

## UNACCOMPANIED MIGRANT CHILDREN – THEIR RIGHTS AND THE CHALLENGE FOR THE STATE

Ana Mgebrishvili

### ABSTRACT

*An unaccompanied migrant minor is deemed to be exceptionally vulnerable for the following reasons: she/he is a child, frequently an irregular migrant, separated from parents or other legal guardians and thus exposed to a greater risk of a violation of her/his rights, inter alia, the risk of being physically or sexually exploited. Some of the issues most likely to contribute to that vulnerability of migrant minors are: the lack of precise data on migrant children, the unresolved issue of “missing children”, the often vague and lengthy procedures of age assessment, and last not least the lack of political will and of economic resources by the State.*

### Introduction

Migration is a global phenomenon which greatly influences international, as well as regional and national, policy making. This is clearly demonstrated by events of the past decade – armed conflicts, a “migrant crisis” in Europe, and massive breaches of human rights, whose resolution depends largely upon the political will of states and the capacities of international organizations. For millions of migrants Europe appears to be the sole hope for a better life but has turned into a new chapter of the same tragedy migrants try to leave behind. In this regard, many legal and practical issues have arisen that should be tackled. However, special attention should be paid to child migrants who embark on dangerous routes from their countries of origin to Europe without parents and guardians and who face multiple violations of their fundamental rights on that journey.

The purpose of this article is to highlight the rights of this vulnerable group of individuals and the measures taken by states to protect them. The first Chapter discusses the definition of the term “unaccompanied minor/child” (these terms are used interchangeably for the purpose of this paper), issues of defining this concept, and the difficulties related to data gathering. Chapters 2 and 3 deal with the core aspects of the best interest of the child, in the lens of which the Author analyses the legal and social issues related to age assessment and detention of migrant minors. The fourth Chapter offers a brief analysis of two judgements of the European Court of Human Rights (ECtHR) concerning the rights of unaccompanied child migrants and the related obligations of states.

### 1. LEGAL FRAMEWORK AND ISSUES RELATED TO DATA GATHERING

Unaccompanied migrant minors are deemed to be vulnerable due to several factors – as a child, as a migrant (frequently an irregular one), and separated from parents and/or other legal guardians. Thus, they are under a greater risk of a violation of their rights and of being physically or sexually exploited.

Apart from their reasons for migration, unaccompanied migrant children have two common features – firstly, they are children and primarily shall be treated as such; and secondly, due to their separation from the family environment, shall be granted special protection.<sup>1</sup>

The legal framework for the protection of this vulnerable group in Europe comprises a number of instruments: the United Nations (UN) Convention on the Rights of the Child (CRC),<sup>2</sup> the

<sup>1</sup> United Nations Convention on the Rights of the Child, 1989, Art. 20, available at: <https://matsne.gov.ge/ka/document/view/1399901?publication=0>.

<sup>2</sup> UN Convention on the Rights of the Child, 1989.

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>3</sup>, and a number of legal instruments by the European Union (EU)<sup>4</sup>. In addition, setting general standards and protecting the interests of child migrants, especially the unaccompanied ones, is of great significance, inter alia, for the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR), and the United Nations Children's Fund (UNICEF). On the regional level, the role of the Council of Europe and the EU should be mentioned.

Apart from the will of the international community to elaborate uniform standards for the protection of unaccompanied minors, it is of great importance to analyze whether the data collected in the EU member states is based on uniform standards and whether it enables the effective protection of the rights of migrant children in Europe.

### VARIED DEFINITIONS AND VARIED RESULTS

In accordance with Art. 1 of the CRC, “a child means every human being below the age of eighteen years”. The term “unaccompanied child” is defined in General Comment No. 6 of the Committee on the Rights of the Child (CRC) pursuant to which unaccompanied children are, as defined by Art. 1 of the Convention on the Rights of the Child, those “*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*”.<sup>5</sup>

EU directives on the right to asylum define a “minor” as “*a third-country national or a stateless person below the age of 18 years*”.<sup>6</sup> Furthermore, the term “unaccompanied minor” is defined as “*a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States*”.<sup>7</sup>

Despite the definition proposed by the EU directives, definitions in national legislations of EU member states are not always in full compliance with it.

<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, <https://matsne.gov.ge/ka/document/view/1208370?publication=0>

<sup>4</sup> European Union, Charter of Fundamental Rights of the European Union, 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>

<sup>5</sup> 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, para. 7, accessed 17 November, 2019, <https://www.refworld.org/docid/42dd174b4.html>.

<sup>6</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 “on common procedures for granting and withdrawing international protection (recast)”, Official Journal of the European Union, L 180/60, 29.6.2013, Art. 2(l), accessed 17 November, 2019, <https://www.easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf>. See also: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of the European Union, L 337/9, 20.12.2011, Art. 2(k), accessed 17 November, 2019, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>.

<sup>7</sup> Directive 2013/32/EU, Art. 2(m); See also: Directive 2011/95/EU, Art. 2(l).

The Global Migration Data Analysis Centre has found that generally the difference in terminology is related to the issue of being accompanied. Moreover, in some states the declaration of the individual of being a minor is essential, while in some other countries an individual is not treated as a minor unless the state organs decide to do so (with regard to those individuals who do not have relevant documentation, or the documentation is falsified).<sup>8</sup> For instance, in Italy, Spain and France, application for asylum by the minor is a secondary factor, while it is decisive in some other countries.<sup>9</sup> Thus, the legal and statistical situation differs from state to state on the basis of their policies.

## DATA GATHERING THROUGHOUT EUROPE

Data gathering and coordination between EU member states is of utmost importance in order to assess the number of child migrants, to assess their individual cases, to monitor how their problems are being resolved and under what conditions minors have to wait for decisions of state organs.

According to the information provided by the Global Migration Data Analysis Centre, gathering data related to migrants entering Southern Europe has not been uniform at national levels, and has not been processed and published at the same intervals. This situation has been aggravated by the large number of irregular migrants entering those states (Greece, Italy, Malta).<sup>10</sup>

Additionally, other factors affect correct data analysis. For instance, the differences in the definitions of ‘unaccompanied minors’ at national levels may lead to double counting of the data related to some groups of minors while excluding others. Moreover, important problems occur in managing huge migrant flows and with regard to unaccompanied minors trying to avoid state organs as they have crossed the state border illegally (due to trafficking or smuggling) and are afraid of the related consequences (mostly, they are not informed about their rights), or are trying to move to another country to find a job.<sup>11</sup>

This issue is problematic since it does not provide states with the opportunity to see the bigger picture of migration and to control the migration routes of unaccompanied minors in Europe, to provide them with minimum standards of protection and to prevent them from being contacted by traffickers and criminals.<sup>12</sup>

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<sup>8</sup> IOM's Global Migration Data Analysis Centre, "Children and unsafe migration in Europe: Data and policy, understanding the evidence base". ISSN 2415-1653 | Issue No. 5, September 2016, p. 9, accessed 17 November, 2019, [http://publications.iom.int/system/files/gmdac\\_data\\_briefing\\_series\\_issue5.pdf](http://publications.iom.int/system/files/gmdac_data_briefing_series_issue5.pdf).

<sup>9</sup> Sigona, N. and Humpris, R., Child Mobility in the EU's Refugee Crisis: What Are The Data Gaps And Why Do They Matter? University of Oxford, Faculty of Law Border Criminologies Blog, accessed 17 November, 2019, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/01/child-mobility-eu>.

<sup>10</sup> IOM's Global Migration Data Analysis Centre, "Children and unsafe migration in Europe: Data and policy, understanding the evidence base". ISSN 2415-1653 | Issue No. 5, September 2016, p. 2-4, accessed 17 November, 2019, [http://publications.iom.int/system/files/gmdac\\_data\\_briefing\\_series\\_issue5.pdf](http://publications.iom.int/system/files/gmdac_data_briefing_series_issue5.pdf).

<sup>11</sup> Migration Data Portal, Child and Young Migrants, accessed 17 November, 2019, <https://migrationdataportal.org/themes/child-and-young-migrants>.

<sup>12</sup> *ibid.*

In short, there is no uniform definition of “unaccompanied child” at the national level.<sup>13</sup> This leads to diversified and imprecise data processing, which makes it difficult for states to assess the problems and to implement child protection regulations more effectively.

However, an important step in the right direction has been the publication of Situation reports by UNICEF which started in 2016 despite the existing difficulties. The Situation reports are the major instruments of the UNICEF program “Humanitarian Action for Children” which deals with the migrant and refugee crisis in Europe.<sup>14</sup> These reports provide details about the current situation, the needs of child- and women migrants, the role of UNICEF in supporting them, and issues of fundraising.<sup>15</sup> The data is mostly based on the information acquired on migration flows in Italy, Greece, Bulgaria and Spain.

According to the statistics provided by UNICEF, in 2018 more than 141,500 people entered Europe through the Mediterranean migration routes, among them 34,200 children (approximately, 24%), of whom some 6,000 were unaccompanied/separated minors.<sup>16</sup>

Pursuant to the same source, in the period of January-September 2019, the proportional size of child migrants increased and among them the number of unaccompanied minors, totaling over 11,940.<sup>17</sup>

Even though these figures are not precise, they contribute greatly to assessing and analyzing migration flows. However, the results of the analysis are not satisfactory as far as the problem of “missing migrant children” is concerned.

### MISSING MIGRANT CHILDREN

Unaccompanied migrant children enter Europe with the hope of finding a better future for themselves. However, in most cases they must wait for assessment procedures, assessment of their status, for the decision on granting asylum, etc. while being detained. During that period, they are extremely vulnerable since due to massive migration flows states on many occasions are unable (or unwilling) to swiftly and duly conduct the relevant procedures while the minors are detained in migration camps, police detention facilities, etc.<sup>18</sup> This often leads unaccompanied minors to avoid such lengthy procedures and to try to “find their own way”.

<sup>13</sup> IOM's Global Migration Data Analysis Centre, “Children and unsafe migration in Europe: Data and policy, understanding the evidence base”, p. 5.

<sup>14</sup> UNICEF, Humanitarian Action for Children 2019, Overview, accessed 17 November, 2019, <https://www.unicef.org/eca/sites/unicef.org.eca/files/2019-02/UNICEF%20Humanitarian%20Action%20for%20Children%202019%20-%20Overview%20%28English%29.pdf>.

<sup>15</sup> UNICEF, Situation reports and advocacy briefs on refugee and migrant children, Latest information on refugee and migrant children in Europe, accessed 17 November, 2019, <https://www.unicef.org/eca/situation-reports-and-advocacy-briefs-refugee-and-migrant-children>.

<sup>16</sup> UNICEF, Refugee and Migrant Crisis in Europe, Humanitarian Situation Report #30, accessed

<sup>17</sup> November, 2019, [https://www.unicef.org/eca/sites/unicef.org.eca/files/2019-02/Refugee%20Migrant%20Crisis%20Europe%2030%20Dec%202018\\_0.pdf](https://www.unicef.org/eca/sites/unicef.org.eca/files/2019-02/Refugee%20Migrant%20Crisis%20Europe%2030%20Dec%202018_0.pdf).

<sup>17</sup> UNICEF, Refugee and Migrant Response in Europe, Situation Report #33, accessed 17 November, 2019, <https://www.unicef.org/eca/sites/unicef.org.eca/files/2019-10/UNICEF%20Refugee%20and%20Migrant%20Response%20in%20Europe%20Situation%20Report%20No%2033-%20September%202019.pdf>.

<sup>18</sup> Fili, A. and Xythali, V., Unaccompanied Minors in Greece: Who can ‘save’ them?, University of Oxford, Faculty of Law Border Criminologies Blog, accessed 17 November, 2019, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/02/unaccompanied>.

In 2016, 6,000 unaccompanied minors went missing in Germany. According to the Ministry of Internal Affairs, most of the unaccompanied children were from Afghanistan, Syria, Morocco and Algeria. The question - where are these children now - remains unanswered. State officials believe that most of the children have continued their migration routes to other European states, data on which is not available to Germany due to the lack of coordinated databases and methods of information exchange. With regard to unaccompanied minors who may have been unable to move to other European countries, the Federal Criminal Law Office assumed that most of them would have gotten in contact with criminals, that some of them might have become victims of physical or sexual exploitation or might have found shelter in the streets of big cities.<sup>19</sup>

In 2017, about 10,000 missing unaccompanied migrant children have been the reason for the European Parliament to refer this issue to the Committee of Ministers for appropriate action.<sup>20</sup> It must be noted here that the problem of missing unaccompanied migrant children is a large-scale and complex one and requires the elaboration of a common policy.

Firstly, in many cases as mentioned above, the minors themselves try to hide from state organs for fear of persecution for having illegally entered the country. This situation is aggravated by the false information and fear spread by traffickers and smugglers who try to exploit these children.<sup>21</sup> Secondly, according to NGOs, age assessment procedures are a major problem. When serious doubts about the age of an individual exist, the real age of the individual should be determined in order to grant them special status and enjoyment of the rights of children. However, the current procedural and substantive aspects of age assessment may expose a minor to the risk of a violation of his/her rights - lengthy, sexually or culturally inappropriate procedures of age assessment while the individual has to live in a detention camp, or in an environment inappropriate to their age and sex, inhuman living conditions, harassment and violence, risk of revictimization - factors that lead to the increased vulnerability of unaccompanied migrant children. In short, concerned individuals may want to avoid all of that.<sup>22</sup>

Therefore, it is of critical importance that age assessment as well as any other procedures related to a minor should be conducted by states in full compliance with the internationally recognized standard of the *"principle of the best interest of the child"*.

## 2. THE BEST INTEREST OF THE CHILD AND RELEVANT STATE OBLIGATIONS

The principle of the best interest of the child is enshrined in Art. 3(1) of the Convention on the Rights of the Child. States have the duty to apply this principle without discrimination, towards every child on its territory or under its jurisdiction (while attempting to enter the territory).<sup>23</sup> It should be mentioned that General Comment No. 14 of the Committee on the Rights of the Child

<sup>19</sup> Baers H., Refugee crisis: Where have 6,000 children vanished? accessed 17 November, 2019, <http://www.dw.com/en/refugee-crisis-where-have-6000-children-vanished/a-19180385>.

<sup>20</sup> European Parliament, Disappearance of Migrant Children in Europe, accessed 17 November, 2019, <http://www.europarl.europa.eu/EPRS/EPRS-AaG-599292-Disappearance-migrant-children-in-Europe-FINAL.pdf>.

<sup>21</sup> Missing Children Europe, Missing Children in Migration, <http://missingchildreneurope.eu/Missingchildreninmigration> [17.11.2019].

<sup>22</sup> Marion MacGregor, "Europe's Lost Migrant Children", Deutsche Welle, 5 September, 2018, accessed 17 November, 2019, <https://www.infomigrants.net/en/post/11779/europe-s-lost-migrant-children>.

<sup>23</sup> UN Convention on the Rights of Child, Art. 2. See also: UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005)*, para. 12.

(CRC) explains the threefold nature of the concept - best interest of child as substantive right, as a legal principle, and as a rule of procedure.<sup>24</sup>

According to the standards elaborated by UNICEF and UNHCR, implementation of the best interest of the child in practice means providing a safe environment, age assessment only if needed, family tracing, employing adequate educational and healthcare measures – and an appropriate process tailored to the needs of the child. In this regard, it is important to appoint a legal guardian, to give access to legal services, to offer effective appeal mechanisms and remedies, to provide a translator, to provide a child-friendly environment and to ensure a child's participation in decision-making.<sup>25</sup>

The principle of the best interest of the child shall be taken into account by states from the time the unaccompanied child migrant is identified as such. However, the practice of states shows that protecting the best interest of the child may be a serious challenge for many of them.

### 3. ISSUES RELATED TO AGE ASSESSMENT

For unaccompanied child migrants a huge problem rests with age assessment and the subsequent process of being granted the relevant protection. Those children mostly migrate without a birth certificate or any other official documentation. Thus, when the age or maturity of an individual is doubtful (the doubt should be serious),<sup>26</sup> the state must assess her/his age since minors shall be granted specific protection in accordance with international law and relevant EU directives.<sup>27</sup> Age assessment may comprise non-medical and medical procedures, which must be appropriate. These issues, together with the detention of minors, may pose serious problems in practice and need to be addressed.

#### AGE ASSESSMENT PROCEDURE – LEGAL FRAMEWORK

Age assessment procedures vary from state to state. 18 member states of the EU apply these measures when granting asylum to migrant children while other states (Austria, Italy, Poland, etc.), without any delay, transfer the child to child-care facilities. Six states assess the individual's age before transferring her/him to child-care institutions if there is any doubt about the documentation presented by the migrant (Malta, France, Belgium, etc.).<sup>28</sup>

It has already been mentioned at the outset that the paramount principle, always to be taken into account, is the best interest of the child. CRC General Comment No. 6 states that it is necessary to identify an unaccompanied migrant child in a timely manner – in a port facility or at any other location within state boundaries. Moreover, the measures of identification shall not be limited to the physical conditions of the individual, but also her/his psychological maturity. Additionally, every procedure shall be conducted in a child-friendly, scientifically and legally

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<sup>24</sup> UN Committee on the Rights of the Child, *CRC, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC/C/GC/14, Art. 3 (1), para. 6, accessed 17 November, 2019, <http://www.refworld.org/docid/51a84b5e4.html>.

<sup>25</sup> *ibid.*, p. 16.

<sup>26</sup> European Asylum Support Office, *EASO Practical Guide on age assessment*, 2<sup>nd</sup> Edition, p. 25, accessed 17 November, 2019, <https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assessment-v3-2018.pdf>.

<sup>27</sup> UN Convention on the Rights of the Child, Art. 3. See also: European Union, Charter of Fundamental Rights of the European Union, Art. 24.

<sup>28</sup> *supra*, note 10, p. 5.

appropriate environment, to avoid infringing upon the dignity of a child.<sup>29</sup>

It should be added that according to current standards, first non-medical assessment methods must be employed (interview with pediatricians and psychologists); if not conclusive, a medical assessment without radiation (e.g. physical development, dental status) should follow; if serious doubts still persist, a medical assessment with radiation (x-ray of teeth and wrist) should be undertaken as a last resort.<sup>30</sup>

The following stage consists in the registration of the child and interview by a qualified professional, which aims at identifying the reasons of separation from family, drafting needed documents, tracing the child's family, if appropriate, etc.<sup>31</sup>

Under EU regulations, Art. 25 of the Directive 2013/32/EU states that the age of an individual may be defined by medical assessment.<sup>32</sup> This provision does not set forth concrete procedures, but defines the standard of child protection, e.g. the right to freely acquire legal and procedural information, the right to have a legal guardian, a private interview with qualified professionals, the presumption of being a minor unless the medical age assessment proves otherwise, the right to consent to age assessment, etc. It should be noted that age assessment tests have a margin of 2 to 3 years of inaccuracy,<sup>33</sup> thus an effective remedy for challenging the results must be available.<sup>34</sup> The methods of age assessment vary among EU member states. For instance, in the United Kingdom, age assessment is carried out by social workers based on the demeanor, physical and social characteristics of the individual, their communication skills, health, the level of maturity and independence, etc. If still doubted, the medical assessment procedure is conducted.<sup>35</sup> In 2016, 843 out of 954 unaccompanied migrants had to undergo this procedure. According to the UK Department of Education, such a high number of medical procedures is unacceptable since age assessment should not become a routine procedure but shall only be employed when the doubt about the age is serious.<sup>36</sup>

In Germany and the Netherlands, the initial assessment is done by pediatricians, psychologists and social workers. If the age of the individual is still in doubt, the medical assessment with x-rays is used.<sup>37</sup> In some cases, the minor migrants act as adults in order not to be detained in camps because of the lengthy age assessment procedures, and because they want to find a job or move to other countries. In some other cases, youth try to obtain the protection and social benefits

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<sup>29</sup> UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005)*, para. 31.

<sup>30</sup> *supra*, note 28, p. 33.

<sup>31</sup> *supra* 3, p. 10.

<sup>32</sup> Directive 2013/32/EU, Art. 25.

<sup>33</sup> Roxanna Dehaghani, *Challenging Childhood: Vulnerability and Age Assessments*, University of Oxford, Faculty of Law Border Criminologies Blog, accessed 17 November, 2019, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/02/challenging>.

<sup>34</sup> Vivien Feltz, *Age Assessment for unaccompanied minors*. MdM International Network Head Office, p. 13, accessed 17 November, 2019, <https://mdmneuroblog.files.wordpress.com/2014/01/age-determination-def.pdf>.

<sup>35</sup> *supra*, note 35.

<sup>36</sup> *ibid.* See also: Home Office of the United Kingdom, *Assessing age, Version 3.0*, accessed 17 November, 2019, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/804760/Assessing-age-asylum-instruction-v3.oext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804760/Assessing-age-asylum-instruction-v3.oext.pdf).

<sup>37</sup> *supra*, note 18.

available for minors.<sup>38</sup>

In conclusion, the standards related to immediate registration, a child-friendly environment, qualifications of the professionals interviewing children, and appropriate methods of age assessment remain challenging for many states. Consequently, some minors remain in detention even though procedures are concluded, in violation of a child's rights.

### **WAITING FOR AGE ASSESSMENT RESULTS - DETENTION OF UNACCOMPANIED MINORS**

Detention may seriously affect the physical, emotional and psychological conditions of a minor. According to Art. 37 of the Convention on the Rights of the Child, illegal or arbitrary detention of a child is prohibited. The same is stated in Art. 11 (3) of 2013/33 EU Directive, which refers to the detention of a minor as an exception from the general rule that detention is the last resort when all other measures are ineffective. Detention must be as short as possible, the child must be separated from adults and not held in a prison, in respect of the best interest of the child.<sup>39</sup>

Notwithstanding these regulations, states are sometimes unable or unwilling to abide by this rule, e.g. see events in Greece in 2015.<sup>40</sup> In 2015, 35% of migrants registered in the migration camps in Greece were unaccompanied minors. Despite the financial and other support of international organizations and human rights NGOs, Greece was not able to offer adequate services, thus being in violation of the rights of unaccompanied migrants.<sup>41</sup>

The abovementioned issues have been of concern to the European Court of Human Rights as well, which in recent years adopted several decisions in cases concerning the rights of unaccompanied migrant children.

### **JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS**

In 2016, massive migrant flows caused serious problems in Malta, which could not protect the interests of the unaccompanied children under its jurisdiction. The case - *Abdullahi Elmi and Aweys Abubakar v. Malta*<sup>42</sup> was adjudicated by the Court in finding violations of Articles 3 and 5 of the Convention. The applicants stated that their detention for 7 and 8 months, respectively while assessing their age, violated their rights.

Malta stated that due to the high number of migrants on the island and the limited economic and human resources available to the state, Malta could not proceed to assessing the age of the Applicants in less time.<sup>43</sup> Additionally, both Applicants looked like adults which made the process more difficult. On the other hand, the Applicants claimed that the duration of detention was much longer than reasonably can be expected and that their case was not discussed as to its merits and without providing them with an effective appeal mechanism.<sup>44</sup>

The Court agreed with the argumentation submitted by the Applicants but stated that detention of unaccompanied minors is permitted before the age assessment procedure is over. However, it

<sup>38</sup> MacGregor, *Europe's Lost Migrant Children*.

<sup>39</sup> Directive 2013/33/EU, Art. 11; See also: Directive 2008/115/EC, Art. 17.

<sup>40</sup> *supra*, note 10.

<sup>41</sup> *ibid*.

<sup>42</sup> *Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016, European Court of Human Rights, nos. 25794/13 and 28151/13, accessed 17 November, 2019, <http://hudoc.echr.coe.int/FRE?i=001-168780>.

<sup>43</sup> *Ibid*, para. 135-138.

<sup>44</sup> *Ibid*, para. 129-134.

ruled that the continuation of the Applicants' detention after being verbally informed that their age was assessed as minors (by Malta's officials) violated Art. 5 of the ECHR and the principle of good faith.<sup>45</sup> The Court held that the Government had been unwilling to grant them the legal privileges accorded to minors and had continued their detention.

Consequently, the Court adjudicated the case based on the following criteria: whether the detention was in accordance with the principle of good faith, whether it was permitted under the law, what were the place, conditions and duration of detention.<sup>46</sup> Finally, the Court ruled that the high number of migrants in Greece did not permit the state to detain unaccompanied minors, a vulnerable group, for 7-8 months.<sup>47</sup>

It should also be mentioned that, in conformity with Art. 3 of ECHR, the Court took into account the international standards on the conditions of children seeking asylum which must be adapted to their age and the "tense and violent atmosphere" the Applicants had to face, and found a violation of those standards ( their treatment amounting to degrading treatment).<sup>48</sup>

Thus, it may be concluded that the decision complied with the principle of protecting the best interest of unaccompanied migrant children. The Court also held that the high number of migrants does not exonerate the State from not protecting the best interests of the child, more precisely the rights of unaccompanied migrant children.

Another interesting case adjudicated by the Court in 2019 concerns the alleged violation of the rights of Afghan, Syrian and Palestinian individuals. In *Kaak and Others v. Greece*<sup>49</sup> the Court assessed the legality of the detention of unaccompanied minors in the Vial and Souda migrant camps in Greece. Regarding the conditions of detention, the Court in this case did not find a violation of Articles 3 and 5(1) of the ECHR. The Court found that the director of the camp had immediately taken steps to ensure compliance with the child's best interest principle in requesting the Social Solidarity National Service to find proper facilities to keep the minors. Thus, the Court found that every measure at hand had been employed by the Government and that the administrative detention of the unaccompanied minors for 24-30 days had not been excessive. Consequently, no violations of Articles 3 and 5(1) were found.

However, the Court held that the Government violated Art. 5(4) of ECHR which provides for the right that the lawfulness of the Applicants' detention should be decided speedily by a court. According to the decision, the information/brochure provided by the Government to the Applicants did not identify in which administrative court they could appeal. Moreover, the information was available only in Greek, which did not provide the Applicants with an effective appeals mechanism.

In view of the abovementioned decisions, it may be concluded that states are required on a priority basis to abide by the principle of the best interest of the child when dealing with unaccompanied migrant children. States must provide all possible means in good faith to ensure the protection of this vulnerable group.

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<sup>45</sup> Ibid, para. 144.

<sup>46</sup> Ibid, para. 142.

<sup>47</sup> Ibid, para. 145.

<sup>48</sup> Ibid, para. 111.

<sup>49</sup> *Kaak and Others v. Greece*, 2019, European Court of Human Rights (application no. 34215/16), accessed 17 November, 2019, <http://hudoc.echr.coe.int/eng-press?i=003-6523877-8615995>.

## CONCLUSIONS

This article aimed at discussing certain aspects of safeguarding the rights of unaccompanied migrant children. In addition to the lack of uniform definitions and approaches in national laws and practices, the lack of precise data negatively affects the elaboration of a transnational policy that protects unaccompanied minors from being exploited by traffickers, smugglers, or from becoming “missing minors”. Another issue analyzed in this article is age assessment and the content and length of the relevant procedures. Until the assessment process is over, detaining unaccompanied minors in an inappropriate environment and/or for an unreasonable period will result in the violation of children’s rights, as stated in the case-law of the European Court of Human Rights discussed above. Limited resources, high numbers of asylum seekers or economic arguments do not excuse states from ensuring the best interests of unaccompanied migrant children, for whom all the necessary measures shall be employed without delay. In conclusion, it is of critical importance to develop a uniform approach at national levels to rights and procedures concerning minors, to improve cooperation and data exchange capacities among states. This would positively contribute to the elaboration of an effective regional policy for protecting the rights of unaccompanied migrant children whose best interest must be the paramount concern for every state.