (Spain was condemned because only medical bone test was used to determinate the age of a minor asylum seeker);
- Decision 63/2018 of the Committee of the Rights of children of January 29th, 2021, about eviction of a Minor about presumption of minority of age, C.O.C. (Spain was condemned because only medical bone test was used to determinate the age of a minor asylum seeker).

Despite of this situation, the Administration practice does not recognize the date of birth in official documents (Passports) or uses non update system in order to determinate the age of the minor.

4.2. Housing and Education

There have been some violations of the right of the child in the two areas. First in relation with housing, it has been some cases which condemns Spain because the Administration has not given an alternative solution the evictions of families with minors. Between and the recent ones, we can mention:

- Decision 85/2018 of the Committee of the Rights of children of February 22nd, 2021, about eviction of a Minor, El Goumari et al. (Eviction of a family with four minors, the woman has a miscarriage due the to the situation. The national authorities did not give any alternative solution to the eviction);
- Decision 54/2018 of the Committee of the Rights of children of February 19th, 2021, about eviction of a Minor, El Ayoubi et al. (Eviction of families with minors, the national authorities did not give any alternative solution to the eviction);
- Decision 48/2018 of the Committee of the Rights of children of February 22nd, 2021, about eviction of a Minor, Soraya Moreno Romero (Eviction with a woman with minors. Despite of the fact that some habitably solutions were given, none of them complies with a situation of dignity);
- Decision 45/2018 of the Committee of the Rights of children of October 13th, 2020, about eviction of a Minor, A.M.O. and J.M.U. (Eviction of a mother with six children, plus it was retired the custody of two children, the Committee established that an alternative solution previous to the eviction should been given).

Finally, it has been one case about the right of education in the city of Melilla (Spanish town in north Africa). There are some families which have been living there for decades but they do not live with a resident permit. For the moment there has been only one decision but some as expected in the next months.

- Decision 56/2018 of the Committee of the Rights of children of September 28th, 2020 about the right of education, M.B.S. (About the negative of Spanish authorities of schooling a girl in Melilla).