



# The protection of minors in the EU context: urgent matters and challenges

## Analysis and concerns

Intensive Training Course “*International protection and rights of minors in the European Union*”  
Jean Monnet Module MARS

Gaia Boneschi  
Federica Graziani  
Daniela Movileanu  
Daniela Rigoni





# Introduction

- Broad topic
- Primary problem: age assessment as a prerequisite to accessing protection
- Related problems: challenges in filling protection gaps and persisting areas of concern

# Outline

- Challenges in accessing protection
  - Age assessment and access to protection in Greece (Gaia)
  - Age assessment and access to protection in the UK (Federica)
- Challenges in filling protection gaps
  - Areas of concern (Daniela R.)

# Greece: the age determination challenge to access protection

- Law No. 4636/2019 (IPA) transposes and adapts the EU Directives  
Most important articles concerning minors: art. 32, 39, 41, 48, 57, 59, 60 and 75
- Concerning age determination: art. 39 and 75 (IPA) + Ministerial Decision 92490/2013 + Joint Ministerial Decision 1982/2016

Age assessment crucial to allow migrant minors to access protection guarantees reserved to them by law and for them to be considered as children first (utmost importance as children have different legal and cognitive autonomy compared to adults).  
Protection gaps cannot even be detected if access to protection is denied due to sometimes hasty, wrong or late age assessment.

# What do age determination provisions foresee in Greece?

- Law No. 4636/2019 (art.39, 75)
  - Referral by competent receiving authorities according to the provisions of the Joint Ministerial Decision 1982/2016;
  - Respect of gender-related special characteristics and of cultural particularities;
  - Guardian appointed to protect the BIC during the procedure
  - Child-friendly information about the procedure (methods, consequences, consequences of the refusal)
  - Procedure only with the consent of the minor
- Ministerial Decision 92490/2013
  - Established age determination procedure in the context of First Reception Services
  - In case of doubt, medical control and psychosocial support team for age assessment (macroscopic features; if inadequate, cognitive, behavioural and psychological development of the individual; medical assessment as last resort) → head of the medical and psychosocial unit recommends to the Head of the RIC the official registration of age → individual (living inside the RIC and unable to leave) informed → appeal within 10 days
- Joint Ministerial Decision 1982/2016
  - Justified doubt → referral to public health institution (pediatrician and psychologist) → age assessment (macroscopic features; clinical examination with due respect of the person's dignity, and take into account deviations and variations relating to cultural and racial elements and living conditions that may affect the individual's development); → if inadequate, psychologist or social worker from a relevant body (or civil society) → last resort: medical examination
  -

=filling the gaps in the Asylum procedure and limiting use of medical examination; safeguards explicitly providing the possibility of remaining doubts and providing the applicant with the benefit of the doubt even after the conclusion of the procedure

# Why is age determination problematic in Greece?

In practice:

- Lack of qualified and specialised staff → no steady psychosocial units on the islands → procedure prescribed by the law bypassed and slowed down (~6 age assessment procedures per month).
- Lack of guardians supporting the children in the procedure (prevents the enjoyment of procedural rights guaranteed by national legislation).
- Age registered incorrectly, either by mistake or due to errors in the interpretation by FRONTEX and the police at the border during the age registration (Samos).
- Inconsistencies in the procedures followed: cases referred directly to the hospital for X-ray or dental examination; invasive procedure and consistent margin of error → bypassing macroscopic and psychosocial evaluation, therefore the law.
- No functioning guardianship system; age assessment procedures taking place when minors are alone.
- Referrals to age determination procedure often decided arbitrarily by the RIS (Reception and Identification Services), determining age assessing registration photos or in person appearance.
- Treated as adults by authorities until they undergo the age assessment procedure.
- Joint Ministerial Decision 1982/2016 does not apply to children in detention → deprived of any age assessment guarantees → systematically undergo medical examinations in case their age is disputed + no remedy is in place to challenge the outcome

# Current challenges and urgent matters in accessing protection in the UK

## Brexit

- Dubs amendment closed
- Dublin III closed
- Eurodac closed

There are no clear plans what will happen next

Although the UK will remain committed to the 1951 UN Convention relating to the status of Refugees and the European Convention on Human Rights (under the jurisdiction of the European Court of Human Rights) there are concerns that the UK will not replace the elements of the EU Charter that are not covered by these international commitments, leading to reduced human rights protection in the UK.

There is no guarantee that the UK will continue to align its asylum standards with those of the EU in the future.

# Why is age important?

A significant number of young asylum seekers arrive in the UK without documentation to prove their ages, or with documentation that does not belong to them or has been obtained fraudulently. Many have their age questioned by either the Home Office, or the local authority to which they have turned for support.

The question of age is extremely important, as it will not only affect how an individual is supported to access to protection but it will also affect how their asylum application is processed.

If a UASC is assessed

**As a child:** Section 17 of the Children Act 1989 imposes a general duty upon a local authority to safeguard and promote the welfare of children within their area who are in need, section 20 of the same Act states that every local authority shall provide accommodation for any child in need within the area who requires accommodation as a result of there being no person who has parental responsibility for him/her

**As an adult:** the age assessment can be challenged by way of judicial review, which is carried out by the Administrative Court, the Upper Tribunal (Immigration and Asylum Chamber) which is very slow and stressful or can be referred back to the Home Office and follow the adult pathway which is more complicated;



# Relevant legislation:

## Section 55 of the Borders, Citizenship and Immigration Act 2009

This statutory duty extends to all Home Office staff and those acting on behalf of the Home Office

Introduced a statutory duty on the Home Office to ensure that its immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

It came into force on 2 November 2009 and is how the UK gives effect to the United Nations Convention on the Rights of the Child (UNCRC) in immigration matters that affect children.

The statutory guidance under section 55, Every child matters - change for children sets out the main principles to take into account. For example, the guidance states the Home Office must act in accordance with the following principles:

- every child matters, even if they are subject to immigration control
- the best interests of the child will be a primary consideration, but not the only consideration, when making decisions affecting children
- ethnic identity, language, religion, faith, gender and disability are considered when working with a child and their family
- children must be consulted and the wishes and feelings of children considered, wherever practicable, when decisions affecting them are made - where parents and carers are present, they will have primary responsibility for representing the child's concerns
- children must have their applications dealt with in a way that minimises the uncertainty that they may experience

Being familiar with and applying the detailed guidance and the guidance within Children's asylum claims will enable the officer to demonstrate that the welfare of a claimant, whose age remains doubtful, has been taken account of in the processing of their case.

- **Section 51 of the Modern Slavery Act 2015:**

Stipulates the manner in which age dispute cases must be treated when a public authority is identifying what support to provide or is already providing support under relevant arrangements and they have reasonable grounds to believe that the person may be a victim of human trafficking.

In such cases, if they are not certain of the person's age but have reasonable grounds to believe that the person may be under 18, they must assume for the purpose of those arrangements, that the person is under 18 until an assessment of the person's age is carried out by a local authority or the person's age is otherwise determined.

'Relevant arrangements' means providing assistance and support to people who are, or for whom there are reasonable grounds to believe that they may be, victims of human trafficking as set out in guidance issued by the Secretary of State.

- **paragraph 18B of schedule 2 to the Immigration Act 1971:**

As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children must not be detained other than in the very exceptional circumstances specified in paragraph 18B of schedule 2 to the Immigration Act 1971 (see Detention – general guidance)

- **Children's legislation in each of the 4 nations of the UK Local authorities**

- the Children Act 1989 in England
- the Social Services and Well-being (Wales) Act 2014 in Wales
- the Children (Scotland) Act 1995 in Scotland
- the Children (Northern Ireland) Order 1995 in Northern Ireland

# Home Office decision on age:

Home Office decisions on age Age disputes most frequently arise when an asylum seeker first applies for asylum, usually at a port of entry or at the Asylum Screening Unit.

If an asylum seeker's claim to be a child is doubted by Home Office, and 'there is little or no documentary evidence to prove their age', the Home Office will conduct an initial 'assessment' of the individual based solely on appearance and demeanour, even though this has been shown to be a flawed method of deciding age.

Home Office policy is as follows:

- a) If the claimant's physical appearance/ demeanour "very strongly suggests that they are significantly over 18 years of age" they should be treated as adults.
- b) All other applicants should be afforded the benefit of the doubt and treated as children, until a careful assessment of their age has been completed. This does not indicate the Home Office's final acceptance of the applicant's claimed age, which will be considered in the round when all relevant evidence has been considered, including the view of the local authority to whom the child should be referred.

# Age assessments by a local authority

A local authority's assessment must be as full and comprehensive as possible, and conducted in a clear, transparent and fair manner. R (B) v Merton [2003] EWHC 1689 (Admin) - Merton Compliance;

Before 2015, there was no guidance provided to local authorities on how to conduct an age assessment and still there isn't a statutory guidance but social workers should refer to:

- **the department for Education' Statutory Guidance: "Care of unaccompanied and trafficked children"**
- **the best practice guidance for social workers published by the Association of Directors of Children's Services:**

Care of unaccompanied migrant children and child victims of modern slavery DoE  
November 2017

Age Assessment Joint Working Guidance: ADCS and Home Office: April 2015

Age Assessment Guidance: ADCS: October 2015

Home Office Assessing Age; October 2018

Home Office: Children's asylum claims October 2017

# Why age assessment is problematic in the UK:

- Many social workers have reported feeling that they do not have the specialist skills required, sometimes due to having to learn 'on the job' from fellow professionals;
- From January 2021 no access to EURODAC to request further information which was useful (sometimes) to determine the age;
- An incorrect age assessment can have serious consequences by denying vulnerable UASC the services that they are entitled to and putting them at risk;
- On the other hand, there have been cases when young adults have falsely put forward a lower age to authorities in order to access more beneficial services and protections designed for children putting a lot of pressure on the already limited resources of the local authorities;
- It cannot be done on basis of appearance and demeanour as the Home Office does;
- Medical intervention inappropriate
- The Merton standard is subject to various criticisms:  
First of all, the differing capacity of local authorities to make such assessments inevitably results in a variation in the quality of age assessment;  
Secondly, the Merton standard encourages disproportionate weight being given by social workers to the perceived credibility of the individual, a factor that also has serious consequences for the asylum claim. (see UNHCR Quality Initiative Project, Sixth Report to the Minister, April 2009: section 3.4.10)

# The protection of minors in the EU context: urgent matters and challenges

- Issues: • civil rights and freedoms; • equality; • personal identity issues; • family life; • alternative care and adoption; • child protection against violence and exploitation; • economic, social and cultural rights; • migration and asylum; • consumer and data protection; • children's rights within criminal justice and alternative proceedings





# Child as a holder of rights

**Under EU law, there is no single, formal definition of 'child'**

-Directive 2004/38/EC of the European Parliament and of the Council

-Directive 94/33/EC of 20 August 1994 on the protection of young people at work, OJ 1994 L 216, Art. 3  
European Commission (2013), Investing in children: breaking the cycle of disadvantage, Recommendation 2013/112/EU, Brussels

- Articles 6 (1) of the TEU and 51 (2) of the EU Charter of Fundamental Rights provide that the Charter does not extend the competences of the EU, nor does it modify or establish a new power or task for the EU.

To date, areas relevant for children's rights where the EU has extensively legislated are: • data and consumer protection; • asylum and migration; • cooperation in civil and criminal matters

- Council of Europe: development of children's rights law and the areas of protection covered
  - Interpretative approaches
    - the ECtHR analyses applications on a case-by-case basis and therefore does not offer a comprehensive overview of children's rights under the ECHR.
- **The CoE, similarly to the EU, is not as an organisation legally bound to the CRC: solution in vacuum?**

General principles of international law (jurisprudence-

ECtHR, Harroudj v. France, No. 43631/09, October 2012, para. 42. 42 / ECSR, World Organisation against Torture (OMCT) v. Ireland, Complaint No. 18/2003, 7 December 2004, paras. 61-63; ECSR, Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, 20 October 2009

# The protection of minors in the EU context: urgent matters and challenges



- **Role of the European Courts**

- **A. The Court of Justice of the European Union**

the CJEU has so far mainly reviewed preliminary references Article 267 of the TFEU

The EU has traditionally been circumspect in attaching decisive force to the CRC, particularly in more politically sensitive areas such as immigration control, although this is changing in recent jurisprudence.

- **B. The European Court of Human Rights.** The ECtHR mainly decides on individual applications lodged in accordance with Articles 34 and 35 of the ECHR. ECtHR jurisdiction extends to all matters concerning the interpretation and application of the ECHR and its Protocols (Article 32 of the ECHR). In contrast to the CJEU, the ECtHR has a vast jurisprudence on children's rights: right to respect for private and family life (Article 8 of the ECHR), right to protection from inhuman and degrading treatment (Article 3 of the ECHR) or the right to a fair trial (Article 6 of the ECHR)
- **C. European Committee of Social Rights-** to date, complaints have involved whether states have violated children's rights under the ESC on issues including the economic exploitation of children, the physical integrity of children, the health rights of migrant children and access to education by children with disabilities



# European law relating to the rights of the child

- **Basic civil rights and freedoms** Freedom of thought, conscience and religion i.e kafala
- Under EU law, Article 10 of the EU Charter of Fundamental Rights guarantees to everyone the freedom of thought, conscience and religion

The cases of *Dogru v. France* and *Kervanci v. France* concern the exclusion from the first year of a French state secondary school of two girls, aged 11 and 12 years, as a result of their refusal to remove their headscarves during physical education classes

- **Right to be heard.** Which Interpretation?

Article 24 (1) of the EU Charter of Fundamental Rights provides that children may express their views freely, and that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. This provision is of general applicability, and is not restricted to particular proceedings. The CJEU interpreted the meaning of this provision in conjunction with the Brussels II bis Regulation.

Under CoE law, the ECtHR does not interpret the right to respect for private and family life (Article 8 of the ECHR) as always requiring the child to be heard in court.

# European law relating to the rights of the child

**Equality and non-discrimination:** Under EU law: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation. By contrast, Article 19 of the TFEU only covers the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

**Non-discrimination based on age :** Age is currently only protected in the context of access to employment, similarly to sexual orientation, disability and religion or belief.

Under CoE law, Article 14 of the ECHR and Article 1 of Protocol 12 to the ECHR do not explicitly mention 'age' in the list of grounds on which discrimination is prohibited

## **Non-discrimination based on other protected grounds**

disability or birth in European jurisprudence pertaining to children.

the CJEU discrimination by association

## **Personal identity issues**

Issues of personal identity have generally not been addressed at EU level, in view of the EU's limited competence in that area.

But CJEU has incidentally ruled on the right to a name

Citizenship and residency aspects have also been adjudicated in light of Article 20 of the TFEU

## **Identity theft**

# European law relating to the rights of the child

- Identity of children belonging to national minorities:

A child belonging to a national minority has the right to enjoy his or her own culture, profess and practice his or her own religion, and use his or her own language.

Under EU law, no particular attention

Under CoE law, Article 5 (1) of the FCNM

But there is no child-specific provision in the FCNM

Under international law, Article 30 of the CRC

## **Family life**

Under EU law, there are no provisions dealing with the substantive scope of the right to be cared for by parents

Council of the European Union (2008), Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance, OJ 2008 L 7 (Maintenance Regulation)

Under CoE law, the ECtHR has underscored that Article 8 of the ECHR primarily establishes the duty of the state not to intervene in family life.

in exceptional circumstances?

## European law relating to the rights of the child

- Alternative care to family care and adoption
- EU law, mainly through the Brussels II bis Regulation, deals with cross-border procedural aspects related to placing children in alternative care

There is no explicit general obligation in EU law to appoint a guardian for children without parental care-

- Adoption: i.e. the question of whether same-sex couples should have an equal right to second-parent adoption as heterosexual couples.
- Child protection against violence and exploitation
- Violence in schools, at home and other settings
- Forced labour, Child trafficking, Child pornography, Children belonging to a minority, Children with disabilities, Missing children
- The European Union's main competence in the area relates to cross-border crimes (Article 83 of the Treaty on the Functioning of the European Union (TFEU)). Particular legislative measures have therefore been enacted with respect to child pornography and human trafficking

# Remaining areas of concern

- Scope of state responsibility
- The ECHR was faced on several occasions with cases concerning violence against children administered by private individuals in schools, private homes or other establishments which were ran by non-state actors, where it was questionable whether state responsibility could arise. More importantly, the ECtHR ruled that a state may not absolve itself of the duty to protect children by delegating the administration of important public services – such as education – to private individuals
- Article 22 of the Istanbul Convention



# Remaining areas of concern

- **Sexual abuse**

- Under EU law, Directive 2011/93/EU

- Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ 2009 L 93, pp. 23–32.

- Framework Decision fills an important gap in the protection system

- **Domestic violence and child neglect**

Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 2011

- **Child exploitation, pornography and grooming-Child trafficking**

Europol and Eurojust

Under EU law, Article 83 of the TFEU-Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims-

Under CoE law, the ECHR does not include any express provision on trafficking



# Remaining areas of concern

- **High risk groups**
- **Children belonging to a minority**
- **Children with disabilities**-Council of the European Union (2009), Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 L 23/35
- **Missing children**
- **Economic, social and cultural rights and adequate standard of living**
- Cultural rights have remained largely underdeveloped and unaddressed in scholarship and litigation-
- Securing the availability of adequate resources is key to ensure the protection of social rights.
- Right to education of migrant children: under EU law, recognised in virtually all aspects of EU migration law
- Council Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (Students Directive)
- Right to housing -Article 34 (3) of the EU Charter of Fundamental Rights-The ECtHR has indirectly dealt with the issue of the quality of housing

# Remaining areas of concern

- **Family reunification for separated children.** Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 21: for it to be 'triggered', a Council decision is required...
- Fair trial guarantees
- Rights of young offenders in relation to detention
- Protection against abuse and ill-treatment
- Consumer and personal data protection
- Almost one out of four children in the EU continue to live at risk of poverty or social exclusion.
- Article 24 of the EU Charter of Fundamental Rights: "Children shall have the right to such protection and care as is necessary for their well-being"-
- The European Pillar of Social Rights
- The 2030 Agenda for sustainable development
- European Social Fund Plus for the programming period 2021–2027



# Remaining areas of concern

- Audiovisual Media Services Directive (Directive (EU) 2018/1808)
- infringement procedures against 23 EU Member States for failing to implement the Sexual Abuse Directive (2011/93/EU)
- Rome integration
- Solution:
  - role of the European Commission in support EU Member States (in legislative guidance)
  - EU Member States and clear information on the GDPR's
  - particular attention to addressing child sexual abuse online, as required by Article 28b of the directive
  - EU Member States should improve their data collection methodologies and tools used to monitor progress on Roma inclusion

# Conclusion

- Challenges in accessing protection
  - Greece: Problems of practical implementation
  - UK: Additional problems associated with Brexit
- Persisting areas of concern
  - civil rights and freedoms, equality, personal identity issues, family life, alternative care and adoption, etc.

# Some recommendations

(Brouwer 2020, emphasis added)

- As long as there is any doubt about the age of a person, he or she should be treated as a child and given the same protection, including the *benefit of the doubt*.
- Medical tests, especially involving radiation should be a *method of last resort*, whereas sexual maturity tests should be *prohibited*.
- When conducting a medical age assessment test, Member States should seek the *explicit consent* of both the person concerned and the legal representative.
- The results of medical age assessment examinations should include *information concerning the accuracy and reliability of the methods* used and the relevant *margins of error*.
- The applicant must have the *right to appeal* against age assessment decisions and to have them reviewed and revised.