

UNIVERSITY OF TARTU
SCHOOL OF LAW
Department of Public Law

Irimi Kaci

**UNACCOMPANIED CHILDREN - THE EFFECTS OF THE
ASYLUM PROCESS ON THE RIGHT TO EDUCATION AND
HEALTHCARE:
CASE STUDY OF ITALY AND THE UNITED KINGDOM**

Master's Thesis

Supervisor:
DPhil Oxford Merilin Kiviorg

Tallinn
2023

To my family,
May my achievements always reward your efforts!

TABLE OF CONTENTS

Introduction.....	4
1. Identifying human rights violations along the journey to Europe of unaccompanied children.....	10
1.1 Introduction.....	10
1.2 Definitions and international legal framework.....	10
1.3 Human rights violations before unaccompanied children leave their country.....	13
1.4 Human rights violations during the journey.....	16
1.5 Arriving in the “safe land”	18
1.5.1 The best interest of the child.....	19
1.5.2 The uncertain legal status of unaccompanied children.....	22
1.5.3 The age-assessment procedure.....	23
2. UK and Italy, an understanding of the effects of the age assessment procedure and international law over the determination of the legal status of unaccompanied children.....	27
2.1 Introduction.....	27
2.2 How the United Kingdom child protection system shapes unaccompanied children’s future? The case of R (MA and HT) v Secretary of State for the Home Department [2022]	27
2.2.1 The case.....	28
2.2.2 UNHCR observations on the National and Borders Act.....	35
2.2.3 UNHCR observations on the Illegal Migration Bill.....	37
2.3 Italy, the national policies on the protection of unaccompanied children and the implementation of international law, specifically EU law, the case of Darboe and Camara v. Italy (Application no. 5797/17), Council of Europe: European Court of Human Rights, 21 July 2022.....	39
2.3.1 The case.....	39
2.3.2 International law and practice.....	42
3. The consequences of the uncertain legal status on unaccompanied children education and healthcare.....	48
3.1 Introduction.....	48
3.2 The right to education.....	49
3.3 The right to health.....	55
Conclusions.....	61
Saatjata Lapsed – Varjupaigamenetluse Mõjud Õigusele Haridusele Ja Tervise Kaitsele: Itaalia Ja Ühendkuningriigi Juhtumid – Resüme.....	65
List of abbreviations.....	66
Bibliography.....	67

"There are far more reasons that push children to leave their homes and fewer pull factors that lure them to Europe. But for those who do aim to come to Europe, the allure is the chance to further their education, find respect for their rights and get ahead in life. Once they reach Europe, their expectations are sadly shattered."

- Afshan Khan, Regional Director for UNICEF in Europe and Central Asia.

INTRODUCTION

Wars, persecution, the worsening of internal security, conflict, violence, poverty, and lately climate change have led to massive departures of the civilian population in recent years, especially from Africa, Southern Asia, and the Middle East. The issue of refugees is not new in terms of international law, as the most important legal instrument behind it, dates back in the last century, the 1951 Refugee Convention and its 1967 Protocol¹, principles of which have become customary law.

The phenomenon of these massive departures of people had a culminating moment, in 2015 when more than a 1.2 million asylum seekers submitted their asylum claims in the European Union countries.² Even though the European Union was not prepared for these flows, implemented numerous responses, some of them worked well, some less. Measures such as responsibility sharing, externalization (with the EU-Turkey Statement³), safe third country concept, as well as new safe countries of origin were taken. Some responses were also focused on the departures, through creating funds to help people at their homes. Besides the efforts of the EU, Member States also had their responses to the crisis. For example, The European Resettlement Scheme is a voluntary scheme through which the Member States agreed to resettle a specific number of people in need, due to the disproportionate numbers of refugees, asylum seekers and migrants that the states were receiving. But this also led to

¹1951 Refugee Convention and its 1967 Protocol Resolution 2198 (XXI) adopted by the United Nations General Assembly accessed 15 February 2023 <https://www.unhcr.org/3b66c2aa10> (hereinafter the 1951 Refugee Convention)

² The UN Refugee Agency "2015: The year of Europe's refugee crisis" available at <https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html>

³ European Council "EU-Turkey statement, 18 March 2016" available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

differences between them in terms of selection criteria, the number of places, and the length of procedures.

In addition, the measures of family reunions have changed, and the number of unaccompanied minors has increased. Not only the European Union countries received high number of migrants, but the crisis was also defined as a global crisis. For this reason, there was also a global response. The UN proposed and implemented numerous negotiations and guidelines to provide help and support to migrants. Although the main definitions and regulations regarding the protection of children and unaccompanied migrant children could already be found in the international legal framework. Therefore, this thesis considers an approach of three branches of law, international refugee law, human rights, and humanitarian law.

A child, as per definition of the Convention on the Rights of the Child, is:

”...every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁴

And an unaccompanied child is considered so when:

“Separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so.”⁵

Unaccompanied children are granted the right to apply for asylum, but, as for adults, they must go through a process of investigation and due to the tremendous increase in unaccompanied children seeking refuge, also the period of investigation is long. Not only the process itself, but also measures during the investigation contribute to the length of this period. One of the procedures that contributes in the length of the investigation is the age assessment procedure. A process that is carried out when an individual’s age is disputed or unknown.

It is important to consider the age because age forms the basis for their legal recognition. For instance, in 2016, 1,945 unaccompanied children claimed asylum in Britain; of these, 918 of the asylum applicants had their age disputed.⁶ Meanwhile the Committee on the Rights of the Child has made clear that this requires taking positive steps to ensure that the procedure of age assessment should be as efficient, timely, accurate and safe as possible and that, where a margin of error does prevail in borderline cases, the benefit of the doubt is automatically applied.⁷ It is crucial to distinguish children from adults in the asylum system because it

⁴ Art. 1 of the Convention on the Rights of the Child adopted 20 November 1989 by General Assembly resolution 44/25. (Hereinafter CRC), available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <https://www.refworld.org/docid/3ae6b3360.html> [accessed 25 March 2023]

⁶ Prabhat, D., Singleton, A., & Eyles, R. (2019) “Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK” *International Journal of Children’s Rights*, 27(2), pp 228-250.

⁷ Committee on the Rights of the Child, General Comment No.6, Treatment of unaccompanied and separated children outside their country of origin, 2005, para. 31 (A), available at: <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

determines how an asylum claim is processed and the state support received, notably education, health and welfare services to meet a child's needs. Though the age assessment is a procedure that has complications and is not always effective, and prolonged delays in the procedure contribute to preventing them from obtaining a secure legal status. In this way, creating situations of legal limbo functions as a type of migration management through “obstruction and circulation”, described by Anselm’s de Vries and Guild as a “politics of exhaustion”.⁸

Unaccompanied children are often particularly vulnerable along their journey, and after arrival, therefore they are classified and should be treated as a unique population requiring more care and immediate attention. However, after arrival, they enter in an uncertain limbo of their legal status that threatens also their basic rights. The word “limbo” in this topic is used to describe various situations of the asylum seekers, that can be summed up in a lack of certainty and security regarding their legal position in the State they are currently in or under the control of.⁹ This might come because they are legally removable, but when and if they will be removed is unknown; may be because the right of permission to remain is short term and when that period concluded the right to remain may not be renewed, may be because they are afforded protection from refoulment but refused other rights or status.¹⁰ During this time children live with an ambiguous migration status, and the UN Committee on the Rights of the Child stressed the need to grant children a “secure legal status”, irrespective of their reason to stay.¹¹

This causes several problems to children, mainly psychological as it increases their lack of trust in national authorities and their discouragement to attend education, and in some cases, children choose to run away and find their own means to face the challenges in the new country. The above forms the basis of the research problem in this thesis. It can be argued that there is a certain unwillingness of the states to deal with the problem, which is also evident, for example, in reporting cycles of the states under relevant human rights conventions, such as the UN Convention the on Rights of Child.¹²

⁸ Leonie Ansems de Vries & Elspeth Guild, “*Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management*” *Journal of Ethnic and Migration Studies* (2019) p. 63.

⁹ Joseph Lelliott, “*Unaccompanied Children in Limbo: The Causes and Consequences of Uncertain Legal Status*”, *International Journal of Refugee Law*, Volume 34, Issue 1, March 2022, p. 4, <https://doi.org/10.1093/ijrl/eeac024>

¹⁰ *Ibid.* p. 23

¹¹ Committee on the Rights of the Child, ‘General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin’, UN doc CRC/ GC/2005/6 (1 September 2005) para 89. [Hereinafter General Comment No 6 (2005)]

¹² UN Convention on the Rights of Child available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

Children are considered the most vulnerable part of our society and the most valuable part at the same time, their future, the future of the entire society has its roots in the present. Defining the problems, highlighting the consequences, and suggesting better paths to be followed in order to protect their basic rights at any stage and in any status is the aim of this research. Thus, the more concrete aim of this research is to analyze the role of the international legal framework to deal with the uncertain legal status of unaccompanied children through an examination of the most relevant legal texts written on the matter. This framework is used to assess legal problems that still exist and continue to have grave consequences on children's rights with the example of Italy and the United Kingdom. For achieving this aim following a research question need to be asked:

1. Whether and how does relevant international law regulate rights of unaccompanied migrant children? Does international law regulate age assessment?
2. What are the duties of the state regarding those children's right to education and right to health?
3. How do the United Kingdom and Italy protect unaccompanied children that seek refugee status in their territory? Is the level of protection in compliance with international law? Does EU law provide any further guidance as to the age assessment?

As numbers of unaccompanied children seeking protection are increasing, so does the focus on the topic. Migrant children's rights have a high visibility in terms of research done by different scholars. Research done by Jacqueline Bhabha¹³, Dominic McGoldrick¹⁴, and G.S. Godwin-Gill¹⁵, have crucial importance for clarifying the legal framework regarding children's rights. However, there is a lack of research on specific countries under consideration in this thesis. There is also lack of up to date research addressing specific rights concerning migrant children, especially right to education and to healthcare during the uncertainty period until they are granted refugee status in the country of arrival.

The first chapter will provide a comprehensive analysis of the relevant jurisprudence and the international mechanisms that offer redress for human rights violations committed against unaccompanied children refugees. The human rights violations that occur before fleeing,

¹³ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), p. 8.

¹⁴ Dominic McGoldrick "The United Nations Convention on the Rights of the Child", *International Journal of Law and the Family*, Volume 5, Issue 2, August (1991)

¹⁵ Guy S. Godwin-Gill, "Who to Protect, how...and the Future?", *International Journal of Refugee Law* 9, 1(1997)

during and after the child has found refuge and in this part the identification of the rights violated will be of great relevance. This is important for the research because it will lay the first stone in understanding the importance of protecting unaccompanied children's rights. The second chapter of the paper will be an analysis of two countries under consideration –UK and Italy. The goal is to provide comparative analysis of two countries that received migrants in high numbers, especially in the last years, but have different approaches in welcoming them. The importance in the age assessment process and how that contributes negatively on the legal status of children will also be delivered in this part, through case law, R (MA and HT) v Secretary of State for the Home Department [2022]¹⁶ and “Darboe and Camara v. Italy (Application no. 5797/17)¹⁷”. The two cases mentioned are relevant for this work because, first, the outcome had an impact on the national legislation. In the first case, the Home Office declared unlawful a guidance that was undertaking truncated age assessments leading to cases of children considered adults unlawfully deprived of their rights as children; and in the second case, the European Court of Human Rights found severe human rights violations.

In addition, it will be relevant to compare and analyze these cases to develop answers in tackling the protection of the right to education and the right to health during the process of obtaining the protection status and after unaccompanied children are provided with protection, therefore with a legal status in the host country. Furthermore, it is beneficial to understand the obligations that these countries have towards international law, as, there is from one side, a post-Brexit situation and from the other one, in Italy, the implementation of European Union law. In addition, given the high numbers of refugees that these two countries receive gives a further reason for analysis, as the national policies are everchanging and the approach to welcome migrants is having significant development and change in both countries. It will be demonstrated in this chapter, how the change in the national policies or the lack of implementation of international obligations as well is directly affecting the right to education and the right to health of unaccompanied children.

After a general overview of the international regulations that affect unaccompanied children and how those regulations changed over the years and after analyzing the differences in the approach towards children migrants in the United Kingdom and Italy, the third chapter of this paper will be focused specifically on the right to education and the right to health care.

¹⁶ England and Wales High Court (Administrative Court Decisions), case number: [CO/428/2021 CO/524/2021](http://www.bailii.org/ew/cases/EWHC/Admin/2022/98.html) R (MA and HT) v Secretary of State for the Home Department [2022] <http://www.bailii.org/ew/cases/EWHC/Admin/2022/98.html>, [2022] EWHC 98 (Admin) [accessed 20 February 2023] (Hereinafter R (MA and HT) v Secretary of State for the Home Department)

¹⁷ European Court of Human Rights “Darboe and Camara v. Italy (Application no. 5797/17), Council of Europe: European Court of Human Rights, 21 July 2022, available at: <https://www.refworld.org/cases,ECHR,62e160514.html> [accessed 20 February 2023] (Hereinafter ECHR: Darboe and Camara v. Italy)

This chapter explores the main consequences that derive from the lack of implementation of international law in the child-sensitive policies that States must take in consideration when proceeding an investigation on the status or the right for protection of the unaccompanied children that reach their borders. In addition, it addresses the challenges that unaccompanied children face in the country of arrival, those depending on the decisions of the host State and those challenges that they face due to their story and background, and how these challenges can be tackled with the support and especially will, of the State. Furthermore, for the mere purpose of comparing and identifying the issues, also a perspective of the challenges that the States themselves face is delved in this section.

The first method used in this research will be qualitative. An analyze of the phenomenon of the human rights violations that occur to unaccompanied children during their life in seeking protection and an examination of the international and national law, policies, case law that are supposed to protect them is important for the goal of this research, because it will be the first examination and identification of the importance that the right to education and right to health have for unaccompanied children. Without doubt, both basic rights that are crucial to every child and human, but identifying the vulnerable position that unaccompanied children migrants are towards having these rights guaranteed makes the goal of the research gain further importance.

The second method used is a comparative method that is beneficial to analyze the two case studies: Italy and the United Kingdom. There are multiple factors contributing to the interpretation of the basic rights analyzed in the third chapter of the thesis. This part of the paper has a more interdisciplinary approach, with the focus of course on the legal aspect – the rights involved. Meaning that, it is important to use a method that combines the social and political perspective together with a legal one, because that contributes to providing a detailed examination of what really affects the limited or denied possibility of unaccompanied children migrants to have these basic rights respected during the process of examination of their legal status. Together with the interdisciplinary approach also as mentioned, in this thesis, three different branches of law are combined, international refugee law, human rights and humanitarian law and this explains also why the issue is of a global importance.

Keywords: unaccompanied children; age-assessment; right to education; right to health.

1. IDENTIFYING HUMAN RIGHTS VIOLATIONS ALONG THE JOURNEY TO EUROPE OF UNACCOMPANIED CHILDREN

1.1 Introduction

As long as there are ongoing and unresolved conflicts over the world, there will always be children, whether with their family or alone, that decide to leave their country in search of a better future.

The decision to leave comes from continuous human rights violations that they experience in their country, due to conflict, war, poverty, violence etc. The protection of children falls within the international human rights regime, and these international legal instruments will be defined in the first part of this chapter. The human rights violations that they experience continue their long journey to seek protection, the right to life for instance, as not all of them make it alive to the country of destination. These rights will be identified further in this chapter and the responsibility of international law to protect them and assist them will be analyzed.

The aim of this part is to understand why unaccompanied children need further protection, by explaining, through collecting data from different sources, all the stages of their journey and how it affects them. The purpose, while creating a sort of timeline of their path, is, as mentioned above, to explain also the international legal framework that is behind and strongly affects this journey.

The questions posed in this chapter are: What procedures are affecting the legal limbo situation that unaccompanied children are in? How international law is affecting their journey from the beginning? What conclusions can be drawn after this analysis?

1.2 Definitions and international legal framework

In 2016 the United Nations High Commissioner for Refugees (UNHCR), stated that the world is facing the biggest refugee and displacement crisis since World War II.¹⁸ And a report of the UNHCR, at the end of 2021, asserted that children make up almost half (41%) of the 36.5 million refugees and asylum-seekers.¹⁹ Regardless of their status, a migrant, asylum-seeker or refugee, what should be in focus is always the principle of the best interest of the child. Various international treaties addressed the need for protection for children, through the

¹⁸ UN Secretary-General Ban Ki-moon 2016, available at <https://press.un.org/en/2016/sgsm17670.doc.htm>

¹⁹ UNHCR “Refugee Population Statistics Database” 2021, available at: <https://www.unhcr.org/refugee-statistics/>

gaps in defining children or building policies focusing on the age brought to lack appropriate attention to the child's best interest principle.

Although the problem is with a high contemporary interest, refugees and displacement as a phenomenon has existed since centuries. After the World War II, the adoption of the Universal Declaration on Human Rights in 1948, had a mentioning, even though not direct, of children, in its article 25:

*“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”*²⁰

Also, the International Covenant on Civil and Political Rights, mentions children in article 24, though as a general right holder, not specifically for children's refugees or children's migrants:

*“1. Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.”*²¹

Then, the International Covenant on Economic, Social and Cultural Rights, does mention children in its article 10, but again no specific protection for children with a different status.

Art. 10, para. 3:

*“Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.”*²²

As it can be noted, there was no specific reference to children, to define them, or to children as asylum-seekers, refugees, migrants, that need further protection due to their specific vulnerability. Not until the adoption of the Convention on the Rights of the Child, in 1989 from the United Nations General Assembly. A crucial international legal instrument, with

²⁰Article 25 of the Universal Declaration of Human Rights

²¹Article 24 of the International Covenant on Civil and Political Rights

²²Article 10, para. 3 of the the International Covenant on Economic, Social and Cultural Rights

more countries that have ratified it than any other human rights treaty in history – 196 countries have become State Parties to the Convention.²³ For the first time there is a definition of the term child, in article 1 of the Convention:

“...a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”²⁴

The Convention's most important articles used also for the purpose of developing this chapter are article 3 and article 9, in which the child's best interest principle is reflected.

Article 3, para. 1:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child** shall be a primary consideration.”²⁵*

And article 9, para. 1:

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.”²⁶

This research focuses on the rights of unaccompanied children, and the definition of unaccompanied children or separated children, is also given and specified in international law. The General Comment no. 6, of the Committee on the Rights of the Child “Treatment of unaccompanied and separated children outside their country of origin” (thereafter General Comment no.6):

“Unaccompanied children (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”²⁷

²³ UN Treaty body database available at:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en

²⁴ Article 1 of the CRC

²⁵ Article 3, para. 1 of the CRC

²⁶ Article 9, para. 1 of the CRC

²⁷ General Comment No. 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin” <https://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf>

The EU also gives a very similar definition, with art. 2 (I) of Directive 2011/95/EU:

*“- who arrives on the territory of an EU Member unaccompanied by the adult responsible for them by law or by the practice of the EU Member State concerned, and for as long as they are not effectively taken into the care of such a person or
- who is left unaccompanied after they have entered the territory of the EU Member State.”*²⁸

It is important to clarify the distinction between migrant, asylum seeker and refugee, because in this research the three stages will be used, from the moment they are asylum seekers until they obtain the status and become refugees. By definition, an asylum seeker is “an individual who has sought international protection and whose claims for refugee status have not yet been determined.”²⁹ And a refugee, by definition of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, article 1, para. 2:

*“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*³⁰

Instead, the definition for migrant is not specifically identified in international law, but most experts agree that an international migrant is someone who changes his or her own country of usual residence, irrespective of the reason for migration.³¹

1.3 Human rights violations before unaccompanied children leave their country.

Children’s vulnerability begins from the reasons why they start the journey, until their life in the country of destination. The reasons why children chose to leave their hometown can be most of the time the same ones as adults, but sometimes even more tragic. They leave to escape from war, from poverty, from persecution, armed conflict, religious, racial, or political persecution, sometimes with their family, sometimes alone they risk their life in search for a better future. The displacement itself is the result of human rights violations, the right to life,

²⁸ Art. 2(l) of Directive 2011/95/EU of the European Parliament and of the Council, 13 December 2011 “*On standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*” (Recast Qualification Directive)

²⁹ UNHCR “Asylum and migration” – notions, available at: <https://www.unhcr.org/asylum-and-migration.html>

³⁰ Article 1, para. 2 of the 1951 Refugee Convention.

³¹ United Nations Department of Economic and Social Affairs – notions – available at: <https://refugeesmigrants.un.org/definitions>

the right to physical integrity, right to equality, the right to non-discrimination, the right to personal liberty, etc.

They escape because everything sounds safer than what they leave behind, even though the journey they take might result in the loss of their loved ones or in their own death. It is easy to identify the reasons they flee just by looking at the statistics of where refugees come from, while more than half of them come from only five countries; Syrian Arab Republic, Venezuela, Ukraine, Afghanistan, South Sudan.³² Syria, remains the world's largest refugee crisis, because of conflict, poverty, unemployment and the last years also disastrous natural phenomenon such as torrential rains, strong winds and floods, with children as the most affected component growing up knowing nothing but the crisis.³³ More than a third of them do not have access to education and an increasing number of Syrian children have fallen victims of child labor.³⁴ While in a similar way, Venezuelans have fled the country because of political strife, human rights abuses and lack of economic opportunity.³⁵ An entire generation is risking to be left displaced and suffering from trauma, with difficult access to school and children who are being separated from their parents are increasing in numbers.³⁶ Ukraine has recently experienced the need for humanitarian assistance. The war which has caused widespread deaths, also, in one year forced millions of people to flee their homes.³⁷ Afghan refugees are one of the most protracted refugee crises in history, now the third generation of Afghan children are born in exile, because of conflict and instability that left millions of people on the brink of hunger and starvation.³⁸ The impact on children is devastating, especially girls that are now even out of school. They are suffering from acute hunger, a climate crisis, and a collapse of the country's economy.³⁹ South Sudan similarly is in a dangerous situation of armed conflict, economic disaster, disease, and hunger and the majority of those who are fleeing are women and children (63% in 2019).⁴⁰ Children often have been separated from their parents and are traveling alone and most of the times they are survivors of violent attacks and sexual abuse.⁴¹

So clearly, they decide to leave, because however the journey will be, it will never be as horrific as the present they are living in. They also escape persecution, discrimination

³² Ibid. UNHCR "Refugee Population Statistics Database" 2021.

³³ UNHCR "Syria Refugee Crisis Explained" available at: <https://www.unrefugees.org/news/syria-refugee-crisis-explained/>

³⁴ Ibid.

³⁵ UNHCR "Venezuela Crisis Explained" available at: <https://www.unrefugees.org/news/venezuela-crisis-explained/#Can%20refugees%20in%20Ethiopia%20go%20to%20school?>

³⁶ Ibid.

³⁷ UNHCR "Ukraine Emergency" available at: <https://www.unrefugees.org/emergencies/ukraine/>

³⁸ UNHCR "Afghanistan Refugee Crisis Explained" available at: <https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/#How%20long%20are%20most%20Afghan%20refugees%20displaced%20for>

³⁹ Ibid.

⁴⁰ UNHCR "South Sudan Refugee Crisis Explained" available at: <https://www.unrefugees.org/news/south-sudan-refugee-crisis-explained/#When%20did%20the%20crisis%20in%20Yemen%20begin>

⁴¹ Ibid.

(homosexuality, in some countries could mean death penalty), they escape because they are targeted with the purpose of exterminating them because they are a minority, they escape because if they stay, they might be recruited and become child soldiers or for girls, forced into marriage or female genital mutilation. They leave to escape a very dangerous future. It reminds me of a very popular poem, by Warsan Shire, called “Home”, which I will divide the verses as the stages of the journey I am building up:

*“no one leaves home unless
home is the mouth of a shark.
you only run for the border.
when you see the whole city
running as well.
your neighbors running faster,
than you, the boy you went to school with
who kissed you dizzy behind,
the old tin factory is.
holding a gun bigger than his body,
you only leave home,
when home won't let you stay.
no one would leave home unless home.
chased you, fire under feet,
hot blood in your belly.
...
you have to understand,
no one puts their children in a boat.
unless the water is safer than the land.
who would choose to spend days?
and nights in the stomach of a truck
unless the miles traveled
meant something more than a journey.”⁴²*

⁴² “Home” Warsan Shire <https://www.amnesty.ie/wp-content/uploads/2016/06/home-by-warsan-shire.pdf>

1.4 Human rights violations during the journey

The journey is not always successful and sometimes longer than geographically possible. This is because of agreements and state policies. The European Union and Turkey deal, for example, is an agreement that also had its negative impacts and made the journey even more dangerous, as it made people forced to undertake a longer journey to reach Europe.

Depending on the country of provenience also the country of arrival differs, geographically Italy and Greece, being at the edge are the most “affected”. For Syrians for example, reaching Turkey was not that hard, though at the border with Turkey, there is Greece, an entry to the much desired, Europe. To stop these entries, stated as ‘irregular migration to Europe’, on March 18th, 2016, the EU-Turkey⁴³ a statement was announced. The goal was, for Turkey to take all the necessary measures to stop people traveling to Greece and anyone who reached the Greek shores could be returned to Turkey, and for doing this, for every Syrian returned from the islands, the EU Member States would accept one Syrian refugee who had waited inside Turkey. In addition, Turkey would receive an amount of money to face the humanitarian issue in the country and Turkish nationals would be granted visa-free travel to Europe. It worked to reduce just in small amounts the number of people taking that risky journey in the sea, but it created a limbo situation as now Turkey is considered a “safe third country” by a Greek Joint Ministerial Decision⁴⁴ which designated Turkey as a ‘safe third country’ for people from Afghanistan, Bangladesh, Pakistan, Somalia, and Syria, for Greece so they can send refugees back, but Turkey is not accepting returns, so people are stuck in a legal limbo with no rights granted. The so-called “push-back” practice is not only happening between Greece and Turkey. Between Libya and Italy or Spain there have been also deadly consequences of this practice. As of a report from UNHCR, only in 2018 an estimated 2,275 people died in the Mediterranean, an average of six people per day.⁴⁵ Sometimes, large numbers of often traumatized and sick people were kept at sea for days before permission to disembark.⁴⁶ The refugees goal is of course either Italy or Malta, not only because entering in Europe sounds like better possibilities but also because the majority of those who reach Libya are detained, often in appalling conditions, from the Libyan Search and Rescue Region (SRR).⁴⁷ Most refugees entered the European Union through three primary routes: the Central Mediterranean route from North Africa to Italy, the Eastern Mediterranean route from Turkey

⁴³ European Council Press release 18 “EU-Turkey statement, 18 March 2016”

<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

⁴⁴ Asylum Information Database „*Safe third country: Greece*” on the decree: JMD 42799/2021.

[\(https://asylumineurope.org/reports/country/greece/asylum-procedure/the-safe-country-concepts/safe-third-country/\)](https://asylumineurope.org/reports/country/greece/asylum-procedure/the-safe-country-concepts/safe-third-country/)

⁴⁵ UNHCR „*Desperate Journeys: Refugees and migrants arriving in Europe and at Europe’s borders, January – December 2018*” available at: <https://www.unhcr.org/desperatejourneys/>

⁴⁶ Ibid.

⁴⁷ Ibid.

to Greece, Bulgaria, and Cyprus, and the Western Mediterranean route from North Africa to Spain⁴⁸ Many people, especially in the last few years, have tried to cross from France to the United Kingdom.

During these journeys, the cases of abuse, especially from smugglers of course affect the most vulnerable, the unaccompanied children. Also, push backs, despite the principles of European or international law, are still a practice that is used a lot in the borders and especially with children.⁴⁹ Human Rights Watch have reported devastating numbers of loss of life in the Melilla border, from Morocco to Spain, by climbing the high chain-link fences surrounding Melilla.⁵⁰

When barriers to entering the EU legally are found, people look for illegal ways and paths to enter the Schengen area.⁵¹ Children are in a desperate situation, and they are able to do everything they can to reach the destination, and this exposes them to even more risks and human rights violations. It seems that there is a huge gap between what is written in the international legal texts and what is really done in order to protect this vulnerable category. The journey takes a long time and very often children have to pay for each stage. An Eritrean refugee after getting out of their country they stay in a refugee camp in Ethiopia and with a truck, for which they pay, they go through Sudan and Sinai desert, and it is not unusual that they at any stage are held hostage and tortured until their family members pay ransom.⁵² They take the risk knowing they can die. The family sends their children, usually the eldest, knowing it might be the last time they are seeing them. Children have done everything to survive, and this sense of survival will not leave them once they reach Europe, they do not trust anyone and in order to survive they can do everything.

Further rows from the poem of Warson Shire,

*“...no one would choose to crawl under fences,
be beaten until your shadow leaves you,
raped, then drowned, forced to the bottom of
the boat because you are darker, be sold,
starved, shot at the border like a sick animal,*

⁴⁸UNHCR “Desperate Journeys: Refugees and migrants entering and crossing Europe via the Mediterranean and Western Balkans routes” Februar 2017, available at: <https://www.unhcr.org/news/updates/2017/2/58b449f54/desperate-journeys-refugees-migrants-entering-crossing-europe-via-mediterranean.html>

⁴⁹ Ibid.

⁵⁰ Human Rights Watch “Morocco/Spain: Horrific Migrant Deaths at Melilla Border” June 2022, available at: <https://www.hrw.org/news/2022/06/29/morocco/spain-horrific-migrant-deaths-melilla-border>

⁵¹ European Parliament “Walls and fences at EU borders” available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI\(2022\)733692_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI(2022)733692_EN.pdf)

⁵² Marjan Schippers “Children on the move: A guide to working with unaccompanied children in Europe” European Guardianship Network, February 2021, p. 23. <https://www.egnetwork.eu/wp-content/uploads/2021/10/Children-on-the-move-A-guide-to-working-with-unaccompanied-children-in-Europe.pdf>

*be pitied, lose your name, lose your family,
make a refugee camp a home for a year or two or ten,
stripped and searched, find prison everywhere... ”⁵³*

1.5 Arriving in the “safe land”

The list of the challenges that children face during migration is indeed not exhaustive, and they put all their energy in survival and their focus on reaching the beloved Europe, but once they reach their destination a whole new set of challenges awaits them, and States need to provide them with the necessary protection. This part of the chapter is crucial to the thesis, as the situation of children once they reach the country of destination is what needs to be analyzed in further details in order to give the answer to the main question posed in this chapter. To get there is important to determine which are the main challenges, and human rights violations, that unaccompanied children face once they reach Europe and how is it “handled” with the current policies in place. The country of arrival can be the destination and often it can be a transit country. The procedures very often are long and there is a lot of bureaucracy. In addition, a further analysis of the principle of the best interest of the child is given in this part as it is important to the further examination of all the procedures in the “life” of an unaccompanied minor. The lack of statistics and information about human rights violations faced by unaccompanied children is common in every country.

“And if you survive and you are greeted on the other side.

with go home blacks, refugees.

dirty immigrants, asylum seekers

sucking our country dry of milk,

dark, with their hands out

smell strange, savage -

look what they've done to their own countries,

What will they do to us?

...

he indignity of everyday life

more tender than fourteen men who

look like your father, between

your legs, insults easier to swallow.

⁵³ “Home” Warsan Shire <https://www.amnesty.ie/wp-content/uploads/2016/06/home-by-warsan-shire.pdf>

*than rubble, then your child's body
in pieces - for now, forget about pride.
your survival is more important.*"⁵⁴

1.5.1 The best interest of the child

Once they reach Europe, the assistance given differs from one State to another, which also creates disparities in the interpretation of the best interest of the child, and very often these children find themselves in countries with a completely different culture, language, and long processes in order to give them a status that will permit them to have an equal access to opportunities and rights as their peers. Some of them want to reunite with their family or relatives somewhere in Europe and some of them do not want to stay in the first country they arrived. The Dublin III Regulation⁵⁵ in this matter plays a crucial role, in which family reunification is provided, though it leaves a certain gap and space for interpretation on the issue of unaccompanied children that do not have any family member to reunite with. It's article 8, para. 4 states that:

*"In the absence of a family member, a sibling or a relative (...), the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor."*⁵⁶

It also can be interpreted that the unaccompanied child can be send back and these transfers are not always safe and in respect to the best interest of the child, as entering from a country where geographically possible, does not mean that the children want to stay there, though the right to be heard is also one of the main principles of the CRC. Because although the EU member States need to follow the same principles, it does not happen, and children are treated differently in different States. As Leibel summed up:

*"It is claimed – not seldom by making explicit reference to the CRC – that the child's wellbeing or the best interest of the child is the premise, yet in the end the state's interests in having an uncomplicated, smooth official procedure or in the "securing of the wellbeing" of the native population is the actual premise".*⁵⁷

⁵⁴ Ibid.

⁵⁵ Regulation (Eu) No 604/2013 Of The European Parliament And Of The Council Of 26 June 2013 "Establishing The Criteria And Mechanisms For Determining The Member State Responsible For Examining An Application For International Protection Lodged In One Of The Member States By A Third-Country National Or A Stateless Person (Recast)" (Hereinafter Dublin III Regulation)

⁵⁶ Article 8, para. 4 of the Dublin III Regulation

⁵⁷ Liebel, M. (2012). "Children's Rights as Living Rights: Why Human Rights Only Make Sense. if They Are Connected to the Lives of Children" In: Revista de Asistentă Socială, anul XI (2/2012), pp. 13-26.

Of course, the economic situation of the country, the welfare system, and politics affect the way the unaccompanied children are welcomed and treated. And as per that principle stated above, unaccompanied children do also face a further risk. They do not fill the application in the first country they arrive, and they continue their journey illegally to reach the country of destination, which exposes them to more danger, as they might become victims of criminal organizations or traffickers and Bhabha in an analysis called this the “domino effect”.⁵⁸ Other challenges and violations of rights that are faced by unaccompanied minors, identified by the 10th European Forum on the rights of the child: “The protection of children in migration”, are:

- Lack of respect of the child's right to primary consideration of their best interests
- Dangers faced while irregularly crossing EU external borders, including transactional sex to finance the onward journey.
- Children in families may face family separation during their journeys, at borders and in countries of arrival and residence, for example in the context of overcrowding/traveling in large groups of people, border closures, deliberate actions by smugglers, and apprehension or detention by state authorities of a parent
- Lack of access to protection while following EU migration routes undetected
- Gaps in registration and identification of unaccompanied children, leading also to gaps in referral to appropriate protection services
- Reception: lack of safe reception/lack of age-appropriate reception capacity/poor reception conditions/lack of focus on quality of care/lack of range of options including family based care/lack of inspection and monitoring
- The tension between their country of destination, chosen because of family ties, and measures in place to prevent secondary movements.
- Lack of procedures and mechanisms for identification of vulnerabilities in reception and detention centers
- Procedural and other obstacles to family reunion within the EU and family tracing challenges: under-developed (cross-border) mechanisms, lack of information, unavailability/unwillingness of family in EU to take care of the child, delays in initiating tracing and establishing and verifying family links.
- The risk of administrative detention, including the risk of detention in inappropriate conditions (lack of separation from adults, etc.) or due to lack of space in open reception and lack of appropriate alternatives

⁵⁸ Bhabha, J. (2004). Child Migration and Human Rights in a Global Age.pg. 245, 246

- Lack of inspection and independent monitoring of reception and detention centers
- Risk of sexual violence, sexual exploitation and trafficking in reception and detention centers, as well as along the route
- Gaps in guardianship systems (e.g., lack of (trained) guardians, overstretched guardians; no immediate allocation of guardian)
- Lack of legal advice and/or representation
- Lack of reliable information and advice and lack of access to child-specific information and provision of information in a child-friendly manner
- Lack of delivery of a good counter-narrative to that of traffickers and/or smugglers
- Lack of, or limited, access to education and adequate healthcare, including psychosocial care
- Long delays or lack of access to family reunification and transfer procedures due to the lack of efficient transnational cooperation and coordination mechanisms
- Disputed ages have a negative impact on children - invasive age assessment methods with variable degrees of results and reliability may be used.
- Age assessment procedure outcomes may be linked to the child's credibility in asylum procedures/accommodation in adult accommodation pending the outcome of age assessment procedures/lack of access to appeal procedures
- Unaccompanied children may have put their entire focus and energy on survival, the journey and arrival - when they do arrive, they are depleted, but find they have to cope with a whole new set of challenges.
- Many (unaccompanied) children are traumatized and need specialized care on arrival and have frequently not had access to (health)care during their journey.
- Lack of mechanisms to identify and implement a durable solution.
- Return to the country of origin may not be based on a best interest determination.
- Absence of child-focused country of origin information reports to inform best interest determinations
- Lack of regularization pathways/granting short-term leads to uncertainty, insecurity and limits full realization of all rights/risk of remaining in legal limbo for long periods.
- Gaps caused by lack of coordination among various services and agencies involved in the treatment of children in migration⁵⁹

⁵⁹10th European Forum on the rights of the child 29-30 November 2016 “The protection of children in migration”, pg. 9

The best interest of the child principle, which is the most important legal principle that needs to be followed while the States overcome and provide help in all these challenges, is laid down in art. 3(1) of the CRC provides:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*⁶⁰

The term is used then again in further provisions of the CRC, in specific contexts. In article 9 (separation of a child from his/her parents against their will), article 37 (treatment while in detention) and article 40 (juvenile justice).⁶¹ The General Comment no. 14 (GC 14) also provides with a list of the areas of concern that should be part of every best interest’s assessment: the child’s views (GC 14, para 53-54), the child’s identity (GC 14, para. 55-57), preservation of family environment and maintaining relations (GC 14, para. 58-70), care, protection, and safety of the child, necessary to ensure the child’s well-being, including emotional care and calculation of future risks and harm because of the decision (GC 14, para. 71-74), the state of vulnerability etc.⁶² Under these conditions, it will be developed the key issue of the following chapter, to determine whether this principle is applied first when generally defining the age-assessment procedure and then when analyzing the situation in the United Kingdom and Italy.

1.5.2 The uncertain legal status of unaccompanied children

But how, specifically, the age-assessment procedure impacts the legal limbo in which unaccompanied children find themselves once they apply for refugee status? Is important first to define what this uncertain status is and what are the general effects that it has on unaccompanied minors.

A definition of “limbo” comes from the Cambridge Dictionary:

*“An uncertain situation that you cannot control and in which there is no progress or improvement”*⁶³

And in the refugee context, is basically the time and situation where applicants are waiting for the decision of determining their refugee status or also people who have been refused the status but are considered as non-removable,⁶⁴ persons who have the protection from

⁶⁰ Article 3 (1) CRC

⁶¹ Article 9, 37 and 40 of the CRC

⁶² Van Os Carla *“Best Interests of the Child Assessments for recently arrived refugee children”* 2018, p. 13.

⁶³ Cambridge Dictionary Online ‘Limbo’ <https://dictionary.cambridge.org/dictionary/english/limbo>

⁶⁴ Benita Menezes Queiroz, *“Non-Removable Migrants in Europe: An Atypical Migration Status?”* (2018), p. 24

refoulement but refused the status⁶⁵, persons in detention⁶⁶, persons who are staying illegally in the country etc. The process is often very long, and the decision is always uncertain, and this waiting period can last even for years. This uncertain present and future affects the applicants in many spheres, it makes them more vulnerable to exploitation, makes them take not legal ways to be able to economically sustain themselves, affects their trust in the system and it damages their mental health. They know they risk return, they risk refusal, or sometimes even worse, they risk detention. This in unaccompanied children provokes even more stress and traumas and mental health problems. Though studies have found a link between these prolonged waiting times, rejected claims and mental illness.⁶⁷ Focused on their present and completely uncertain of what the outcome will be, children do not even think of a prosperous future, and the behavior that they have towards education is also negatively affected. Why would they learn the language if they are not going to stay; why would they study and work hard if they are always going to be lacking in opportunities as they do not feel equal to the others; why would they invest themselves in a country that maybe does not want them at all.

Much research has been made in this regard, though what is left less uncovered is the issue of age determination procedure, and how it affects first the uncertain legal status and then when the outcome is not exact, the life and future itself of the child. It has been clearly regulated and defined in detail in terms of international law, though it has demonstrated to be still a problematic issue.

1.5.3 The age-assessment procedure

Children, whether unaccompanied or not, should be identified once they apply for refugee status, as this is the first step for protecting them. Many of these children arriving in the countries where they seek asylum do not have their official documents to show their identity.⁶⁸

When they arrive, children of whom the age is disputed, undergo the process of age assessment, which is different from State to State, but in this part, I will focus on the common procedures and what must be applied in terms of international law when determining the age of an individual and how they should be treated once the age is determined. An effective, reliable, and human right-based mechanism for estimating the age of a person is a critical step

⁶⁵ Jean-François Durieux and Jane McAdam, “*Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*” (2004) 16 *International Journal of Refugee Law* 4.

⁶⁶ Katherine Perks and Jarlath Clifford, “*The Legal Limbo of Detention*” (2009) 32 *Forced Migration Review* 42.

⁶⁷ A Ryan, Fiona E Kelly, and Brendan D Kelly, “*Mental Health among Persons Awaiting an Asylum Outcome in Western Countries*” (2009) 38 *International Journal of Mental Health* 88, p. 104.

⁶⁸ Council of Europe, Resolution 2195 (2017) “*Child-friendly age assessment for unaccompanied migrant children*” 2017

to ensure that children can benefit from the specific measures designed to protect their rights.⁶⁹ Their rights include, special support, health care, right to education, legal representation, family reunification, safe stay, and appropriate accommodation.

First, when the age of an individual is disputed, that person should be treated as a child, and the United Nations Committee on the Rights of the Child expressed its guidance for this:

*“Ensure that children are identified promptly in border controls and other migration-control procedures within the State’s jurisdiction, and that anyone claiming to be a child is treated as such, promptly referred to child protection authorities and other relevant services, and appointed a guardian, if unaccompanied or separated.”*⁷⁰

Determining the age of an individual is not easy and until now, there is no procedure found to determine the age without a margin of error. Taking this in consideration, as a challenge faced from States, they must still follow some crucial principles to have a child rights-based approach when doing this procedure:

- The best interest of the child principle during all the procedure must be followed.
- The benefit of the doubt principle should be applied, and the person must be treated as a child until the conclusion of the procedure.
- The child must have a legal representation during all the age determination procedure.
- The child must be kept informed during all the procedure about their rights and should give the consent for all the practices.
- Medical procedures should only be used as a matter of last resort.

These principles and guidelines were given from the UN in different occasions, guiding the process in detail, though there are still countries and many cases of grave consequences on children because of the not application of this approach when undergoing the age assessment process:

“To make an informed estimate of age, States should undertake a comprehensive assessment of the child’s physical and psychological development, conducted by specialist pediatricians or other professionals who are skilled in combining different aspects of development. Such

⁶⁹ Council of Europe: “Age assessment for children in migration, a human rights-based approach”, 2019

⁷⁰ (UN Committee on the Rights of the Child, Joint General Comment 3/22, Para 32(h).)

<https://www.refworld.org/docid/5a1293a24.html>

assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes. States should ensure that their determinations can be reviewed or appealed to a suitable independent body.”⁷¹

Similarly, in General Comment no. 6:

“Age assessment should be safe, child and gender sensitive and the individual should be given the benefit of the doubt. This necessary initial assessment process entails the following: Prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities (art. 8). Such identification measures include age assessment and should not only consider the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such.”⁷²

Again, the UNHCR, in Guidelines on International Protection:

“Age assessments are conducted in cases when a child’s age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual. It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner

⁷¹ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23 <http://www.refworld.org/docid/5a12942a2b.html>

⁷² Committee on the Rights of the Child, General Comment No.6, Treatment of unaccompanied and separated children outside their country of origin, 2005, <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

that, in case of uncertainty, the individual will be considered a child. As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child. ⁷³

The theory behind is well formulated, the practice instead has caused thousands of children's life and future. However, each country also has its own policies and legal framework to follow when assessing the age of the individuals. More often, the European approach of how a child looks, results in many challenges and consequences, as a very careful and sensitive approach is needed when interviewing children from different cultural backgrounds.

Furthermore, young individuals who have experienced severe trauma might have reduced ability to recall moments, dates, and time.⁷⁴ They very often are that traumatized that have caused them serious mental health problems and the age-assessment procedure put in place does not always consider this. What in Europe can look like an adult, in different cultures it can be a child who grew up before the organically age. As seen from previous affirmations, they often come from poverty, war, and zones of conflict, they come from an exhausting journey in which they had to make life decisions, and all these experiences also affected the way they behave and look like. Very often, boys are seen as responsible for their whole family from a very young age and girls are “trained” to be wives also from a very young age and this also affects their behavior and the way they stand in front of important decisions. Although very well stated in the comments mentioned above, not always in European countries this detachment from the western perspective is applied.

⁷³ UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009
<http://www.refworld.org/docid/4b2f4f6d2.html>

⁷⁴ Bronstein, I., Montgomery, P., & Ott, E. “Emotional and behavioral problems amongst Afghan unaccompanied asylum-seeking children: Results from a large-scale cross-sectional study” *European Child & Adolescent Psychiatry*, 2013, 22(5), 285–294.

2. UNITED KINGDOM AND ITALY, AN UNDERSTANDING OF THE EFFECTS OF THE AGE ASSESSMENT PROCEDURE AND INTERNATIONAL LAW OVER THE DETERMINATION OF THE LEGAL STATUS OF UNACCOMPANIED CHILDREN

2.1 Introduction

The two countries taken into consideration the United Kingdom and Italy, are of significant importance because of the high number of migrants, changing national policies and restrictive approach towards refugees. The new Nationality and Border Act and the Illegal Migration Bill implemented in the United Kingdom directly affects the status of children that seek asylum as the age assessment procedure was revised and amended. This will be discussed in further details in the second chapter. The deterring policies aimed by the new government in Italy will also be analyzed.

2.2 How the United Kingdom child protection system shapes unaccompanied children's future? The case of R (MA and HT) v Secretary of State for the Home Department [2022]

The Home Office reports asylum statistics. In 2021, 44,778 asylum claims were made, of which 8% (3,762) were from unaccompanied children (94% of which were males). The most common nationalities of unaccompanied children applying for asylum since 2017 are Iranian, Eritrean, Sudanese, Afghan and Iraqi.⁷⁵ There were 700-900 age disputes every year between 2017-2020; this increased to 2,517 in 2021 and Between 2017-2021, 57% of asylum seekers whose age was disputed were determined to be adults.⁷⁶

The case taken in consideration is of a high importance as it was the beginning of a change in the age assessment procedure, though it remains a discussion for the end of this part, if the new age assessment policy in the Nationality and Borders Act, is a safeguard to unaccompanied children rights. While writing this research, the UNHCR shared the legal observations on the new Nationality and Borders Act and the Illegal Migration Bill, relevant parts of both will be analyzed after the case study.

⁷⁵ UK Parliament "The Use of Biological Methods in Asylum Age Assessments", March 2022 in Postnote available at: <https://researchbriefings.files.parliament.uk/documents/POST-PN-0666/POST-PN-0666.pdf>

⁷⁶ Ibid.

2.2.1 The case

The case is about two unaccompanied children with a similar background.

1. The first Claimant, MA, is a Kuwaiti Bidoon, who arrived in Kent after a long, difficult, and frightful journey, from France in the back of a lorry. He claimed his birthday was the 15th of June 2004. The age assessment of him was conducted the same day he arrived, the 15th of December 2020, and lasted 42 minutes and concluded that he was 20 years old. He claimed that he was not offered the opportunity to have an independent appropriate adult present at the assessment and did not have an opportunity to know the reason his age was disputed. He was then detained and transferred to Wood Immigration Removal Centre for three days, before being released to adult asylum support accommodation in Coventry.⁷⁷

2. The second Claimant, HT, comes from Iran and after being rescued at sea, he arrived in the morning hours the 10th of January 2021 in the UK. He claimed his birthday was the 6th of May 2003. His age assessment was conducted only 4 hours after that terrible long journey of which he was already exhausted. It lasted one hour, and it was concluded that he was 21 years old.

At the same time, he claimed the lack of an appropriate adult and the lack of information about the way his age was disputed and why. HT was transferred to Tinsley House Immigration Removal Centre for five days, before being put in adult asylum support accommodation in Coventry. While he was in detention, the Second Defendant (SSHD) applied to him a decision that is made only for adults, deciding that his case was suitable for inadmissibility action under Immigration Rule 345A, which will be explained further.⁷⁸

The claimants challenged the KIU Social Worker Guidance, claiming that it breached Section 55 of the Borders Citizenship and Immigration Act 2009⁷⁹, on the grounds that it required the social worker to do an immediate assessment of age, shortly after the arrival of the person in the United Kingdom and for a very short period of time, respectively 40 minutes and 1 hour, as demonstrated above.

They claimed that the KIU Social Worker Guidance was incompatible with the policies of the Home Secretary, which in the first place, excludes the detention of the individuals whose age is disputed. They also challenged the decision by the Second Defendant (SSHD), considering them adults based on the KIU age assessment.

The Claimants also retained that, in addition to the unlawful policies applied during the procedure itself, they were also unlawfully detained.

⁷⁷ R (MA and HT) v Secretary of State for the Home Department, para. 5

⁷⁸ Ibid, para. 6

⁷⁹ Section 55 of the Borders Citizenship and Immigration Act 2009 [Borders, Citizenship, and Immigration Act 2009](#)

The case is long, and many provisions are taken in consideration, though what is important to highlight is the decision of the Court, the legal background of the decision and how it affected and brought to an amendment to the age assessment procedure.

The grounds.

1. The SSHD acted unlawfully disputing the Claimant's age and not following the Merton complaints principles (*R (B) v London Borough of Merton* [2003] 4 All ER 280, [2003] EWHC 1689 (Admin) (“*Merton*⁸⁰”) and subsequent cases)⁸¹
2. The Guidance is unlawful on the basis that it is incompatible with “*Assessing age*” and further on the basis that it fails to adequately take account of the Court of Appeal judgment in *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872 [since reversed by the Supreme Court as noted later]; and therefore failing to specify that “*clearly an adult*” must be an equivalent threshold to “*significantly over 18*”. The Guidance and the assessments in this case are further unlawful for failing to properly discharge the SSHD's duty under section 55 of the Borders, Citizenship, and Immigration Act 2009 to promote and safeguard the best interests of children.⁸²
3. [MA] The SSHD unlawfully detained the Claimant at the KIU in circumstances where he had not been the subject of a *Merton* compliant age assessment and therefore should not have been detained under immigration powers. [HT] In the light of the fact that KIU age assessments are routinely conducted in a detained environment, in the absence of a *Merton* compliant assessment, the Claimant has been unlawfully detained.⁸³

First it was the SSHD that heard the claimants, and made some clarifications, some of which were then taken in consideration from the Court. In short terms, the SSHD retained that the guidance is actually lawful as the policies of the SSHD itself do not preclude the detention for a short time while a decision is being made and also the benefit of the doubt can also not be given when the social workers consider after a short assessment that the individuals are “very clearly” over 18 years old, and they may be treated as adults. Also, the SSHD denied that the assessment was not Merton-compliant.

The applicable principles (merits):

⁸⁰ Jill McGregor & Sandra Bruce “Age assessment of unaccompanied asylum seeking child” reviewed 2020, Rochdale Borough Council, available at: https://www.proceduresonline.com/rochdale/cs/pdfs/age_assess.pdf

⁸¹ R (MA and HT) v Secretary of State for the Home Department , para. 2 (i)

⁸² Ibid, para. 2 (ii)

⁸³ Ibid, para. 2 (iii)

Legislation

The SSHD may only detain individuals if she has lawful authority to do so. So far as relevant here, that authority is conferred by Schedule 2 to the 1971 Act⁸⁴.

Paragraph 2 of Schedule 2 provides:

“(1) An immigration officer may examine any persons who have arrived in the United Kingdom by ship. for the purpose of determining –

(b) whether, if he is not, he may or may not enter the United Kingdom without leave

Paragraph 16 of Schedule 2 provides that⁸⁵:

“(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 19A or 12 to 14, that person may be detained under the authority of an immigration officer pending -

(a) a decision as to whether or not to give such directions.

(b) his removal in pursuance of such directions.

(2A) But the detention of an unaccompanied child under subparagraph (2) is subject to paragraph 18b.”

Paragraph 18B provides⁸⁶:

“(1) Where a person detained under paragraph 16(2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where –

(a) the child is being transferred to or from a short-term holding facility, or

(b) sub-paragraph (3) of paragraph 18 applies.

(2) An unaccompanied child may be detained under paragraph 16(2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.

⁸⁴ R (MA and HT) v Secretary of State for the Home Department, para. 32

⁸⁵ Ibid, para. 33

⁸⁶ Ibid, para. 35

(3) *The first condition is that –*

(a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24-hour period, or

(b) a decision on whether or not to give directions is likely to result in such directions.

Case law

The case law that set out the age assessment guidelines of a relevant importance is *Thornton J in R (AB) v Kent County Council*⁸⁷.

For the purposes of understanding and also to note down the policies that can be a ground of the present case, some of the relevant policies are as below:

*Purpose of the assessment*⁸⁸:

(2) There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child.

(5) The benefit of any doubt is always given to the unaccompanied asylum-seeking child since it is recognized that age assessment is not a scientific process.

(11) The applicant should be told the purpose of the assessment.

(12) An interpreter must be provided if necessary.

(13) The applicant should have an appropriate adult and should be informed of the right to have one, with the purpose of having an appropriate adult also being explained to the applicant.

may weigh against him. It is not sufficient that the interviewing social workers withdraw to consider their decision, and then return to present the applicant with their conclusions without first giving him the opportunity to deal with the adverse points.

What is important to highlight in this procedure is the “obvious cases” or the “significantly over”, terms that have been disputed often, as per their being vague and not giving a margin of error or a determined number and therefore leaves dangerous space to interpretation. There has been, “*obvious cases*” that revealed to be wrongly assessed - *R (on the application of BF (Eritrea)) (Respondent) v Secretary of State for the Home Department*⁸⁹.

Many, many children faced these “abbreviated assessment” procedures and were wrongfully assessed to be adults, therefore detained, held in adult reception centers, and denied the rights they were entitled to.⁹⁰

⁸⁷ *Thornton J in R (AB) v Kent County Council* [\[2020\] EWHC 109 \(Admin\)](#), [\[2020\] PTSR 746](#)

⁸⁸ *R (MA and HT) v Secretary of State for the Home Department*, para. 38

⁸⁹ *BF (Eritrea), R (on the application of) v Secretary of State for the Home Department* [2021] UKSC 38 (30 July 2021) URL: [\[2021\] UKSC 38](#)

⁹⁰ *R (MA and HT) v Secretary of State for the Home Department*, para. 39

The obvious cases have been dealt in the Merton method itself, a relevant guidance was set out by judge Sankey Burton J, who considered as “clear cases” only those cases where it is obvious that the applicant is much over the 18 years old, not the cases where there is a doubt to be a few years over 18 years old. Using the wording “obvious cases” in the second case, might lead to wrong assessments, as there are many factors to be considered, such as the background of the applicant, the difficult journey, and the country the person comes from, and many other instances, might strongly influence the physical appearance.

For instance, the “obvious cases” proved to be wronged several times (see para. 48-52).⁹¹

Lawfulness of detention and the guidance:

1. Age assessment while in detention

In the first argument from the Claimants and the SSHD the judge declares the SSHD submission lawful.

The Claimant

The Claimants submit that it was not lawful to detain them for the purposes of an age assessment. They highlight, in particular:

- i) the statement in in DSO 02/2019 that a person “*must not remain in detention pending a Merton compliant age assessment*” ...
- ii) the direction in DSO 02/2019 that immigration officers promptly make arrangements for the local authority to collect the age disputed child from immigration detention.
- iii) the conclusion reached by the Court of Appeal in *AN and FA v Secretary of State for the Home Department* [2012] EWCA Civ 1636 that the point at which a local authority should be notified of the presence of an unaccompanied child for the purposes of taking them into local authority care is shortly after the initial welfare interview, albeit that was not an age assessment case (§§95-97);
- iv) the statements in EIG § 55.9.3.1 that the threshold that must be met for individuals to enter or remain in detention following a claim to be a child “*is a high one*” and “*is only met if the benefit of doubt afforded to all individuals prior to any assessment of their age is made is then displaced*” by reason of documentary evidence, a decision that they are “*significantly over 18*” or a lawful age assessment; and
- v) the statement in *Assessing age* that the policy rationale is, cogently, “*to guard against the detention of children generally, including accidental detention of someone who is believed to be an adult but subsequently found to be a child.*”⁹²

The SSHD core submission:

⁹¹ R (MA and HT) v Secretary of State for the Home Department para. 48 - 52.

⁹² Ibid, para. 87

- “Against this context, ... consistently with [*Assessing age*], which sets out bases on which immigration officers can make “initial age assessments” ..., the Secretary of State is entitled to reach an early decision as to an individual’s age - including on the basis of a Merton compliant age assessment should one be available. And there is nothing to preclude the taking into account of a ‘short’ or reduced age assessment provided it complies with Merton principles.”⁹³

As mentioned above, in this regard, the judge considers SSHD’s submission lawful, recognizing the rights to the SSHD for “the detention for the purposes of a short, formalized process, within the overall parameters of the duration of Schedule 2, 16 (1) detention referred to previously.”

1. Compliance with the Merton Case law

The Claimants submit that the age assessments envisaged by the Guidance are inconsistent with *Merton* principles because⁹⁴:

- i) they are carried out shortly after individuals arrive at the KIU, typically following a long and difficult journey (as in the cases of the Claimants), and the Guidance does not direct any consideration of the appropriateness of carrying out an age assessment in such circumstances: even though (as recognized in *Assessing age*) impressions about physical appearance and demeanor are even more fragile factors for determining age in relation to a newly arrived young person, and long and traumatic journeys can have an aging effect on a person’s appearance and demeanor.
- ii) The report form which the Guidance requires the social workers to use, referred to above, preempts any view that the social workers may take about the young person’s physical appearance and demeanor and how that is to be factored into the assessment as a whole, by directing social workers to proceed on the basis that it is already “*very clear from the individuals’ physical appearance and demeanor that they are over 18 years of age, with no compelling evidence to the contrary.*”
- iii) No appropriate adult is on offer to young people who are subject to KIU age assessments.
- iv) No fair and proper opportunity is given to young people to know the adverse points to their age case which may weigh against them and to have an opportunity to provide clarification, corrections, or further information to deal with them.

⁹³ Ibid. para. 92

⁹⁴ Ibid. para. 96

The SSHD responds that whether an assessment is compliant with *Merton* principles does not depend on compliance with a given set of requirements, whether described as ‘core safeguards’ or otherwise. Ultimately, what matters is whether the individual decision as to age is rational and fair. What is required may vary from case to case:

- i) The purpose of the Guidance is not to establish a procedure that is comparable to a full *Merton* compliant assessment - which is necessarily carried out some time after the person’s arrival in the UK. Rather it is to provide immigration officers with an additional, but robust (i.e., social worker supported) basis on which to make an initial assessment of age...
- ii) The Guidance does not direct social workers to assume that individuals referred to them are “*potentially clearly an adult*”. In fact, they are directed to carry out a short *Merton* assessment only where “*they are of the view that the claimant is potentially clearly an adult*”. Where that threshold is not met, the social worker is not entitled to carry out a short assessment at all.
- iii) For a short age assessment of the kind contemplated in the Guidance to be *Merton*-compliant, an appropriate adult will not always be required, and the SSHD does not accept that there is any binding authority to that effect... Both the ‘threshold’ test (“*potentially clearly an adult*”) under the Guidance for the carrying out of a short assessment, and the conclusion (“*very clearly an adult*”) that is to be reached for the individual to be assessed as an adult, operate to ensure that where there is any doubt in either of these respects, the individual will not be assessed to be an adult on the basis of a short assessment and instead will be referred to the local authority.
- iv) The SSHD does not accept that there is any separate and independent requirement for a ‘minded-to process’ to be written into the Guidance. The underlying question will be whether the assessment was carried out in a way that was rational and fair... Nothing in the Guidance precludes such a process being undertaken, and the prescribed form of report makes specific provision for the social workers to indicate whether or not such an opportunity was provided.

The decision

The judge concluded that “the Guidance, and the age assessments carried out in relation to the Claimants, were not lawful in the particular respects I have identified; and that if and insofar as the Claimants’ detention was lengthened for the purpose of carrying out those assessments, it was unlawful. I shall hear further from counsel as to the appropriate form of relief.”⁹⁵

This case is relevant because it was an important step towards a safer stay for the unaccompanied children. The High Court declared unlawful the guidance of the Home Office used by the Kent Intake Unit, which came into force in September 2020 and laid the foundation

⁹⁵ Ibid, para. 130

for many unaccompanied children to be detained after a short age assessment, a process where the SSHD could not be sure that the young person was a child or an adult. It is a recent important development that gave hope to the children arriving in the United Kingdom, frightened, exhausted, and unsure of the future.

The United Kingdom is legislating continuously, and its national policies are going towards a more controlled and restricted immigration. First the Nationality and Borders Act 2022⁹⁶ (thereafter NABA) and just one year after that, the Illegal Migration Bill⁹⁷. The Home Office retains that there was a need for the Illegal Migration Bill because it goes considerably further than any previous immigration bill.⁹⁸ They have raised particular concerns with the incompatibility of some parts with the UN Refugee Convention 1951 and further the legal observations from the UNHCR for both the legislations will be shortly analyzed. It is important for this part of the research to highlight the national policies direction with regards to refugees to understand the role that they will play in the future of education and healthcare rights for unaccompanied children.

For the sake of brevity and utility the observations of the UNHCR for the two legislations mentioned above will be considered only on the provisions regarding the right to education and healthcare and how they are affected by the new legislation in place.

2.2.2 The UNHCR observations on the NABA 2022⁹⁹:

The UNHCR published its observations already when the NABA was introduced, expressing its concern that the new legislation is at odds with the country's commitment to fulfill the international obligations under the Refugee Convention. Since then, many amendments have been adopted but they have not been made in conformity with the observations of the UNHCR. The last option that the UNHCR published is of January 2022 considering the areas where the Bill is not in conformity with the 1951 Convention and its 1967 Protocol.

The Bill would allow the UK to keep asylum seekers in limbo indefinitely, denying their right to seek and enjoy asylum.

⁹⁶ Nationality and Borders Act 2022 (hereinafter NABA 2022) available at: <https://www.legislation.gov.uk/ukpga/2022/36/contents/enacted>

⁹⁷ Illegal Migration Bill <https://publications.parliament.uk/pa/bills/cbill/58-03/0284/220284.pdf>

⁹⁸ Home Office "Nationality and Borders Act 2022 compared to the Illegal Migration Bill: factsheet" 2023 <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/nationality-and-borders-act-compared-to-illegal-migration-bill-factsheet>

⁹⁹ UNHCR Updated Observations on the Nationality and Borders Bill, as amended - updated January 2022 <https://www.unhcr.org/publications/legal/61e7f9b44/unhcr-updated-observations-on-the-nationality-and-borders-bill-as-amended.html>

- It is well established that prolonged insecurity of status is damaging to refugees' mental health, and it is likely to be even more damaging when there is no clear end in sight. Because family reunion cannot be applied for until refugee status is granted, this indefinite limbo period will also mean indefinite family separation...including women and children in need of protection, to make dangerous journeys to the UK themselves, rather than waiting for family reunion through regular routes.¹⁰⁰

The Bill risks harm to children

Unaccompanied children's claims will be delayed, suspended or denied.¹⁰¹ In addition, the changes made to the way the age assessment is conducted, lowering the threshold for when it is decided to be made as a procedure and introducing the use of scientific methods which are harmful and have a significant margin of error.¹⁰² Evidence from the local authorities about the age of a claimant might be asked from the Home Office also when no doubts have been raised about the age of a him/her. These changes together have the potential to increase the number of unnecessary age assessments conducted and the risk that children are incorrectly assessed as adults and diverted to adult reception and immigration processes (including detention).¹⁰³ UNHCR recommends that any centralized approach should remain multidisciplinary and continue to draw on the expertise of those who play a role in the young person's life at the local level (e.g. social workers, health professionals, psychologists, teachers, foster parents, youth workers, advocates, and guardians).¹⁰⁴

The Home Office already doubts age in a significant proportion of asylum claims by those claiming to be children, from the statistics for the number of disputed ages cases against unaccompanied children from 2017 to 2021 it is 33%.¹⁰⁵ Of those, respectively 4,438 recorded resolutions of unaccompanied children whose age the Home Office doubts, a high proportion, 1968 of them are subsequently assessed to be children, and that constitutes 44% of them.¹⁰⁶

The new Bill would lower the threshold for age-disputes in situations where authorities doubt the claimed age and when they do not have enough evidence to be sure about a claimants age. Also, the local authorities need to provide evidence to the Home Office for any decision they

¹⁰⁰ Ibid. para. 48

¹⁰¹ Ibid. para. 62

¹⁰² Ibid. para. 63

¹⁰³ Ibid, para. 64

¹⁰⁴ Ibid. para. 66

¹⁰⁵ UK Home Office, *Immigration Statistics, year ending September 2021: Asylum and Resettlement – Age disputes*, available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#age-disputes>.

¹⁰⁶ Ibid.

took of not doing the age assessment procedure. This would clearly increase the age assessment procedures initiated on UNHCR's view and that would directly affect their emotional and psychological distress, the risk of physical harm and all of it for an outcome which is an estimation of the age.¹⁰⁷

2.2.3 UNHCR legal observations on the “Illegal Migration Bill¹⁰⁸”, 22 March 2023¹⁰⁹

The UNHCR published its observations shortly after the Bill was introduced, focusing on the matters of greatest concern, because the Bill is making its way in an accelerated schedule to the Parliament.¹¹⁰

The UNHCR declares that “the Bill would breach the UK’s obligations under the Refugee Convention, the 1954 Convention relating to Stateless Persons, the 1961 Convention for the Reduction of Statelessness and international human rights law and would significantly undermine the international refugee protection system.”¹¹¹

The observations of the UNHCR are on different matters, though, relevant to this research are those that touch upon the rights of unaccompanied children affected by the Bill.

The Bill extends the inadmissibility rules by not allowing anyone who arrives in the UK irregularly to claim asylum, if they passed through a country where they did not face persecution, regardless of whether they will be admitted and guaranteed protection in that country.¹¹² In this point, the Bill is inconsistent with the country’s obligations under the Refugee Convention as it extinguishes the right of refugees to be recognized and protected in the United Kingdom.¹¹³ In fact, it is clear that in reality there are no safe legal routes to reach the island, and there is no such visa that allows them to apply for asylum or humanitarian protection before arriving. Who meets the conditions for the asylum ban, and that includes children, will be liable to detention for as long as the Secretary of State considers reasonable.¹¹⁴ This will create an indefinite limbo and will risk indefinite detention, including children, in violation of international law.

Under the Bill, the SSHD will have the power to arrange for the removal of unaccompanied and separated children but may also decide to postpone their removal until they turn 18.¹¹⁵

¹⁰⁷ UNHCR Updated Observations on the Nationality and Borders Bill, as amended - updated January 2022 [UNHCR Updated Observations on the Nationality and Borders Bill, as amended](#), para. 26

¹⁰⁸ Illegal Migration Bill [Illegal Migration Bill - Parliament \(publications\)](#)

¹⁰⁹ UNHCR legal observations on the “Illegal Migration Bill” <https://www.unhcr.org/641c7cfea>

¹¹⁰ Ibid, para. 3

¹¹¹ Ibid, para. 4

¹¹² Ibid, para. 6

¹¹³ Ibid, para. 8

¹¹⁴ Ibid, para. 13

¹¹⁵ Ibid. 14

This would, again contribute to the limbo period which leads to a limited access to health care and education.

The Bill puts at risk the safety and welfare of children.

The Bill does not exempt children from any of its penalties, including indefinite detention and removal to countries with which they have no prior connection.¹¹⁶ Children who remain in the UK are likely to be adversely affected by the lack of secure legal status and, as they become old enough to understand it, the knowledge that their insecure status will be permanent; if they are unaccompanied, they will become ineligible for leave and subject to removal as soon as they turn 18.¹¹⁷ This provision is directly in violation of Article 20 (1) of the Convention on the Rights of the Child, which states that “A child temporarily or permanently deprived of his or her family environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”¹¹⁸

With the exception of the deferral of the duty to remove in the case of unaccompanied children, nothing in the Bill indicates that the Secretary of State would be required to exercise her discretion if this was in the best interests of a child - existing legislation designed to protect the welfare of children have been expressly disappplied - including limits on where and for how long children can be detained.¹¹⁹ Therefor the Bill is inconsistent with the duty under Article 3 of the UNCRC¹²⁰.

The position of the UNHCR is clear on the new legislation that is currently being amended and applied in the United Kingdom, setting the reasons why the NABA and the Illegal Immigration Bill are incompatible in most of the provisions with international law and refugee law.

¹¹⁶ Illegal Migration Bill [Illegal Migration Bill - Parliament \(publications\)](#), clause 12

¹¹⁷ Ibid. Clause 3 (1)

¹¹⁸ Article 20 (1) CRC, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child#Article-20>

¹¹⁹ Illegal Migration Bill [Illegal Migration Bill - Parliament \(publications\)](#), clause 11 (4) (e)

¹²⁰ Article 3 of the CRC

2.3 Italy, the national policies on the protection of unaccompanied children and the implementation of international law, specifically EU law, the case of Darboe and Camara v. Italy (Application no. 5797/17), Council of Europe: European Court of Human Rights, 21 July 2022¹²¹

2.3.1 The case

The case is about two minors who were placed in an adult detention center after the procedure of age-assessment.

Mr. Moussa Camara, born in 1999, reached Sicily in 2016 and was transferred to an adult reception center in Cona, Venice. His whereabouts are unknown. In 2021 his representatives informed the Court that they had lost contact with their client.¹²²

Mr. Ousainou Darboe was also born in 1999, and he also reached the coast of Sicily in June 2016. He declared orally that he was a minor and expressed the will to apply for international protection. He was housed initially in a center for unaccompanied minors, then he was transferred to an adult reception center in Cona and given a health card that indicated his date of birth as 22 February 1999, which meant that he was seventeen years old at that time.¹²³

Later, a doctor of the local health authority carried out a medical examination of the applicant to determine his age. The method that was used is the Greulich and Pyle method¹²⁴, which consists of an examination of the left wrist and hand, to determine his bone age, and they declared that he was an eighteen-year-old male, without any margin of error.¹²⁵ The decision was not communicated to him, and he was not notified prior to the examination about the procedure.

The first application that was filed for the applicant was on 16 January 2017, to the Venice District Court, from his representatives, to obtain the appointment of a legal guardian.¹²⁶ They explained all what happened with the applicant upon his arrival, as stated above, and that he was not informed about anything regarding his application for international protection and the

¹²¹ ECHR: Darboe and Camara v. Italy [accessed 15 March 2023]

¹²² Ibid. para. 5-7

¹²³ Ibid. para. 8-11

¹²⁴ “Greulich and Pyle” is a wrist and hand bone marker method. According to the “Medical Age Assessment of Juvenile Migrants” report (JRC - Science for policy report, European Commission, 2018), wrist and hand bone markers “consist of the evaluation of the form and size of bone elements as well as the degree of epiphyseal ossification. Evaluation is done by either comparing against a radiographic atlas (most prominently the one of Greulich and Pyle from 1959) or at individual bone level according to the Tanner-Whitehouse approach. The Greulich and Pyle atlas distinguishes 31 images of males and 27 images of females. Each image is considered as an individual phase. For each of these phases, several studies have investigated the corresponding age distribution”. Other important types of age markers are the collar bone and the third molars. Knee-based methods also exist.

¹²⁵ ECHR: Darboe and Camara v. Italy, para. 12

¹²⁶ Ibid. para. 15

procedure. The applicant was interviewed only once upon his arrival, also at that time only the reasons of migration were asked, no other information regarding his status and rights as a minor or questions regarding his journey.

In addition, the applicant submitted evidence about the horrible living conditions in the camp, which was overcrowded, accommodating around 1400 people meanwhile the capacity was 542 people.¹²⁷ He claimed lack of proper healthcare, no psychological assistance, only one doctor during the day and a nurse during the night; lack of proper heating and hot water in the bathrooms; various episodes of violence, prostitution, and drugs circulating in the center; there were no or poor education and recreational activities.¹²⁸ Everything was evidenced by photos that he had and a report from a parliamentary question submitted by a member of parliament on 6 December 2016 following a visit to Cona on 16 November 2016; in addition the applicant submitted a report from a non-governmental organization, “Associazione Giuristi Democratici” and both reports confirmed what claimed from the applicant.¹²⁹ Only after a subsequent application to the Court he was finally transferred to a center for minors on 18 February 2017, after a further age-assessment, with the TW3¹³⁰ method and it was concluded that he was a minor. Only in March further interviews were made with the applicant asking him about his family situation and the steps of his journey.

The decision

The government arguing on applicants lack locus standi.

The first argument brought up from the Government is the applicants lack locus standi, stating that he had not been represented by a legal guardian and he had no standing proceedings before the court. While the applicant observed that he asked for a legal guardian and not having been appointed one constituted the main reason for his complaint. The Court concluded that the applicant’s complaint was based and rejected this argument of the Government.

The basis of the decision

Non-exhaustion of domestic remedies

¹²⁷ Ibid. para. 22

¹²⁸ Ibid. para. 23

¹²⁹ Ibid. para. 25-29

¹³⁰ According to the report, TW3 refers to Tanner-Whitehouse, an age-assessment method published in 2001, considered to be more advanced and reliable compared to the Greulich and Pyle method.

The government argued that the applicant had the chance to challenge and appeal the decision of the age assessment under Article 19 and Article 26 of Legislative Decree no. 25 of 2008¹³¹, which provides as follows:

Article 19 - Guarantees for unaccompanied minors¹³²

“1. Unaccompanied minors who have expressed their intention to ask for international protection shall be provided with the necessary assistance to lodge such a request. They shall be provided with the assistance of a legal guardian at all stages of the examination of the application... “

2. In case of doubt about the minor’s age, the individual may be subjected, with his or her consent or that of his or her representative, to non-invasive medical examinations. If the examinations do not allow the exact age to be determined, the provisions of this Article shall apply.

3. The person shall be informed that his or her age can be determined through a medical examination, of the type of examination to be carried out and of its consequences in relation to the result of his or her request. Refusal to undergo the examination does not constitute grounds for not granting asylum or adopting the relevant decision.

4. The minor shall participate in a personal interview [for the asylum request] and shall be duly informed of the significance and possible consequences of the personal interview ...”

Moreover, the Government, objecting to the non-exhaustion of domestic remedies, pointed out Article 26 of the same Decree, arguing again that the applicant had the possibility to appeal the decision.

Article 26 - Treatment of requests for international protection¹³³

“... When the request is presented by an unaccompanied minor, the receiving authority shall suspend the proceedings and immediately inform the Juvenile Court to open guardianship proceedings and appoint a legal guardian ... Within forty-eight hours the court shall appoint a legal guardian. The legal guardian ... shall make immediate contact with the minor to inform him or her of his or her appointment ... and with the police [Questura] to confirm and follow up the request [for international protection]. ...”

Furthermore, other relevant domestic provisions, which guarantee to the unaccompanied minors that seek protection in Italy, and their rights are stated in “Legislative Decree no. 24 of

¹³¹ “Decreto Legislativo 28 Gennaio 2008, n. 25” [Decreto Legislativo 28 Gennaio 2008, n. 25](#)

¹³² Article 19 of “Decreto Legislativo 28 Gennaio 2008, n. 25” [Decreto Legislativo 28 Gennaio 2008, n. 25](#)

¹³³ Article 26 “Decreto Legislativo 28 Gennaio 2008, n. 25” available in italian: [Decreto Legislativo 28 Gennaio 2008, n. 25](#)

4 March 2014 “Implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims”¹³⁴ and “Legislative Decree no. 142 of 18 August 2015”¹³⁵, also.

“Law no. 47 of 7 April 2017”¹³⁶ - Provisions concerning the protection of unaccompanied minors.”

These domestic laws implemented the EU law regarding the protection of unaccompanied minors.

The Court concluded that this objection should be dismissed as the applicant, on the first chance that he had to meet a legal guardian lodged an application, the 16 January 2017. Furthermore, from the Government there was no response to his application, the only annotation that came as a response was that the application was sent to Venice police headquarters “for the necessary checks”. It is understandable that the applicant took the first chance that he had to claim his rights, but there was no avail from the Government.

2.3.2 International law and practice

Violation of “Article 8 of the European Convention on Human Rights”¹³⁷

The following argument comes on regards to article 8 of the Convention, as the applicant retained that there was a violation of this article, as the lack of protection from the authorities had amounted to a violation on his right to respect for his private life, relying on the following Article 8 of the Convention:

Article 8

“1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹³⁴ Decreto Legislativo 4 marzo 2014, n. 24 available in italian: [DECRETO LEGISLATIVO 4 marzo 2014, n. 24 - Normattiva](#)

¹³⁵ Decreto Legislativo 18 agosto 2015, n. 142 available in italian: [DECRETO LEGISLATIVO 18 agosto 2015, n. 142 - Normattiva](#)

¹³⁶ Legge 7 Aprile 2017, n.47 available in italian: [LEGGE 7 aprile 2017, n. 47 - Normattiva](#)

¹³⁷ Article 8 of the European Convention on Human Rights available at [European Convention on Human Rights](#)

The Court declared that the applicant's complaint under Article 8 was admissible, on the grounds that; the age of a person was a means of personal identification and that the procedure to assess the age of an individual alleging to be a minor, including its procedural safeguards, was essential to guarantee all the rights deriving from a person's minor status¹³⁸. Determining whether the individual is an adult, or a minor is the first step to recognize his rights and if that process is done wrongly and the individual is recognized as an adult while being a minor causes serious consequences and breaches to his or her rights.¹³⁹

International law, specifically EU law, in the meantime already provided several guarantees for unaccompanied minor asylum-seekers. At a UN level it is important to mention the General Comment no. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin describes the particularly vulnerable situation of such children and outlines the multifaceted challenges faced by States and other actors in ensuring that children are able to access and enjoy their rights¹⁴⁰; General Comment no. 12 (2009) on the right of the child to be heard strengthens the objective of supporting States Parties in the effective implementation of this right¹⁴¹; General Comment no. 14 (2013) focuses on the right of the child to have his or her best interests taken as a primary consideration.¹⁴² At an EU level, many directives and recommendations have been provided in this regard; the above mentioned national laws that implemented EU Directives and as to the Council of Europe sources the Court reiterates for example Parliamentary Assembly Resolution 1810 (2011)¹⁴³. These provisions are relevant for this research because they recognize the crucial importance to the principle of presumption of minority rights and the principle of the best interest of the child in respect of unaccompanied children reaching Europe. In addition, attention is given to the methods.

of age-assessment and the margin of error that needs to be taken in consideration given the serious breach of the rights of an individual that is decided to be an adult meanwhile is a child.

The Court declares the complaint admissible on these merits:

¹³⁸ ECHR: Darboe and Camara v. Italy, para. 124

¹³⁹ Ibid.

¹⁴⁰ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: <https://www.refworld.org/docid/42dd174b4.html> [accessed 14 March 2023]

¹⁴¹ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.htm> 1 [accessed 14 March 2023]

¹⁴² UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 14 March 2023]

¹⁴³ Parliamentary Assembly Resolution 1810 (2011) available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17991&lang=en>

1. The competent authorities failed to provide the applicant with a legal representative, preventing him to submit the asylum request effectively
2. The national authorities did not consider his declared minor age and consequently he was placed in a reception center for adults,
3. The age-assessment that was carried out was immediately a medical one and furthermore no information was given to him for the procedure that was to be carried out nor his consent was taken.
4. No margin of error was noted, and as mentioned above, there is no age-assessment procedure that is exact.
5. No judicial decision concluding that the applicant was an adult was issued, preventing the applicant to lodge an appeal
6. After his application and the appointment of a legal guardian, no information about the outcome of the application was given to him.¹⁴⁴

The Court decides that there has been a violation of Article 8 of the Convention.

Violation of Article 3 of the Convention on the Rights of the Child 1989¹⁴⁵

- “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, considering the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
- 3. States Parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”*

The applicant submitted evidence about the conditions in which he lived during his stay in the adult reception center, and complained about the lack of basic facilities, for being overcrowded, for lack of hot water and proper heating and lack of access to healthcare, mental

¹⁴⁴ ECHR: Darboe and Camara v. Italy, para. 151-157

¹⁴⁵ Article 3 of the CRC

health, and physical health due to lack of staff members. He also complained about the lack of educational activities. The two last points will be developed further in the research. All these complaints were supported by third parties mentioned above. The Government argued that these complaints are unfounded and that due to the high number of migrants they were providing all the basic needs in that structure.

The Court declared the submission admissible on these merits:

1. On behalf of Article 3 of the Convention, the conditions must meet the basic needs of children and must be adapted to their age, also to ensure that the conditions do not create to them a further situation of stress and anxiety. Considering their vulnerability and need for protection and humanitarian assistance.
2. The evidence submitted is reliable according to the court following confirmed information also from a member of parliament following a visit to Cona on 16 November 2016, and the report of the non-governmental organization *Associazione Giuristi Democratici* as third parties. The renovations done to the structure claimed by the government did not show that they took place before the applicant's arrival in this reception center and the fact itself that they did renovate it confirmed its insufficient conditions.
3. The Court argued also that the fact that the State receives a higher number of migrants compared to other Member States does not exempt it to fulfill its obligations under this obligation.

The Court concluded that there has been a breach of Article 3 as the applicant was a subject to inhuman and degrading treatment.¹⁴⁶

Violation of Article 13 of the Convention on the Rights of the Child¹⁴⁷

The applicant claimed that he had not been provided an effective remedy under Italian legal system by which to lodge his complaints under Article 3 and 8 of the Convention, relying on Article 13 of the Convention:

“1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either

¹⁴⁶ ECHR: *Darboe and Camara v. Italy* para. 174-183

¹⁴⁷ Article 13 of the Convention on the Rights of the Child

orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (order public), or of public health or morals.”

He also observed that he had not been informed about the age-assessment procedure, not before either after the decision was made.¹⁴⁸ The Government argued that he had opportunities to have a legal and administrative disposal aimed at his protection again arguing that he could appeal the age-assessment decision further on and that he was issued a health card, concluding that effective remedy was at his disposal and the rights had been respected.¹⁴⁹

The Court declares the complaint admissible on these merits:

1. The effective remedy should be provided by national law and the Government failed to indicate any of these remedies by which the applicant could have benefited from.

2. The only remedy offered, the age-assessment, turned out to be ineffective.

So there has been a violation of Article 13 taken in conjunction with Articles 3 and 8 of the Convention.¹⁵⁰

Then reparations followed founded on Article 41 of the Convention.¹⁵¹

As stated at the beginning of this case, the Mr. Moussa Camara application was decided to be struck out of the list of the cases as the representatives lost contact with their client. This is another plague and another consequence of the harm that was done to him by considering him an adult and not providing the necessary protection. He might be lost, unable to speak for himself, he might have taken another path, probably more dangerous, to avail himself with the protection and to fulfill the needs that were not provided to him from who was supposed to. Therefore, follows this report:

¹⁴⁸ ECHR: Darboe and Camara v. Italy para. 185-188

¹⁴⁹ *Ibid.* para. 1189-191

¹⁵⁰ *Ibid.* para. 193-199

¹⁵¹ *Ibid.* para. 200

Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, published on 30 January 2017, GRETA (Group of Experts on Action against Trafficking in Human Being) (2016)¹⁵²:

“...GRETA is seriously concerned by the fact that unaccompanied children disappear within a few days of being placed in reception centers. In the context of quick disappearances, it is not possible to establish whether the child is already in the process of being trafficked and what are his/her concrete individual protection needs, including that of international protection. GRETA once again urges the Italian authorities to take steps to address the problem of disappearance of unaccompanied children, by:

- providing enhanced safeguarding measures in reception facilities specialized for children, with adequately trained staff.

- ensuring that unaccompanied children are assigned a legal guardian, as expeditiously as possible, and providing adequate training to legal guardians and foster families to ensure that the best interests of the child are effectively protected, in accordance with Article 10, paragraph 4, of the Convention. ¹⁵³

Further, GRETA considers that the Italian authorities should review the age assessment procedures, ensuring that the best interests of the child are effectively protected and that the benefit of the doubt is given in cases of age disputes and special protection measures are provided, in accordance with Article 10, paragraph 3, of the Convention, and taking into account the requirements of the UN Convention on the Rights of the Child and General Comment No. 6 of the Committee on the Rights of the Child...” ¹⁵⁴

Although the report is from 2017, the provisions are not fulfilled in this case, by the Italian government, and further from not being fulfilled are caused, as the placement of a child in an adult center with those conditions mentioned above might be the main reason for his disappearance.

Though this is a broad topic that needs a detailed discussion, it will not be further explained in this part, but it is still important and crucial to be mentioned, also to testify another living condition of unaccompanied children in Italy.

¹⁵² Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, published on 30 January 2017, GRETA (Group of Experts on Action against Trafficking in Human Being) (2016) available at <https://rm.coe.int/16806edf35>

¹⁵³ Ibid. para. 74

¹⁵⁴ Ibid. para. 75

3. THE CONSEQUENCES OF THE UNCERTAIN LEGAL STATUS ON UNACCOMPANIED CHILDREN EDUCATION AND HEALTHCARE

3.1 Introduction

Twenty years ago, leading refugee law expert Guy Goodwin-Gill wrote:

“The Convention on the Rights of the Child (CRC) uniquely embraces the whole spectrum of children’s rights, specifically endorsing the principle of the best interests of the child in a total regime oriented to his or her development and self-fulfillment. Today, the child is the subject, not object. International law and international instruments do not alone provide the answers, although the CRC can be used as a model of the achievable, somewhat in the sense of a checklist: a review of its provisions expands the concept of protection, while encouraging focus on the possibilities for effective implementation in any situation of forced migration.”¹⁵⁵

The consequences of the wrong age assessments; the national policies aimed at rejecting refugees (mentioned above); the long processes in the application stage; the placement in accommodations for adults; detention; and all what analyzed since now, are reflected in the quality of education and healthcare provided to unaccompanied minors.

In the two case studies analyzed in the second chapter, can be noted the different approaches that the countries implement in the national policies and how they are applied. In the United Kingdom, the international law in terms of the Refugee Convention and the Convention on the Rights of the Child should be implemented and fulfilled, as clearly noticed, also from the observations of the UNHCR itself, the new policies on refugees that the country is implementing are inconsistent with international law. Therefore, the access to proper education and proper healthcare is lacking. By using the word “proper” it is intended to mean the fact that these rights are positive rights - meaning that the state must ensure their application. The concept is valid for Italy as well, and for all the states that ratified the CRC for that matter. Although Italy has implemented all the EU policies and in terms of national policies in force now are in conformity with international law as well. The case analyzed though, gives a very recent example of how those rights guaranteed are not being respected. Of it being, of course, not an isolated case.

¹⁵⁵ Mateja Sedmak, Birgit Sauer, Barbara Gornik “*Unaccompanied Children in European Migration and Asylum Practices: In Whose Best Interests?*” 2019 by Routledge, p. 48

In this chapter, the purpose is to address how the two different approaches are both reflecting the lack of education and healthcare that unaccompanied minors have when they arrive in the countries where they seek protection. Because despite all the circumstances already mentioned and that brings them to leave home and start over in a new country, they are entitled to the same basic needs rights when they resettle. Children need access to education; all the refugees need access to healthcare. These are fundamental human rights, but host countries often design policies that restrict these rights, sometimes deriving from the economic possibilities that countries have, and the ability to face these challenging situations, and most of the times deriving from discrimination.

3.2 The right to education

In addition to the Refugee Convention and the Convention on the Rights of the Child, international agreements and treaties protect the basic right to education, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁵⁶ or the Universal Declaration of Human Rights¹⁵⁷, they all protect the universality of the right to education and require the countries that ratified them the ensurement of the right to education equally to migrants as to the citizens. Lately, in 2017, the two UN Committees, responsible for monitoring the implementation of the Migrant Workers Convention and the Convention on the Rights of Children, published a joint general comment that made countries' commitments clear: "All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education and vocational training, on the basis of equality with nationals of the country where those children are living. This obligation implies that States should ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status."¹⁵⁸

At the time of writing, except for the United States, all the members of the United Nations, 196 countries, are parties to the CRC, which binds them to respect these standards. Article 28 of the CRC states:

¹⁵⁶International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>

¹⁵⁷ Universal Declaration of Human Rights

¹⁵⁸ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available at <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrMuIHhdD50s6dX7ewCBgoc3aRFSDe0ukyIgphiFFs8N%2Fk1uf0mPUJgdK2vXMEFXwBUJydRTZ4IILcOtT9GDUqemWeCc2%2B1%2F6gJkKBzFDWgi>

“Every child has the right to an education. Primary education should be free. Secondary and higher education should be available to every child. Children should be encouraged to go to school to the highest level possible. Discipline in schools should respect children’s rights and never use violence.”¹⁵⁹

Also, another important article to mention is the article 22 of the Refugee Convention, that states:

“1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees’ treatment as favorable as possible, and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.”¹⁶⁰

It is a core need to provide equal access to education, regardless of their citizenship status to children refugees, considering that half of refugees globally are under eighteen years of age. Education is an essential factor for every child, and so it is for children that escape home. It is the essential factor to build a future, to have more opportunities to participate in the community, and to have a healthy and productive life. Education is the leading tool to fight poverty and crime and is central to children integration.

Although the challenges faced from unaccompanied children in the country of arrival are many, and from the other perspective, the countries also face multiple challenges in setting the basis in legislation and in practice to offer equal access to education to all children.

The challenges faced from unaccompanied children in the host country are mainly; language barriers - they arrive in a country that speaks a different language that in order to integrate, they need to learn as fast as possible, and they need assistance in the process as well; lacking of documents - for obvious reasons, pretty often, children arrive in the country of destination without documentation, and that leads to many barriers in accessing education, one of them being the doubt of their age therefore the age assessment procedure which does not promise to be either short or effective; cultural and priorities - while we tend to apply a western perspective when defining age and responsibilities that derive from certain ages, it might be a completely different understanding for other cultures, sometimes boys need to work from an

¹⁵⁹ Article 28 of the CRC available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

¹⁶⁰ Article 22 of the 1951 Refugee Convention, available at <https://www.unhcr.org/1951-refugee-convention.html>

early age and they do not even attempt to attend school while girls think that the priority should be creating and providing for a family already at an early age. In this aspect, also children that migrate have more economic needs and priorities. They might have to provide for the family left behind and education might not be the immediate way that provide them that, even though in a long term it can result in such; stress and pressure - the journey to reach the host country is already a strong pressure and many of them might have gone through traumatic experiences, in their country very often or in the long way to reach the destination as well; lack of professional assistance - either in schools or in centers of accommodation there is a lack of assistance offered and provided to children, like specialized teachers, or psychologists or also legal assistance.

States must take all necessary measures to facilitate the integration of children refugees by making it available, accessible, acceptable, adaptable by and to everyone.¹⁶¹

Available meaning the inclusion of the influx of refugees in the national educational system, in cooperation with the international community. Accessible refers to making easy access by supporting in terms of economic and physical accessibility, by facilitating the access when there is lack of documentation or providing them transportation when they are living in rural areas or in camps. Acceptable to diversity means to understand their cultural and traditions and language challenges as well. By accepting their perspective of priorities and lifestyle and helping them to integrate in the best way possible. And adapt refers to the need of children to rebuild their lives, to integrate and adapt in a whole new life for them.

Given the theoretical and legal background, it is important to analyze, focused on the country's token in consideration also the political approach. Because it is not uncommon that in these countries the political interest is reflected in educational policies. It was demonstrated from the cases above, mainly the United Kingdom short analysis of the new just implemented legislation, how the political interest of the country is directly reflected in legislation. But Italy is not left behind, the new government is clearly aiming to implement restrictive policies for refugees. But how are these policies shaping the right to education for unaccompanied children?

As mentioned, the right to education is a positive right. The State must ensure that all children have the right to equal access to education. Both countries have ratified treaties and agreements that provide the right to education and also in their national legislation they do have the right to education as a basic right. Although the policies that the countries implement in relation to refugees, directly affect their access to education.

¹⁶¹ Katarina Tomasevski, "Human rights obligations: making education available, accessible, acceptable and adaptable" in Right to Education Primers no. 3, pg. 11-16 (https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf)

As of June 2022, in Italy there are 15,595 unaccompanied minors (an increase of 99.9% caused mainly from the war in Ukraine).¹⁶² The legislation provides that all children, foreign and nationals have equal access to education, even when they are in an irregular situation. The teaching of the Italian language is mostly provided, though other measures that might help the integration of children and facilitate their access to education are lacking.

When the war in Ukraine started, thousands of refugees also reached Italy and by the end of July, almost 150,000 people coming from Ukraine had been granted temporary protection; and approximately 27,500 Ukrainian students were enrolled in Italian schools by the beginning of June.¹⁶³ Meanwhile the focus and the economic funds were destined to accommodate Ukrainians, as they clearly needed immediate assistance, the police, who process all initial asylum applications, prevented asylum seekers from other countries from lodging claims, leaving hundreds homeless and destitute.¹⁶⁴ Indirectly the consequences are also to children's education, as being left behind steps them one foot back from accessing education.

The reception centers, mainly the one in Lampedusa, is periodically overwhelmed, causing unaccompanied children to spend days and weeks in inadequate conditions.

At the time of writing, the first quarter of this year has been the deadliest quarter for migrants in the central Mediterranean since 2017.¹⁶⁵ The month of February 64 people died on the coast of Calabria in Italy. This to demonstrate the continuous danger and loss of life that children undertake to reach Italy, and if lucky enough to reach the shore, they do face multiple barriers to a safe and promising future.

Although the main reason why they flee might not be economical, for sure poverty is part of the circumstances they are in. And many of them undertake the journey alone to provide for the family that they leave behind. Therefore, they are going to do everything they can to find the means to have an economic profit. And if the path to education is going to be made harder from the authorities for sure they will not be keen to follow it.

As demonstrated from the case analysis in the second chapter, one of the applicants has gone missing, and that is another consequence to the long procedures of application and wrong age assessments following a period of uncertainty which makes children undertake other dangerous paths. The case represents a violation of the minor's right and the inhuman and

¹⁶² Italy: Report on unaccompanied minors - European Commission https://ec.europa.eu/migrant-integration/library-document/italy-report-unaccompanied-minors_en

¹⁶³ Human Rights Watch - Italy, events of 2022 <https://www.hrw.org/world-report/2023/country-chapters/italy>

¹⁶⁴ Ibid.

¹⁶⁵ Deadliest Quarter for Migrants in the Central Mediterranean Since 2017, IOM Report 12 April 2023 <https://www.iom.int/news/deadliest-quarter-migrants-central-mediterranean-2017>

degrading treatment he received, and it is a representation also of a denied right to education. This child, wrongfully detained, was not able to have proper education and after months of detention and years of procedures in seeking his rights, very probably his wish to attain education faded.

Children who undertake the journey with their parents, and due to traumatic experiences, sometimes also losing their parents, need specific and professional assistance in the country of arrival to be able to have a normal life and to concentrate on their future and on their education. Valid also for the United Kingdom, mental health problems include in children's welfare and on their wish to integrate in the society and attend school. Although this issue will be analyzed in further details in the second part of this chapter, as related mostly to the lack of access to healthcare, it is important to mention that its consequences are reflected also in the will and inclination or ability to adapt to attend school as its peers.

Although Italy has implemented all regulations or directives of the European Union law in terms of treatment of unaccompanied children, violations of rights of minors still occur. Overcrowded centers of reception, disappeared children, wrong age assessment, long procedures of obtaining refugee status, all reflect directly on the access of education to refugee children's refugees.

The United Kingdom instead is implementing, as demonstrated by the case law in the second chapter, legislation that clearly also limits the access to education of refugee children.

Following the observations of the United Nations High Commissioner for Refugees, the approach that the British national system is taking, is clearly threatening the right to education for unaccompanied children.

The Clauses of the Bills are also mentioned in the second chapter, therefore in this part a focus on the consequences of those clauses in the right to education will be delivered. That is the reason why the references to specific clauses will not be given for the sake of not repeating what started already.

Increasing the threshold for age assessment and requiring all the evidence for any procedure of age assessment not made to be submitted to the Home Office, means more age assessment procedures will be made, leading to more children waiting for their status, therefore not able to attend school. What is more concerning is that the more age assessment procedures the local authorities undertake, the higher probability of wrong results will be and that leads to more children considered adults and deprived from their rights as children, one of them the right to education.

Children can also be detained, and the time is not specified, and that will directly affect their access to schools.

The detention of children will also affect them emotionally and psychologically, because after a traumatic and unsafe journey, they face disbelief and violation of their rights also in the country of arrival and that certainly affects their trust in the national authorities.

The lack of trust and the economic needs will lead some of them to undertake illegal paths to provide for themselves.

The Statutory Guidance from England, Scotland and Wales, contains provisions that place a duty

on local authorities to prioritize education for looked after children, and recognises that looked after children, including unaccompanied asylum-seekers, may have additional and unique education needs.¹⁶⁶ According to guidance for England: a Personal Education Plan (PEP) should be initiated for looked after children within 10 days of a child coming into care; looked after children should have the highest priority in school admission arrangements; and an education placement must be secured within 20 school days.¹⁶⁷

But, according to UNICEF studies, unaccompanied children wait months before being able to access education.¹⁶⁸ And age disputed children face particular delays in accessing education. As mentioned, these delays in accessing education will threaten the wellbeing of children and their emotional stability, they will be deprived of motivation and purpose and the integration process will also be more difficult for them.

They come from different educational backgrounds, and they may have different needs in terms of education. They arrive mostly in their mid-teens or almost when obtaining their majority age, so the time they have in learning a new language and adapting with a new pedagogy and educational standard is limited. If they fail to do so, their future is hampered and their ability to fund their further education because of lack of employment.

Also once enrolled in education, due to their different educational backgrounds and the period in which they had no access at all to education, they do have particular needs, from their ability to learn the new language to their ability to integrate in a new environment as well.

Comparing the two nations' models, it can be clearly deducted that the first main difference there is, is the Italian model influenced by the recommendations of the European Union law and the United Kingdom national policies that are not bound to implement them anymore and the emerging new legislations are clearly not in conformity with the European Union regulations.

¹⁶⁶ Department for Education, “*Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*” November 2017, available at: <https://bit.ly/2Y1Klmx>.

¹⁶⁷ Ibid.

¹⁶⁸ UNICEF UK, Education for refugee and asylum-seeking children: Access and equality in England, Scotland and Wales, July 2018, available at: <https://bit.ly/2Y1KQwV>.

From the other side, we do have two western countries, with a welfare system, that have the same concept of children rights in general and are both signatories of various international Conventions, mainly the Universal Declaration of the Rights of the Child of 1989, from which the best interest of the child principle emerges, that both countries are bound to respect. In terms of right to education, both countries share the compulsory education up to age 16, both for citizens and refugees.

Although, it can be deduced, that for both countries the unaccompanied children situation is still an unsolved issue regarding the balance between reception policies and policies to control the migration flows.

3.3 The right to health

Poor physical health, as a result of persecution, torture, abuse and injuries, is common amongst all refugee and health risks are particularly high for refugee and migrant pregnant women and very young children.¹⁶⁹

During their difficult journey, travelling for months (or years) children are exposed to traumatic experiences physically and psychologically; they are exposed to infectious diseases and nutrition disorders, they might carry physical scars of violence, including sexual abuse. Also, before undertaking the journey, considering the main countries where refugees come from, with a broken health system, health issues might be one of the reasons why they chose to leave. Although, even when they reach their destination, they continue to experience inadequate health services, due to camps being overcrowded and lacking even basic health conditions. And barriers in accessing health care and a high level of stress due to, among others, uncertain legal and economic status, family separation and poor housing conditions.¹⁷⁰

The right to health is a basic right, contained in international conventions and treaties: Article 24 of the Convention on the Rights of the Child¹⁷¹

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

¹⁶⁹ OECD (2016), Making Integration Work: Refugees and others in need of protection, Making Integration Work, OECD Publishing, Paris, <https://doi.org/10.1787/9789264251236-en> Paris p42 available at <http://dx.doi.org/10.1787/9789264251236-en>.

¹⁷⁰ Refugee and Migrant crisis in Europe, UNICEF, available at <https://www.unicef.org/eca/sites/unicef.org/eca/files/UNICEF%20Advocacy%20Brief%20Health.pdf>

¹⁷¹ Article 24 of the CRC <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

2. States Parties shall pursue full implementation of this right and shall take appropriate measures:

(a) To diminish infant and child mortality.

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care.

(c) To combat disease and malnutrition, including within the framework of primary health care, though, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.

(d) To ensure appropriate prenatal and postnatal health care for mothers.

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular accounts shall be taken of the needs of developing countries.

Article 23 of the 1951 Refugee Convention¹⁷²

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)¹⁷³

The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest. However, if there is more than one possible treatment for a health condition or if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the views of the

¹⁷² Article 23 of the 1951 Refugee Convention available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees>

¹⁷³ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), para. 77

child must also be given due weight based on his or her age and maturity. In this respect, children should be provided with adequate and appropriate information to understand the situation and all the relevant aspects in relation to their interests, and be allowed, when possible, to give their consent in an informed manner.

Access to healthcare is crucial for the physical and mental development of refugee children. It affects their well-being, their integration, their ability to engage with others and their performance in schools.

Despite it being a core right and crucial to their future, many children still face barriers to access healthcare due to cultural issues, bureaucracy, uncertain legal status, financial uncertainty, lack of understanding information also because of the language barriers.

Depending on their status, also the right to healthcare can differ. In the European Countries contest the services that unaccompanied children can access vary from country to country.¹⁷⁴ 22 EU Member States provide health care, in addition to emergency treatment to UASC even when they are undocumented, and only in eight Member States, children, whether with their parents or unaccompanied, have the same entitlements to health care as children who are nationals of that country, including Italy.¹⁷⁵

In Italy the right to access to healthcare, even if undocumented, is provided by law to all children, including unaccompanied children, in article 63 of the Decree of 12 January 2017.¹⁷⁶ Although in practice, as seen in the case analyzed in the second chapter as well, the conditions in the reception center are far from those meeting the requirements for healthcare services. At the end of 2021, the total number of unaccompanied children accommodated in Italy was 12,284; 96% were accommodated in reception facilities, while 4 % were accommodated in private housing (with families); the majority of unaccompanied children were accommodated in Sicily (19%), followed by Lombardy (11%), Emilia-Romagna (10.4 %), Lazio (7.7%), Campania (7.3%), Apulia (6.6 %) and Tuscany (6.2%).¹⁷⁷

In Italy, the NGO “Doctors for Human Rights” published a study on post-traumatic stress disorder (PTSD) among refugees and asylum applicants. The study concluded that overcrowding, geographical isolation, prolonged stay, length of legal proceedings, as well as episodes of violence particularly in large reception centers, have detrimental effects on

¹⁷⁴ Refugee and Migrant crisis in Europe, UNICEF, available at <https://www.unicef.org/eca/sites/unicef.org/eca/files/UNICEF%20Advocacy%20Brief%20Health.pdf>

¹⁷⁵ Policies, practices, and data on unaccompanied minors in the EU Member States and Norway: Synthesis Report May 2015 Annexes. EMN (2015) Brussels Table A3.5 pp 54-55.

¹⁷⁶ Decreto del presidente del consiglio dei ministri 12 gennaio 2017 available in italian <https://www.trovanorme.salute.gov.it/norme/dettaglioAtto?id=58669>

¹⁷⁷ Ministry of Labour, Monitoring report on unaccompanied foreign minors, 31 December 2021, available at: <https://bit.ly/3EHAIVN>.

asylum seekers and refugees' mental health and in a public appeal, together with other 18 civil society organizations – called for a policy that avoids the use of large reception facilities.¹⁷⁸

Also, Covid19 was a situation of emergency for unaccompanied children and their access to healthcare. In Italy, in application of the anti-COVID-19 regulations, the unaccompanied minors, disembarked or just arrived by land borders, were placed in ad hoc structures for quarantine and the procedures for placing unaccompanied minors in quarantine have been provided for by the various regional ordinances and thus resulting, also in 2021, in a not uniform management of the quarantine phase on the national territory; in some areas regions have used hotels, in other cases rooms have been organized within the reception system.¹⁷⁹ As reported by the Ministry of Labour, in cases where hotels were used, the minors, at the end of the quarantine, were transferred to government reception facilities; when the quarantine was carried out in second-level structures, the minors continued their reception in the same facility, after the period of fiduciary isolation.¹⁸⁰

Although, many minors had to spend the quarantine on ships, with serious consequences for access to treatment and psychophysical health of minors; at the beginning of October, Abou Diakite, aged 15, died following an emergency hospitalization, which occurred only after several days of isolation on the GNV Allegra ship and just before, on September 15, Abdallah Said, aged 17, died of tuberculous encephalitis at Catania Hospital, where he had been transferred only after a period of quarantine on the ship GNV Azzurra.¹⁸¹

Besides the issues with the practical implementation of the laws in relation to the reception of unaccompanied children, one main issue is also the age assessment procedure.

As already analyzed in this research, the wrong decisions on age assessment provide unaccompanied children from the rights they are entitled as more vulnerable. And in Italy, access to healthcare is one of them.

According to Article 19 (4) of the Reception Decree, unaccompanied children cannot be detained or held in reception centers for adults.¹⁸²

However, throughout 2017 and 2018, both due to the problems related to age assessment and to the unavailability of places in dedicated shelters, there have been reported cases of children accommodated in adults' reception centers.¹⁸³ Throughout 2017, more appeals were presented

¹⁷⁸ Fra, Migration: Key Fundamental Rights Concerns, Quarterly Bulletin, February 2021, available at: <https://bit.ly/37WS13N>, 17.

¹⁷⁹ Country report: Special reception needs for vulnerable groups, Italy. Asylum Information Database, available at https://asylumineurope.org/reports/country/italy/reception-conditions/special-reception-needs-vulnerable-groups/#_ftn5

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Article 19 (4) of the Reception Decree, available in Italian <https://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg>

¹⁸³ Children's Ombudman and UNHCR, "L'ascolto e la partecipazione dei minori stranieri non accompagnati in Italia, Rapporto finale attività di partecipazione 2017-2018", May 2019, available in Italian at: <https://cutt.ly/vyO8mh2>

to the ECtHR to protect unaccompanied children placed in adult reception centers in Italy, including Rome, Lazio,¹⁸⁴ and Como, Lombardy.¹⁸⁵

In the United Kingdom (with very few distinctions between England, Scotland, and Northern Ireland), there is free hospital treatment to asylum seekers with a current claim, those refused asylum seekers who are receiving Section 95 or Section 4 support and unaccompanied children in the care of the local authority.¹⁸⁶ Free hospital treatment is not generally available to asylum seekers who are not on Section 95 or Section 4 support. Hospital doctors should not refuse treatment that is urgently needed for refused asylum seekers who are not receiving Section 95 or Section 4 support, but the hospital is required to charge for it.¹⁸⁷ Accident and emergency services (but not follow-up in-patient care) and treatment for listed diseases are free to all including refused asylum seekers who are not on asylum support.¹⁸⁸

For unaccompanied children in particular, those who are given the benefit of the doubt and those who are accepted as being under the age of 18 are referred to a local authority social services department which becomes responsible for their care.¹⁸⁹

The access to emergency services is a great opportunity, and in both countries unaccompanied children have access to it. But as analyzed also for Italy, also the vast majority of children that reach the shores of the United Kingdom, need assistance for post-traumatic stress disorder, anxiety, loneliness, low level and severe depression, so a psychological assistance as well. In a study in the UK carried out by Allsopp, Chase, and Mitchell, time spent in limbo was perceived by unaccompanied children ‘as a tactic of state control, imposed through chronological age markers, time-limited legal statuses and bureaucratic process rhythms’.¹⁹⁰ In a longitudinal study of the mental health of unaccompanied refugee children, Vervliet and others found that traumatic experiences have clear and substantial impacts on unaccompanied children, with daily stressors (including concerns over legal status) in particular leading to long-term effects on mental health.¹⁹¹

The consequences of the new Illegal Migration Bill also affect healthcare. The detention of children will expose them to ongoing danger, for their physical health and their mental health as well. Already there are tens of thousands of people being accommodated for months or years in inadequate, unhealthy living conditions as they wait for their claims to be

¹⁸⁴ ECtHR, *Bacary v. Italy*, Application No 36986/17, Communicated on 5 July 2017

¹⁸⁵ ECtHR, *M.A. v. Italy*, Application No 70583/17, Communicated on 3 October 2017

¹⁸⁶ Part 4 HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238.

¹⁸⁷ British Medical Association, *Access to health care for asylum seekers and refused asylum seekers – guidance for doctors*, April 2012, available at: <http://bit.ly/1CqjDIN>.

¹⁸⁸ *Ibid.*

¹⁸⁹ Home Office, *Asylum Policy Instruction: Processing an Asylum Application from a Child*.

¹⁹⁰ Jennifer Allsopp, Elaine Chase, and Mary Mitchell, *The Tactics of Time and Status: Young People's Experiences of Building Futures while Subject to Immigration Control in Britain* (2014) 28 *Journal of Refugee Studies* 163, 165.

¹⁹¹ Marianne Vervliet and others, *Longitudinal Follow-Up of the Mental Health of Unaccompanied Refugee Minors* (2014) 23 *European Child and Adolescent Psychiatry* 337, 340–42.

processed.¹⁹² In late 2022, bottlenecks in the system led to severe overcrowding at the Manston asylum processing center in Kent, where people were forced to sleep on the floor of tents in unsafe and unsanitary conditions, resulting in outbreaks of scabies and diphtheria.¹⁹³ Furthermore, the age assessment procedures, in the same way as they affect the right to education, will affect the right to healthcare, as if children will be wrongfully assessed as adults, their right to access healthcare services will be more limited. And what is more concerning is the fact that, being put in reception centres with adults, children risk sexual abuse. The conditions in adult centers are more dangerous, they might include alcohol or use of drugs, and conflict as well, which will have grave consequences in the wellbeing of children.

¹⁹² Refugee Council “Number of people seeking asylum trapped languishing in hotels almost trebles in a year” 2022. Available at <https://www.refugeecouncil.org.uk/latest/news/number-of-people-seeking-asylum-trapped-languishing-in-hotels-almost-trebles-in-a-year/>

¹⁹³ Taylor D. Calls for public inquiry into abuses at Manston asylum centre in Kent. *Guardian* 2023 Jan 4. <https://www.theguardian.com/uk-news/2023/jan/04/calls-for-public-inquiry-into-abuses-at-manston-asylum-centre-kent-police-investigations-claims-assault>

CONCLUSIONS

Each year, hundreds and thousands of migrants and refugees leave their home, taking journeys for a protected life, for a better future. Each year thousands of them lose their lives on the way, in the deserts, in trucks, in fences, in the hands of smugglers, on the sea, at the borders. They go missing for years, their fate remains unknown, their names not registered, and their bodies at the bottom of the sea. It is not clear how international legal principles can be applied or can solve these tragedies.

Some of these children make it to Europe, alone, maybe because they lost their family on the way, or maybe they lost it even before departure, or maybe they left their families at home. They make it to, what they hoped it could be, the land of hope and dreams. States must provide them with safety and commitment, with trust and the feeling that they will be heard and protected and guided to the prosperous future. What they find, in many cases, is unsafety, bad living conditions, treated without belief and respect. Many camps in Europe are overcrowded, the living conditions are horrible and the access, even to the basic rights, is difficult. Many of them are assessed as adults, not believed, put in adult reception centers, where they face abuse and certainly not a child-friendly environment. Children are the most vulnerable, they have experienced trauma, they have gone through a hard life because otherwise they would have never taken a journey that risks their life.

The magic formula to make everything work perfectly does not work, a utopian world with every child that has all his/her rights provided and respected does not exist. But what can be done is definitely more than the States are doing. The principle of the best interest of the child is often neglected in the procedures of asylum assessment. Demeaning age-assessment procedures, family separations, lacking appointing a legal guardian, limited access to education, health and social benefits, the use of detention instead of child welfare protection are child protection frameworks that can be done differently, if the States had the will to. The age assessment procedure itself is sensitive and not easy, though despite all the guidelines and the guarantees under international law, given in the second chapter, the procedures still do not comply even with the basic requirements.

These cruel and deplorable policies breach the UN Refugee Convention, or other international laws, will not stop people fleeing war, persecution, and other horrific realities from trying to seek safety in the UK, Italy or in all the other countries that receive the highest number of refugees.

Children asylum seekers do need much more assistance than what they receive to be able to pursue education and to be mentally and physically healthy.

I volunteered in a refugee camp in Serres, Greece, and the asylum seekers there were from the Yazidi minority, coming mainly from Iraq. They escape after the ISIS invasion. I volunteered there in the Children Educational Program, and mainly there is where my interest to develop my knowledge about the topic further comes from. I listened to many stories and understood how the reality of these children is and how they need just a little bit of more support to build a better future. I think it is worth sharing two of the stories that I believe, I will never forget. Two stories strongly connected with the education of children. One of the children, supposedly M, was almost 7 years old and he used to attend our program every day. They speak their own language, and M was certainly fluent in his language. He was attending school, therefore he could speak Greek and also started to learn to write with the Greek alphabet. M was also fluent in English and knew the latin alphabet as well. In one of the workshops that I was doing with some of the children, he was translating for me, meanwhile drawing on his paper, he was very smoothly switching three languages and helping me to talk with all the children that were attending the workshop. He was in the camp, still waiting for his documents and for his status to be granted, and I thought that if M will not be further supported in his education, it will be a great loss for him, a kid with high capabilities and for the community, as he would certainly contribute to it.

Another child, supposedly N, about 5 years old, was a lot quieter, he used to speak only when trying to get with force a toy from another child. When we were doing one of the activities outside, he got into a fight with one of his peers. I saw an anger in his eyes that I couldn't believe it was coming from a child that little. We struggled to calm him and one of the trained psychologists was there as well. I then got to know his story, of the traumas he had gone through losing his parents and the scenes of violence he witnessed, I could understand where his anger and his attitude was coming from. He was not only traumatized therefore more angry than usual, that trauma had caused him a mental condition. We, as volunteers, of course with also professionals, who were also volunteering in the same organization, were helping them on a daily basis, in a modest way I would say. But that child was not receiving any special mental health assistance from the authorities.

So first of all, States, as duty-barers should provide children who seek protection in their country with safety and trust, by showing them commitment, stimulating their resilience and guiding them to a realistic future perspective in a trauma-sensitive way. Providing them with a mental health support, not only at the interview stage or during the procedure of investigation but also after they obtain the status of refugee would contribute to these children future. Secondly, the benefit of the doubt and the presumption of minority should be respected and given to children also in the period when the decision is being made. This is a provision

already covered, as demonstrated, from international law but also from the national policies, both of Italy and the UK, though it is not implemented as it should. So international law regulates the rights of unaccompanied children, the guidelines and observations analyzed demonstrate that the framework regarding age assessment procedures is also provided. Their implementation is lacking, specifically the Illegal Immigration Bill that is now being implemented in the UK, is threatening to inflict greater suffering, force people to take even more dangerous routes, and ultimately cost lives. Because it has been demonstrated that making the migration illegal won't stop it, either it increases the illegal routes taken from refugees and therefore puts them in higher danger. In addition, when arriving in the country of destination, from the fear of not being offered protection, they disappear and chose other paths that do not improve either their conditions, or the country's economy or safety. The only realistic way to stop people making treacherous crossings across the English Channel is to urgently set up safe and legal routes to the UK, accessible to people of all nationalities, and commit to a fair, workable asylum system. Children disappearance is another very concerning issue in most of the States. According to the EU Agency for Fundamental Rights more than 18 000 migrant children had gone missing in Europe between 2018 and 2020, and the main reasons for child disappearance are: poor reception conditions, lack of child-friendly information, lack of guardian-appointment procedures, fear of detention etc.¹⁹⁴ And also in this regard, the trust and the support given to them in the first meeting or interview is crucial, they need to believe that someone will offer them help after having experienced a journey where they were used and treated bad, by smugglers or traffickers mainly. They need to know they are in safe hands and that finally their rights will be respected, otherwise they will try to figure out everything on their own and escape. Detention of unaccompanied children should never be an option. The benefit of the doubt guaranteed would provide the children with the rights they are entitled to, meanwhile they are waiting for their age to be assessed. In addition, the margin of error should always be considered. As noted from the cases, the margin of error was not considered at all, even though, it is scientifically proven that there is no method in the age assessment procedure that would determine the exact age of the individual. The States should give more attention to the integration of children, offering them more support, not only to learn the language but also more focused courses in the education system, to treat them also according to their background and not only merely as migrants.

¹⁹⁴ European Parliament “Disappearance of migrant children in Europe” 2022 available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733670/EPRS_ATA\(2022\)733670_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733670/EPRS_ATA(2022)733670_EN.pdf)

A professional gender-sensitive, cultural-sensitive approach should be provided from the staff since the first interview and in the accommodation centers. An appointment of a legal guardian and a translator should always be guaranteed.

The procedures of investigation should be shorter and effective, waiting for months or sometimes even years certainly does not help their integration and the respect even of basic rights, as such those considered in the research, the right to education and healthcare.

When it comes to human rights of children, they do not have borders or nationality, so all countries, those of origin, transit and destination have the responsibility to protect unaccompanied migrant children. The child's best interest should always be the priority and the guiding principle in the implementation of migration policies. The right to education and to the right to health are not a privilege, they are human rights.

SAATJATA LAPSED – VARJUPAIGAMENETLUSE MÕJUD ÕIGUSELE HARIDUSELE JA TERVISE KAITSELE: ITAALIA JA ÜHENDKUNINGRIIGI JUHTUMID – Resümee

Pagulased, varjupaigataotlejad ja rahvusvaheliselt ümberasustatud isikud vajavad kaitset mitmesuguste inimõiguste rikkumiste eest, kuivõrd neil on õigus kõigi ratifitseeritud lepingutest ja tavaõigusest tulenevate inimõiguste kaitsele. Käesolev väitekiri keskendub saatjata laste teekonnale sellise kaitse saamiseks ja takistustele, millega nad sihtriiki jõudes kokku puutuvad, takistustele, mis seavad ohtu nende õigusele haridusele ja tervisele. Väitekiri uurib lahknevusi seoses riikide kohustusega tagada lapse parimate huvide kaitse kõigi juhtumite puhul, mis seonduvad saatjata lastest sisserändajatega, eriti nende õigusliku staatuse kindlaksmääramise menetluse ajal sihtriigis. Väitekirja peatükkides antakse hulgaliselt menetlusjuhiseid ning põhjalik analüüs rahvusvahelisest õigusraamistikust. Lisaks on väitekirja eesmärgiks heita valgust saatjata laste inimõiguste rikkumistele, mis leiavad aset enne ümberasustamist, põgenemise ajal ning pärast seda, kui inimene on kaitse leidnud. Vaadeldakse ja analüüsitakse kahte juhtumit, et paremini mõista Itaalia ja Ühendkuningriigi riiklikke poliitikaid ja nende vastavust rahvusvahelisele õigusele. Väitekirja lõpus uuritakse puuduseid ja puudujääke, mis institutsionaliseeritud süsteemides, peamiselt Itaalias ja Ühendkuningriigis, saatjata lastest sisserändajatega tegeledes esinevad ja selliste puudujääkide jätkuvalt avalduvaid tagajärgi laste põhiõigustele. Selles protsessis on ka riikidel väljakutseid ja väitekirja eesmärgiks on ka tuvastada põhjuseid, miks menetluste pikkus ja lapse õigusliku staatuse määramise meetodid langevad inimõiguste rikkumiste alla. Väitekiri teeb ettepanekuid pikaajaliste strateegiatega osas hariduses või tervishoiusüsteemis, mida saaks rakendada, et parendada saatjata laste inimõiguste kaitset ja vähendada rikkumiste ohtu.

LIST OF ABBREVIATIONS

CRC – Convention on the Rights of the Child

EU – European union

UN – United Nations

UK – United Kingdom

ECtHR – European Court of Human Rights

ECHR – European Convention on Human Rights

UNHCR – United Nations High Commissioner for Refugees

UDHR – Universal Declaration on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

NABA – Nationality and Borders Act

KIU – Kent Intake Unit

GRETA – Group of Experts on Action against Trafficking in Human Being

BIBLIOGRAPHY

Treaties:

1. Convention on the Rights of the Child (CRC), General Assembly resolution 44/25, [20 November 1989]
2. International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200A (XXI), [16 December 1966]
3. International Covenant on Economic, Social and Cultural Rights (ICESCR) General Assembly resolution 2200A (XXI), [16 December 1966]
4. The 1951 Refugee Convention and its 1967 Protocol, Resolution 2198 (XXI), United Nations General Assembly.
5. Universal Declaration of Human Rights (UDHR), Paris, 1945 [December 10, 1948]

International legal instruments, general comments and guidelines

1. Council of Europe, Resolution 2195 (2017) “Child-friendly age assessment for unaccompanied migrant children” 2017
2. Directive 2011/95/EU of the European Parliament and of the Council [13 December 2011] European Union - Turkey Statement, European Council [18 March 2016]
3. General Comment No. 6 (2005) “Treatment Of Unaccompanied And Separated Children
4. GRETA (Group of Experts on Action against Trafficking in Human Being), Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, [30 January 2017]
5. Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration. [CMW/C/GC/3-CRC/C/GC/22 2017] Outside Their Country Of Origin“, UN, [CRC/GC/2005/6 1 September 2005]
6. Parliamentary Assembly , Resolution 1810 (2011), “Unaccompanied children in Europe: Issues of arrival, stay and return” [15 April 2011]
7. Regulation (EU) No 604/2013 of the European Parliament and of the Council, the Dublin Regulation, [26 June 2013]
8. UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23

- (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23 [16 November 2017]
9. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, [20 July 2009]
 10. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, [29 May 2013]
 11. UNHCR “Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum”
 12. UNHCR legal observations on the “Illegal Migration Bill” [2023]
 13. UNHCR Updated Observations on the Nationality and Borders Bill, as amended - updated [January 2022]
 14. UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, [22 December 2009]

Case law

1. BF (Eritrea), R (on the application of) v Secretary of State for the Home Department uksc 38 [30 July 2021]
2. European Commission, Italy: Report on unaccompanied minors [30 August 2022]
3. European Court of Human Rights “Darboe and Camara v. Italy (Application no. 5797/17), Council of Europe: European Court of Human Rights” [21 July 2022]
4. European Court of Human Rights, Bacary v. Italy, Application No 36986/17, Communicated on [5 July 2017]
5. European Court of Human Rights, M.A. v. Italy, Application No 70583/17, Communicated on [3 October 2017]
6. R (AB) v Kent County Council EWHC 109 (Admin) [2020]
7. R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12, per Lord Dyson
8. R (MA and HT) v Secretary of State for the Home Department [2022] EWHC 98 (Admin)
9. UN High Commissioner for Refugees (UNHCR), Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, [February 1997]

Domestic law:

1. Borders Citizenship and Immigration Act 2009
2. Home Office: Illegal Migration Bill [2023, in via of implementation]
3. Home Office: Nationality and Borders Act [2022]
4. Italian Government “Legge 7 Aprile 2017, n.47”
5. Italian Government “Decreto del presidente del consiglio dei ministri 12 Gennaio 201, n. 657”
6. Italian Government “Decreto Legislativo 18 agosto 2015, n. 142”
7. Italian Government “Decreto Legislativo 28 Gennaio 2008, n. 25”

Doctrine (articles, journals, books, reports):

1. “Children on the move “A guide to working with unaccompanied children in Europe ,European Guardianship Network, [February 2021]
2. “The United Nations Convention on the Rights of the Child ”, International Journal of Land the Family, 5 [1991].
3. 10th European Forum on the rights of the child 29-30 November 2016 “The protection of children in migration”
4. A. Ryan, Fiona E Kelly, and Brendan D Kelly, ‘Mental Health among Persons Awaiting an Asylum Outcome in Western Countries’ (2009) 38 International Journal of Mental Health 88. Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway, [2018]
5. Asylum in Europe, Country report: Special reception needs for vulnerable groups, Italy. Asylum Information Database.
6. Benita Menezes Queiroz, ‘Non-Removable Migrants in Europe: An Atypical Migration Status?’ (2018)
7. British Medical Association, Access to health care for asylum seekers and refused asylum seekers – guidance for doctors, [April 2012]
8. Bronstein, I., Montgomery, P., & Ott, E “Emotional and behavioral problems amongst Afghan unaccompanied asylum-seeking children: Results from a large-scale cross-sectional study” European Child & Adolescent Psychiatry, 22(5) [2013]
9. Children’s Ombudman and UNHCR, “L’ascolto e la partecipazione dei minori stranieri non accompagnati in Italia, Rapporto finale attività di partecipazione 2017-2018” [May 2019]

10. Council of Europe: Age assessment for children in migration, a human rights-based approach, 2019
11. Deadliest Quarter for Migrants in the Central Mediterranean Since 2017 , IOM Report 12 April 2023
12. Department for Education, “Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities” [November 2017]
13. Dominic McGoldrick “The United Nations Convention on the Rights of the Child”, International Journal of Law and the Family, Volume 5, Issue 2 [August 1991]
14. European Parliament “Disappearance of migrant children in Europe” [2022]
15. European Parliament “Walls and fences at EU borders” 2022.
16. Fra, Migration: Key Fundamental Rights Concerns, Quarterly Bulletin, [February 2021]
17. Guy S. Godwin-Gill, “Who to Protect, how ..., and the Future?”, International Journal of Refugee Law 9, 1(1997).
18. IOM report, “At least 50000 people died during migration since 2014”, [November 2022]
19. Jacqueline Bhabha, Child Migration and Human Rights in a Global Age, New Jersey: Princeton University Press, [2014]
20. Jean-François Durieux and Jane McAdam, ‘Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ 16 International Journal of Refugee Law 4. [2004]
21. Jennifer Allsopp, Elaine Chase, and Mary Mitchell, ‘The Tactics of Time and Status: Young People’s Experiences of Building Futures while Subject to Immigration Control in Britain’ 28 Journal of Refugee Studies [2014]
22. Jill McGregor & Sandra Bruce “Age assessment of unaccompanied asylum seeking child” reviewed 2020, Rochdale Borough Council [2020]
23. Joseph Lelliott, “*Unaccompanied Children in Limbo: The Causes and Consequences of Uncertain Legal Status*”, International Journal of Refugee Law, Volume 34, Issue 1, [March 2022]
24. Katarina Tomasevski, “*Human rights obligations: making education available, accessible, acceptable and adaptable*” in Right to Education Primers [2001]
25. Katherine Perks and Jarlath Clifford, ‘The Legal Limbo of Detention’ (2009) 32 Forced Migration Review 42.
26. Leonie Ansems de Vries & Elspeth Guild, “*Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management*” Journal of Ethnic and Migration Studies [2019]

27. Liebel, M. (2012). Children's Rights as living rights: Why human rights only make sense if they are connected to the lives of children. In: *Revista de Asistentă Socială*, anul XI [2/2012]
28. Marianne Vervliet and others, 'Longitudinal Follow-Up of the Mental Health of Unaccompanied Refugee Minors', *23 European Child and Adolescent Psychiatry* 337, 340. [2014]
29. Marjan Schippers "Children on the move: A guide to working with unaccompanied children in Europe" European Guardianship Network, [February 2021]
30. Mateja Sedmak, Birgit Sauer, Barbara Gornik "Unaccompanied Children in European Migration and Asylum Practices: In Whose Best Interests?", Routledge [2019]
31. Ministry of Labour, Monitoring report on unaccompanied foreign minors, [31 December 2021]
32. OECD, Making Integration Work: Refugees and others in need of protection, Making Integration Work, OECD Publishing, Paris [2016]
33. Part 4 HM Government National Health Service (Charges to Overseas Visitors) Regulations, No. 238. [2015]
34. Policies, practices, and data on unaccompanied minors in the EU Member States and Norway: Synthesis Report Brussels 15 May 2015]
35. Prabhat, D., Singleton, A., & Eyles, R. "Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK" *International Journal of Children's Rights*, 27(2). [2019]
36. Refugee Council "Number of people seeking asylum trapped languishing in hotels almost trebles in a year" [2022]
37. Taylor D. Calls for public inquiry into abuses at Manston asylum centre in Kent. *Guardian* [January 4 2023]
38. The UN Refugee Agency "2015: The year of Europe's refugee crisis"
39. UK Home Office, Immigration Statistics, year ending September 2021: Asylum and Resettlement – Age disputes [2021]
40. UK Parliament "The Use of Biological Methods in Asylum Age Assessments", POSTNOTE [March 2022]
41. UNICEF UK, Education for refugee and asylum-seeking children: Access and equality in England, Scotland and Wales, [July 2018]
42. Van Os Carla "Best Interests of the Child-Assessments for recently arrived refugee children." [2018]

43. Vasileia Digidiki and Jacqueline Bhabha, 'Sexual Abuse and Exploitation of Unaccompanied Migrant Children in Greece: Identifying Risk Factors and Gaps in Services during the European Migration Crisis' [2018]

Secondary sources

1. Asylum Information Database website
2. Cambridge Dictionary Online website
3. Home by Warsan Shire
4. Human Rights Watch website
5. UN Treaty database
6. United Nations High Commissioner for Refugees website
7. United Nations International Children's Emergency Fund website