The rights of unaccompanied migrants from their arrival to the adulthood

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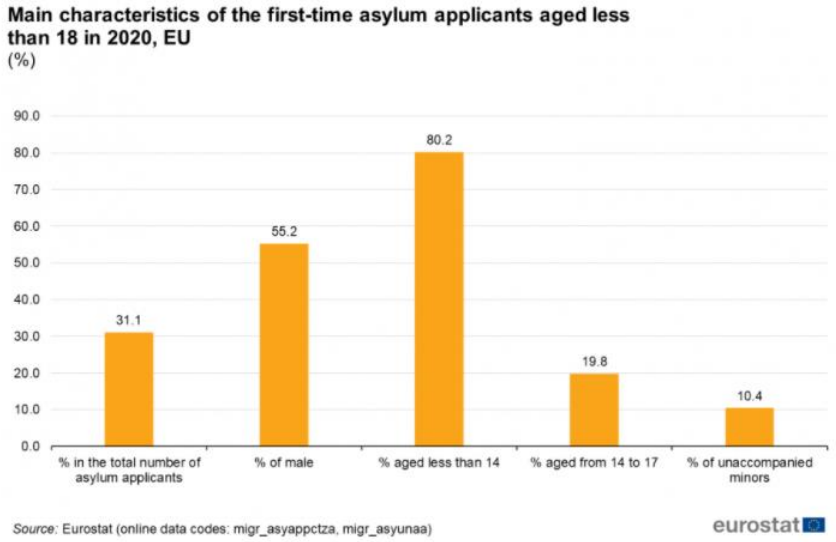
Abstract This chapter is aimed at examining, in a critical perspective, the current situation about unaccompanied migrants, in the light of International legislations as well as national and European case law. First, it will be introduced the topic departing from International provisions on reception and protection of unaccompanied minors, also analysing some ECtHR pronouncements regarding refoulement and detention. Then, it will be examined the living conditions of minors and the related problems in the context of the "best interest of the child". It will be focused also the matter of transition to adulthood and the main problems faced by young migrant. Therefore, in analysing Italian legislation it will be highlighted the introduction of the volunteer guardians and the new protocol for the age assessment.

1 Introduction

According to the last Eurostat Report[1], in 2020, the estimated number of first-time asylum applicants - having the status of unaccompanied migrants - was about 13,600[2]. This value constituted the 10% of all the applicants aged less than 18, who were the 31.1% of all the claimants[3].



These values, analysed within the trend registered in the decade 2010-2020, are the consequence of a decrease registered since 2015 (after the migration crisis), but it is far from the lowest value observed in 2010. Regarding the share of unaccompanied migrants in the total number of minors claiming asylum, the trend during the decade 2010-2020 fluctuated around 10-15%, with two exceptions: the maximum value of 25% in 2015 and the minimum value of 7.9% in 2017.

It is to clarify that the statistics do not include the number of "minors in transit", considering that thousands of minors disappear after their arriving in Europe and before being registered. This happens if they are victims of trafficking or if they prefer, following recommendations of friends or relatives, do not have access to health and welfare services. For the length of the bureaucratic procedures and the lack of adequate information, the reception system is considered as an obstacle to

[1] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants#Main_features_at_EU_level_in_2020.

[2] Monthly reports on unaccompanied migrant seeking asylum at https://ec.europa.eu/eurostat/databrowser/view/migr_asyumactm/default/table?lang=en.

[3] According to the mentioned statistics, in 2020 the 55.2% were males, the 80.2% were aged less than 14 and the 19.8% were aged from 14 to 17.

their route, a waste of time and opportunities, so they prefer to hide from the system and continue the migration in risky and unsafety conditions[4].

The mistrust of the system and the desire for profits bring also unaccompanied migrants already registered to abandon the reception system for irregular or illegal work, becoming untraceable[5]. It is considered that between 2018 and 2020 approximately 20,000 unaccompanied migrants disappeared in Europe, with the reasonable risk of becoming victims of abuses, exploitation, and trafficking[6].

The UN Committee on the Rights of the Child reported, as main reasons to migrate, the need to escape from wars and conflicts, poverty or natural catastrophes, discrimination or persecution, but also the desire to access to education and welfare, to join family members or the fact of being victim of exploitation[7]. Young migrants move to Europe motivated by the family or by their own willingness. For the families, sending the child abroad is an investment, an opportunity for his/her life but also for obtaining an economic support. The decision depends not only on the living conditions in their Country of origin, but also on the vision of the "European dream" provided from social media or acquaintances.

Both the Dublin III Regulation[8] and the Return Directive[9] consider unaccompanied migrants as particularly vulnerable persons, who need specific procedural guarantees.

They are not only minors, coming in Europe for the above-mentioned reasons but they also experienced the migration alone, and are particularly exposed to traumatic experiences, abuses and trafficking.

Nevertheless, their situation poses some concerns. On the one hand they are minors, and this status require the recognition of specific rights and guarantees, but on the other hand they are also migrants, who are subjected to the laws regarding public security and border defence, needing a proper balance.

At the international level the definition of unaccompanied migrants is provided by the UN General Comment no. 6 on Treatment of Unaccompanied and Separated

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[4] COM/2017/0211 final, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52017DC0211 .

[5] UNCHR, UNICEF(2014) Sani e Salvi. Posizione UNCHR sul superiore interesse del minore", available in https://www.unhcr.org/it/wp-content/uploads/sites/97/2020/07/Safe_and_sound_final.pdf . For deepening the topic: EUROPEAN MIGRATION NETWORK, How do EU Member States treat cases of missing unaccompanied minors?: EMN Inform, 8 April 2020, available at https://emn.ie/wp-content/uploads/2020/04/EU_Inform_Unaccompanied_Minors_2020.pdf .

[6] The Guardian, Nearly 17 child migrants a day vanished in Europe since 2018, available at https://www.theguardian.com/global-development/2021/apr/21/nearly-17-child-migrants-a-day-vanished-in-europe-since-2018 .

[7] UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf .

[8] Considerandum n. 13, Regulation (EU) No 604/2013, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0604-20130629 .

[9] "Art. 3 co. 9, Directive 2008/115/EC; available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115 .

Children and the Dublin III Regulation[10]. Both documents define the figure of a children, aged less than 18, not cared by parents, relatives or by any adult responsible for his/her care. The Comment also stated that the provided guarantees and rights are not limited to young citizens of the State Parties, but also available to "asylum-seeking, refugees and migrant children, irrespective of their nationality, immigration status or statelessness".

The Convention on the Rights of the Child[11] (hereinafter UNCRC), adopted by the General Assembly of the United Nations on the 20th of November 1989, stated the main principles to follow regarding unaccompanied migrants: the principle of non-discrimination (art. 2), the best interest of the child (art. 3), the right to life, survivor and development (art. 6) and the right of every child to freely express her or his views (art. 12).[12]

The best interest of the child is also echoed in the European Charter of Fundamental Rights[13] and, as it will be clarified, in all the legislative acts of the Common European Asylum System. For better understanding the rights and guarantees of unaccompanied migrants it is also necessary referring to the European Convention of Human Rights[14] and the Convention on Action Against Trafficking in Human Beings[15], especially for what concerns right to life, prohibition of torture and inhuman or degrading treatments, prohibition of slavery and forced labour, right to liberty and security, right to respect for private and family life.

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[10] Regulation No. 604/2013, ibid., Art. 2 j).

[11] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

[12] The Convention and the enshrined principles are completed by the following comments: UN Committee on the Rights of the Child (CRC), General comment No. 6, CRC/GC/2005/6, available at: https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf ; UN Committee on the Rights of the Child (CRC), General comment No. 12, CRC/C/GC/12, available at: https://www2.ohchr.org/english/bodies/crc/docs/advanceversions/crc-c-gc-12.pdf ; UN Committee on the Rights of the Child (CRC), General comment no. 5, CRC/GC/2003/5, available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsiQql8gX5Zxh0cQqSRzx6Zd2%2FQRsDnCTcaruSeZhPr2vUevjbn6t6GSi1fheVp%2Bj5HTLU2Ub%2FPZZtQWn0jExFVnWuhiBbqgAj0dWBoFGbK0c .

[13] Art. 24 co. 2, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT .

[14] European Convention for the Protection of Human Rights and Fundamental Freedoms, available at: https://www.echr.coe.int/documents/convention_eng.pdf .

[15] Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197, available at: https://rm.coe.int/168008371d https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT .

2 The reception procedure and the rights of the child

Since the first encounter with the child, the main principles to be considered are: the child's best interest and the principle of non-discrimination.

The principle of non-discrimination establishes that children's rights must be protected and guaranteed without any discrimination and the Comment no. 6 to the UNCRC recommended, specifically for unaccompanied migrants, to act in various ways depending to the specific needs of children, also addressing specific issues or stigmatizations connected to their status. For this purpose, it is necessary to detect conditions of vulnerability of each child, in a case-by-case assessment, conducted through interviews in a child-sensitive, fair, culturally and gender-oriented manner.

Regarding "the best interest of the child", the General Comment no. 14 to UNCRC specified that it has to be taken into account during all the steps of the displacement and for each fundamental decision, defining it after proper assessments based on the identity and history of the child. Moreover, it stated that "the concept of the child's best interest is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child".

The concept is considered threefold, representing:

- the substantive "right of the child to have his/her best interest assessed and taken as a primary consideration" in order to make a decision;
- an interpretative legal principle to follow when there are more possible interpretations;
- a procedural rule to consider when a decision should be taken, being necessary explain why is considered the best interest of the child and due to what factors.

2.1 Prohibition of refoulement and expulsion

With regard to return and expulsion of migrant children, General Comment no. 6 to UNCRC affirmed the non-refoulement obligations, according to art. 33 of the 1951 Refugee Convention[16] and art. 3 of the Convention against Torture[17].

The provision is extended to all the cases where "there are substantial grounds for believing that there is a real risk of irreparable harm to the child" in the country where is to be taken or where it could be subsequently removed. It comprehends not only direct harms but also indirect, and it prescribes the need of an assessment conducted in an age and gender-sensitive manner, considering also "the particularly

[16] Convention Relating to the Status of Refugees, 28 July 1951, available at: https://www.unhcr.org/3b66c2aa10 .

[17] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, available at: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx .

serious consequences for children of the insufficient provision of food or health services". In presence of conflicts or war in the country where the child is to be removed, States should value the return if there is a possibility of recruitment, "not only as a combatant but also to provide sexual services", or of a direct or indirect participation in the conflict.

Despite that, the ECHR condemned some practices put in place by some EU Member States like Belgium and France, having considered them a clear violation of the prohibition of degrading treatments (art. 3), of right of liberty (art.5) and of right to respect for private and family life (art. 8).

Some important principles are provided by the following cases law: Mubilanzila Mayeka and Kaniki Mitunga v. Belgium[18] and Moustahi v. France.

In the first case, Belgian authorities detained for two months a five years old chid in a centre designed for adults, not considering that had arrived in Belgium with her uncle. Additionally, notwithstanding that the mother gained the status of refugee in Canada and started there the procedure for obtaining a VISA for the daughter, the Belgium authorities deported the child. For the Court it is manifest the lack of humanity and the distress caused to the minor, having Belgium violated its positive obligations deriving from art. 8, namely taking care of the child and facilitating the family reunification.

In the case Moustahi v. France[19], the French authorities detained and deported two minors, considering them being cared by a migrant who arrived at the same time, even though their father reached the Police station declaring they were his sons and showing the birth certificates. The Court underlined a practice used in Mayotte, for which minors are often arbitrarily considered being cared by some adults arrived at the same time, for making possible the detention and the expulsion. The fact that the authorities arbitrarily established a relation between the children and another migrant, although their father went at the Police Station, and the fact that the father was prevented from meeting his children are evaluated as violations of art. 8, not being in the best interest of the minors.

2.2 Identification and age assessment

From the first encounter with a migrant child, it is necessary to adopt the necessary protection measures and satisfy the primary needs, detecting specific vulnerabilities and distresses. It is also essential to understand if the minor is accompanied or not, determining the two situations different procedures.

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[18] Mayeka and Kaniki Mitunga v. Belgium, Application no.13178/03, ECHR, 12 October 2006, available at https://hudoc.echr.coe.int/fre?i=002-3083 .

[19] Moustahi v. France,Application no. 9347/14, § 64, ECHR, 25 June 2020, available at https://hudoc.echr.coe.int/fre?i=001-203163 .

Since this preliminary phase, aimed at securing children and providing health measures, the actors involved should take any decision with the aim of guaranteeing the best interest of the child[20].

The Dublin III Regulation[21] stated that accompanied minors should be assisted or represented by a representative who has to take into account the best interest of the child during the procedures for the asylum claims[22]. This person will assist the child for all his /her stay, since the identification to the majority, acting in accordance with child's best interest, properly assessed in relation to his/her own identity, traumas and background.

The main issue at this phase is the evaluation of the age, relevant for defining the rules about procedure and treatment. Indeed, the recognition of some rights and liberties is strictly connected to the status of minor and it is crucial avoid depriving a child of this right. Furthermore, for warding off risks of abuses, trafficking and re-trafficking, minors should be separated from adults as soon as possible.

The main sources for detecting the age are identity documents, but often migrants lose theirs during the route or hide them, so it is necessary the reference to other methods.

As the procedure is considered intrusive and could constitute a new trauma, it should be executed only if there is a reasonable doubt on the age of the child and according to his/her best interest.

The representative should supervise the procedure and the law should provide the right to an effective remedy[23] for challenging the age assessment decision[24]. It is important conducting the evaluation in a safe, child-sensitive, gender and culture-oriented manner, preserving the integrity of the child, explaining clearly what will happen and why and, also, that he/she can refuse the examination.

In case of doubts about the child's age, different measures could be put in practice, prioritizing the less intrusive, according to a case-by-case assessment based on the history, the identity and the migration experience.

The first measures that should be used, as less intrusive, are: analysis of identity documents and evidence collected, general interview and psychological assessment. The procedure should be continued only if persists, after the previous methods, a reasonable doubt about the age of the child.

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[20] See Considerandum no. 9, Directive 2013/33/EU (recast), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033.

[21] Regulation (EU) No 604/2013, ibid., Art. 6 co. 2.

[22] Art. 13 co. 2. Directive 2011/36/EU ,available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036

[23] It seems useful highlight that in France it is possible appeal the decision. Nonetheless, during the process of appeal, it is not possible to take the person into care, and more young migrants start to live up on the street. More information available on OXAM, Teach us for what is coming - The transition into adulthood of foreign unaccompanied minors in Europe: case studies from France, Greece, Ireland, Italy, and the Netherlands, 2021, available at https://www.oxfamitalia.org/wp-content/uploads/2021/06/Teach-us-for-what-is-coming-report.pdf .

[24] EASO, Practical Guide on Age Assessment - Second Edition, 2018, available at https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf

Only in this case it should be practiced medical exams and EASO recommended first the less intrusive (dental observation, MRI, exams on physical development) and, only as measure of last resort, the medical exams including X-rays (carpal, collar, bone, pelvic or dental). When the assessment becomes intrusive and stressful for the child, it should be stopped, regardless its accuracy.

The mentioned exams does not provide precise and accurate results and consequently it is preferrable talking about "evaluation" of the age, rather than "determination". Moreover, for the same reason, it should be considered the possibility of mistakes, giving the benefit of the doubt. Actually, the benefit of the doubt is not always respected and, sometimes children are detained in inhuman conditions while they wait for the results and, sometimes, also after it is assessed they are minors.\

This happened in the case Abdullahi Elmi and Aweys Abubakar v. Malta[25], where two minors were detained in Malta for months waiting the results of a medical examination (X-rays of the bones of the wrist). One of them claimed difficult conditions of detention, without adequate information and basic facilities, also manifesting difficulties to meet a doctor. They were detained with adults in an overcrowded centre where fights often occurred. The ECHR condemned Malta. stating the existence of a violation of art. 3 for degrading and inhuman treatments, especially for the minor age of the children and their status of asylum seekers.

2.3 Detention of minors

As a general principle, children cannot be detained for the reason of being unaccompanied or for the irregular entry or permanence in a State. Detention is allowed only for specific exceptionally justified reasons and as a measure of last resort, according to the principle of proportionality and only for the shortest period of time and following the best interest of the child.

The General Comment no. 6 to UNCRC stated that the approach should not be of detention, but "care", children should be separated from adults unless it is their best interest." They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention.

In order to effectively secure the rights provided by article 37 (d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with

[25] Abdullahi Elmi and Aweys Abubakar v. Malta, Applications no. 25794/13 and 28151/13, ECHR, 22 November 2016, available at https://hudoc.echr.coe.int/FRE?i=001-168780 .

prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative."

Art. 37 of the UNCRC stated that "No child shall be deprived of his/her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

It is worth also mentioning art. 5 of the ECHR, which remarks the right of liberty unless the deprivation is circumscribed to specific situations and executed according to a lawful procedure[26].

Despite of this normative frame, some States systematically detain children in police stations as highlighted by NGO's reports and by some ECHR case law.

At this regard, it is worth a reference to H.A. v. Greece and Sh.D. v. Greece, where the Court condemned Greece for having detained minors in police cells not considering their vulnerabilities and causing feeling of distress, isolation and fear and, consequently, putting in place degrading and inhuman treatment prohibited by art. 3 of the Convention.

Several reports of NGOs and of the Council of Europe[27] remarked that Greek Police regularly detained minors through the concept of the "protective custody" (προστατευτι κή φύλαξη) until a shelter placement were available and that minors were detained with adults and without adequate security measure, in "an oppressive and prison-like atmosphere".

This situation persisted also in 2020, aggravated by the COVID-19 pandemic and the diffusion of contagious between the detainees (Doshi, Goyal 2020) but on December 2020 Greece finally abolished the legal provision of the protective custody (Barn, Di Rosa 2021) , operating the relocation of unaccompanied migrants in other EU Member States.

[26] ECHR, ibid., art. 5.

[27] Council of Europe, Committee for the Prevention of Torture (CPT), Concluding observations on the seventh periodic report of Greece, 3 September 2019, p. 5, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGRC%2fCO%2f7&Lang=en . Council of Europe, Committee for the Prevention of Torture, Report to the Greek Government on the visits to Greece carried out by the CPT from 13 to 18 April and 19 to 25 July 2016, 26 September 2017, available at https://rm.coe.int/pdf/168074f85d.

https://www.hrw.org/node/375270/printable/print

The ECtHR, in the above mentioned Mubilanzila Mayeka and Kaniki Mitunga v. Belgium case, also stated a violation of artt. 3 and 5 (right to liberty), considering that Belgium have not provided adequate protection to liberty. Additionally, it remarked the absence of an effective remedy to detention "with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release"[28]. Indeed, the Belgian law provides the appeal to the Chambre du conseil, but in the specific case the deportation of the child was organized without waiting a decision after the application for the release to the Chambre and, without waiting the expiration of the term for the appeal. Consequently, notwithstanding Belgian law provided a specific remedy, in the specific case it was ineffective.

2.4 Accomodation and search of a durable solution

Once estimated the age of the children, each State Party has to provide a proper accommodation, facilities, health services and rehabilitation, taking care of their physical and psychological integrity and considering their particular vulnerabilities, case by case. The provided standard of living must be adequate to the physical, mental, spiritual, and moral development of the minor.

After the child moved to the facility, it should be provided, in a child-oriented manner, information about procedures for asylum, reunification and other kind of protection measure for victims of trafficking. The information provided by the child could also activate procedures for tracing the family as soon as possible.

[28] ECHR, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ibid., § 122.

At this stage it should be defined a durable solution considering all the possibilities, according to the best interest of the child, the tracing of family, the situation in the Country of origin and his/her health and development.

This solution shall consist of reunification in the Country of origin, reunification in the State of arrival or another State where the family is, providing asylum or a legal status which permits them to live and be integrated in the State, resettlement.

The return in the Country of origin is excluded if would lead a risk for the minor that can imply a breach of his/her rights, according to the principle of non-refoulement and expulsion. It is allowed only if considered in the best interest of the child.

If the best option for the child is to remain in the local community, the actors involved and the competent authorities will assess the adequate long-term measures for the integration.

Meanwhile it should be provided access to education, training, health care and social services as enjoyed by national children, respecting the principle of non-discrimination and providing also professional training for the adolescents.

The child has always to be properly informed, also with the assistance of a cultural mediator, in a comprehensible language and child sensitive.

It must be pointed out that, once again, the real situation differs from the legal background.

The Khan v. France[29] case gives a suitable demonstration of the failure by the States to protect children, particularly related to the positive obligations deriving from art. 3 of ECHR.

The Court of Human Rights highlighted also that art. 3 does not imply only the prohibition to put in place some conducts, but also to engage specific actions to provide the effectivity of human rights and, specifically, the prohibition of torture and degrading treatments.

The specific case regarded a 12 years child, living in the Calais heath, in precarious conditions, with serious risks for his physical and mental health. The Court considered that the situation in the Calais zone was inhuman and that the State failed in his positive obligation to protect and take care of unaccompanied children. Especially because the Country intervened only after an order of the Youth Judge, but nothing was provided before this decision, notwithstanding the number of migrants and the inappropriate living conditions of all these people.

2.5 Transition to adulthood

While for accompanied migrants the majority means the automatic conversion of their residence permit, the situation changes in respect of unaccompanied migrants.

[29] Khan v. France 12267/16, ECHR, 28 May 2019, available at https://hudoc.echr.coe.int/eng?i=001-191277 .

Reaching the 18 means loss of accommodation, protection, contacts with the social workers, health services, guarantees and rights they were used to in the previous years. This situation causes a huge trauma, distress and fears, sometimes leading the young migrants to escape from the facilities, living in risky and unsafety conditions.

Young migrants with psychological traumas who had started a therapy should break off at 18, because costs for therapies are not more covered by the State and usually, they are not able to afford it.

Moreover, when there is not a transition period, migrants have to search another accommodation, facing challenges as lack of affordable housing, impossibility to afford the costs and also discriminations in the housing market. Sometimes they become homeless and start to live in precarious situations.

All these challenges, analysed with the generated distress and the break of the integration could represent the ineffectiveness of what has been done during their minor age.

Consequently, the UN High Commissioner for Refugees and the Council of Europe sustained the need of a proper integration for facilitating the transition to adulthood[30]. Integration means, in this sense, not the simple learning of the language, but an ongoing process through educational or professional participation in a society, but also through engagement and support.

The Council of Europe, in a specific recommendation[31], encouraged the States to improve their legal frameworks regard the transition, ensuring welfare benefits and accommodations in this period, but also protection, adequate educational opportunities and social integration, including in family or community-based accommodation, if this is appropriate and in accordance with the wishes of all parties involved. It is also highlighted the importance of youth work, non-formal education learning and the support of migrants' competences and aspirations.

What has been reported about EU Member States is that often the best practices are limited to local experiences or carried out by NGOs. There is not a legal framework that coordinates both political and public administration sectors which are supposed to help minor until autonomy[32].

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[30] UN High Commissioner for Refugees (UNHCR), Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate? March 2014, available at: https://rm.coe.int/16807023ba .

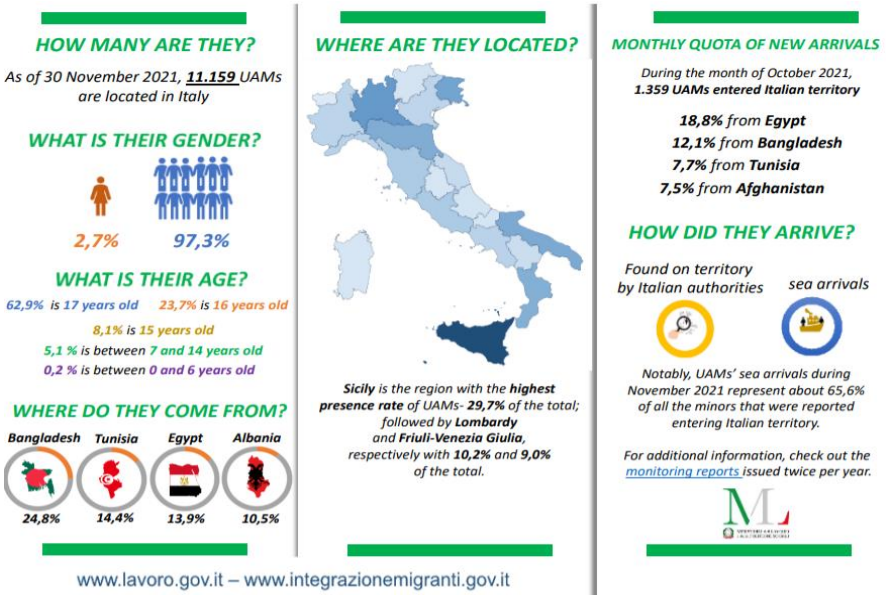
[31] Council of Europe, Supporting Young Refugees in Transition to Adulthood – Recommendation CM/Rec(2019)4 available at https://rm.coe.int/recommendation-cm-2019-4-supporting-young-refugees-transition-adulthoo/168098e814 .

[32] Integrating young refugees in the EU - Country , 20 October 2020, https://fra.europa.eu/en/publication/2020/integrating-young-refugees-eu-country-information#publication-tab-1 .

The situation is very unequal from one Country, or one municipality, to another and led the European Commission to manifest its concerns about suggesting a new strategy for the Member States for the next years[33].

3 Italy: strengths and weaknesses of the legislation on unaccompanied migrants

The report of the Ministry of Labour and Welfare for the month of November 2021 reported 11,159 unaccompanied migrants registered in Italy, the majority of whom are males and 17 years old, main located in Sicily.



Currently Italy is one of the first countries in Europe to have adopted an organic law specifically thought for unaccompanied migrants. It is the Law no. 47 of 2017[34], called "Zampa Law", by the name of the senator who firmed the act, that represents a milestone in the area of reception system for unaccompanied migrants.

This paragraph is aimed at analysing the some provisions of Law no. 47/2017 as well as other Italian rules governing he situation of unaccompanied migrants, to

[33] See COM/2021/142 Final, available At: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52021DC0142; COM/2020/758 final, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020DC0758 .

[34] Law 7 April 2017 no. 47, available at https://www.gazzettaufficiale.it/eli/id/2017/04/21/17G00062/sg

ascertain if Italy is in line with the international prescriptions and if there are critical issues.

Art. 2 of Law no. 47/2017 defines as unaccompanied minor a foreign minor, not being Italian or EU citizen, that for any reason is in the national territory o that is in any way subjected to the Italian jurisdiction, not being cared and represented by parents or adults legally responsible according to Italian laws.

One of the main aspects of the law is the expressed parification of unaccompanied foreign minors to Italian or EU citizens, recognising their specific vulnerability.

Another relevant statement is constituted by art. 3, that modifies Art. 19 of Legislative Decree 286/98 (TUI)[35] and sets the prohibition of refoulement and expulsion of children, according to the international prescriptions.

This clearly reveals that children's rights prevail on public order and border defence, as the only exception provided regards the situation in which parents or custodians are expelled.

It is also remarkable the provision concerning the national informatic system for migrant minors (SIM), for monitoring the children and registering the "social folder" with all the useful information for designing a durable project of life for the minor[36].

3.1. The volunteer guardian

The presence of an unaccompanied minors should be immediately noticed to the competent authorities and then he/she should be conducted in an adequate accommodation. The facility manager should ask the Juvenile Court to nominate a guardian within 30 days[37] , meanwhile the manager eventually decides according to the child's best interest.

For overcoming a situation of distress of the system, the Law 47/2017 introduced the role of volunteer guardians, instead of professional guardians[38].

The volunteer guardians are private citizens, properly trained, registered in specific lists at each Juvenile Court, for exercising the legal guardianship of unaccompanied migrants.

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[35] Legislative Decree 25 July 1988 no. 286, available at https://www.gazzettaufficiale.it/eli/id/1998/08/18/098G0348/sg .

[36] Art. 9, L 47/2017, Ibid.

[37] Art. 19, Legislative Decree 18 August 2015, no. 142.

[38] Art. 11, L. 47/2017, Ibid.

A critical point of this innovative figure is the average between the number of volunteers and the unaccompanied minors but also the fact that guardians are generally distributed around the State, while most minors are located in Sicily[39].

The State is acting to enhance this role and the Budget Law for 2020 adopted specific measures for promoting this activity and making it more effective. Indeed the Budget Law 2020 provided an increase of one thousand euros for: actions in favour of the volunteer guardians; compensation for the businesses, for covering the permits for the reimbursement for the costs incurred by guardians.

3.1. Age evaluation

As said before, the age evaluation is the main issue to address at the arrival of a young migrants. The procedure for the age evaluation in Italy must be activated within three days since the request of the competent judicial authorities and should be concluded within 10 days preferably, 20 at most.

The first step is the gathering of identity document, eventually with the assistance of diplomatic authorities,

According to International statements and recommendations, it is established to proceed with further measures only if there are reasonable doubts and it is not possible to define the age by using identity documents. Consequently, the Attorney of the Juvenile court will order for medical examinations[40].

It is provided a multidisciplinary analysis through various steps: social interview, psychologic or neuropsychiatric evaluation, paediatric auxological consultation and specifical medical exams. All these consultations must be carried on in a respectful and not invasive way, preserving the psychological and physical integrity of the minor.

It seems relevant to consider that the report on the psychological exams has a specific part referred to vulnerabilities that recommend not to execute an exam of the pubertal development.

Only after the mentioned consultations it is possible, eventually, to proceed with X-rays exams.

The procedure is stopped when there are clear results about the age; if it ends without a clear evaluation, the minority is presumed, respecting the benefit of the doubt, as internationally prescribed.

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[39] In 2019 the number of unaccompanied minors was estimated around 7000, and the number of registered guardians was 2960. For more information: Report on the volunteer guardianship, First semester 2019, available at https://tutelavolontaria.garanteinfanzia.org/sites/default/files/2021.05/Rapporto%20monitoraggio%20QUANTITATIVO%20sistema%20tutela%20volontaria%201%20sem%202019.pdf

[40]

The legislation strongly recommends an adequate communication with the children, providing adequate information in a comprehensible language and according to their maturity, about the assessment, the reason, the possibility to refuse it and results and consequences. All the exams and interviews are executed with the consent of the minor or the guardian, adequately informed, who can also assist taking care of the minor and protecting his/her rights.

In July 2020, it was signed a Multidisciplinary Protocol for the age assessment of unaccompanied minors[41] for promoting a common national procedure for the age assessment of unaccompanied children and avoiding different procedures at the local level.

The Law no. 47/2017 and the new protocol underlined the importance of the holistic and multidisciplinary evaluation, carried out by various experts that will write a report, indicating the risk of mistake and clear indication about the used methods.

After the report, which the minor is informed about, the Juvenile Court adopts the order of age attribution, giving proper notice to the minor and the guardian, the Police and the Ministry of Labour and Welfare. The order can be appealed within 10 days from the notification and the Judge should decide within 10 days: in the meantime, any administrative or criminal statement deriving from the assessment of majority is suspended.

The Supreme Court of Cassation[42], criticizing a frequent praxis, remarked that the age assessment is not valid if medical examinations prevail on documents provided, if the assessment is based on a unique exam and not on a multidisciplinary evaluation and if it is not specified the margin of mistake, for eventually applying the presumption of minor age[43].

3.3. Reception and permits

The Italian law stated two level of reception:

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[41] Presidenza del Consiglio dei Ministri – Conferenza Unificata, Accordo, ai sensi dell'articolo 9, comma 2, lett. c) del decreto legislativo 28 agosto 1997, n. 281, tra il Governo, le Regioni e le Autonomie locali, sul documento recante "Protocollo multidisciplinare per la determinazione dell'età dei minori stranieri non accompagnati, 9 July 2020, available at https://www.simmweb.it/images/protocollodeterminazione/p3-cu-atto-rep-n-73-9lug2020.pdf .

[42] Corte di Cassazione, Sez. I Civile, 03 March 2020, no. 5881.

[43] Similarly Consiglio di Stato, Sez. III, 10 May 2021, no. 3668, available at https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=202007098&nomeFile=202103668_11.html&subDir=Provvedimenti.

- the first level is constituted by governmental child-designed centres that should be used only for the identification and for no longer than 30 days[44];
- the second level facilities are constituted principally by the SAI system[45] but, for the increasing number of arrivals they result insufficient and, consequently, are supported by communities managed by the municipalities and eventually by the extraordinary reception centres for minors (CAS)[46].

Notwithstanding this frame, usually minors are accommodated in the hotspot centres, often overcrowded and without sufficient spaces and hygienic conditions, with adults.

Moreover, the COVID-19 pandemic got worse the conditions of arrival, causing the displacement in quarantine boats after a first identification in the hotspot. Even if at the legal level minors should not be placed in the quarantine boats with adults, some NGOs reported that after their arrival they are often registered as adult in the hotspot, even if they declare to be minors (Nicolosi 2021, Anderlini Di Meo 2021).

While the facilities of first level are designed only for the identification and the evaluation of the age, for limited period, the second level structures are organized for various activities related to inclusion and integration of the children: support of cultural and linguistic mediators, definition of a durable project of life, learning of the Italian language, access to education and training courses and also registration for the health cover[47].

Despite of that, as noted by scholars, the two levels are not clearly separated, for the inadequate capacity of the second level structures, usually overcrowded and that, sometimes the reception facilities strengthen the dependence from the system instead of the process of integration and autonomy (Di Rosa 2019).

Regarding the possible residence permits for minors, they have three options: applying for international protection[48], obtaining a permit for family reason (if they live in foster families, with their parents or with custodians), obtaining the permit for minor age (if they live in reception facilities).

3.4. Transition to adulthood

[44] These facilities are funded by the European Funding Asylum, Migration, Integration (FAMI).

[45] System Acceptance Integration.

[46] Even if thoughts for extraordinary reception situation, nowadays the CAS structures are ordinary used for the reception of migrants.

[47] Art. 14 of L. 47/2017 stated that unaccompanied minors can be registered in the National Health Service.

[48] It needs to be remarked that Law 1 December 2018 no. 132 (Security Decree) abolished the humanitarian protection, that was re-introduced by the Legislative Decree 21 October 2021, no. 130.

Focusing on the residence permits for family reasons and for minor age, it is relevant to highlight the different endpoints when the children reach the 18.

The permit for family reasons guarantees at the 18 years old the automatic renewal of their stay and the right to obtain a permit for study, access to work, job, health necessities and care.

Conversely, this does not happen for the unaccompanied migrants living in the reception facilities, that consider the reach of the 18 as a break with their rights and protection, feeling the distress for the renewal of the permit and the possibility of refusal, but also for the loss of an accommodation and the connected relationships.

They can apply for the "administrative continuity", which can allow them to benefit of the services and facilities for at least three years more, under specific conditions. Indeed, they need a valid passport or another equivalent document and to demonstrate the attendance of courses of study, an employment contract and a positive evaluation from the General Directorate of Immigration of the Ministry of Labour and Welfare[49]. Furthermore, they must have been staying in Italy for minimum three years and have participated in social and civil integration programmes for no less than two years.

It seems appropriate a focus on the concept of integration and its relationship to the job. In some International recommendations, as mentioned, it is pointed out the need of youth work as way for better integrating the minors in the society. Nonetheless, Italy could not be perfectly in line with these provisions, because it is not allowed unaccompanied migrants to work, differently from accompanied migrants or Italian citizens.

The Ministry of Labour clearly established that the residence permit for minor age does not allow to unaccompanied minors to work[50].

The situation changes considering the possibility of work for accompanied minors and Italian minors, who are equally treated: they can work since the 16 years old respecting specific conditions, and before, with the guarantees provided for the employment of children.

Regarding this provision, the Italian Constitutional Court[51] pointed out some key points in relation to the conversion of the residence permit for minor age into a permit for work, required by a migrant subjected to guardianship. The Court remarked that art. 32 of Legislative Decree 286/1988 has to be interpreted in an extensive and constitutional-oriented way, in the sense that it allows the conversion of the permit for family reason to accompanied migrants and unaccompanied

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[49] Art. 32 D. Lgs. 286/1998, ibid.

[50] Ministry of Interior, Department of Public Security, Circolare n- 300/C/2000/785/P/12-229.28/1^DIV, Permessi di Soggiorno per minore età rilasciati ai sensi dell'art. 28, comma 1 letta a) del D.P.R. 394/99, 13 November 2000, available at : https://www2.immigrazione.regione.toscana.it/?q=norma&doc=/db/nir/DbPaesi/circolari/_circolare-300-2000.xml&datafine=20211009 .

[51] Corte Costituzionale, 23 May 2003, no. 198, available at https://www.giurcost.org/decisioni/2003/0198s-03.html .

migrants living in foster families, but also for unaccompanied migrants subjected to guardianship.

It is unquestionable that permitting the youth work could enhance the integration and inclusion in the community and help minors to be more independent, representing a possible durable solution for their independence. Additionally, legalizing the work for unaccompanied migrants could avoid the illegal entry or irregular work.

Unfortunately, the Zampa Law did not solve this problem and lose the opportunity to fix this leak in the system. It revealed to be a family-oriented law, undermining the guarantees for unaccompanied migrants in transition and preferring the automatic renewal for children with a family connection.

4 Final considerations

International provisions analysed reveal a complete framework for protecting unaccompanied children under 18 years, being a duty on national authorities to consider all their needs and the different conditions of each child, taking into account that case-by-case assessments are always necessary.

The European laws also echoed the principles enshrined at the International level and particularly the best interest of the child. By contrary, NGOs' reports and cases law reveal a gap between the legal prescriptions and the realm.

It is undoubtful that the migration crisis in 2015 and the current migratory movements pose the system of each Country, especially the front-line States under stress, but this cannot justify the violation of fundamental human rights, as demonstrated by ECHR case law.

Detention, refoulement and expulsions are the main concerns, and it is advisable the cease of all these practices, as happened in Greece, with the abrogation of the protective custody.

Moreover, the presumption of the minor age, as well as the benefit of the doubt should be strengthened, avoiding abuses and diminution of guarantees. As correctly affirmed by the Italian Court of Cassation, it should not be considered valid an assessment based only on one exam, avoiding the multidisciplinary approach and not indicating the margin of mistake for applying the presumption of minor age.

It would be desirable a major attention on the transition to adulthood, for integrating in an effective manner minors in the communities, also through youth work and removing the divergent treatment between the status of migrant minors for the renewal and access to work.

Minors should experience the community in all the aspects for growing and be independent, in a process of ongoing integration. In some States there are some project, at the local level, aimed at creating training courses and traineeship for migrants, but this actions should be promoted at the national level, preventing different situations depending from the living place.

The discipline has clearly some good basis and some good practices have been developed, but also some critical aspects, as highlighted in the ECHR cases law.

Even if International laws designed a system where rights and guarantees of minors prevail on public security and border defence, this is not always put in practice by public authorities.

For the next future it will be desirable not only an homogeneous legal framework in all the States, but also an equal level of application in practice as a consequence of the concrete effort for implementing an equal treatment and equal rights for EU and foreign children.

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