



Difficulties and detrimental effects in the determination of the age of unaccompanied foreign minors, legal protection in Spain and Italy

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Abstract

The purpose of this paper is to perform a critical analysis of the procedure for determining the age of unaccompanied foreign minors in Spain and Italy in the detrimental effects that may arise from establishing the legal status of these minors. On one side this study looks at the Spanish legal system and on the other, the Italian Law n. 47 of 2017 on dispositions upon protection measures of foreign unaccompanied minor, which contemplates, in a uniform way, the protection of unaccompanied minors in the EU. One of the basic aspects dealt with is that relating to the assessment of the age of the foreign individual, which in accordance with current regulations, will be performed according to the personal law applicable; an issue that is infringed by the Spanish Administration in this process. However, the lack of coordination among Member States threatens the practice efficacy of those legal provisions, which coercive force is confined through the Italian territory. We discuss upon the need of harmonizing the different states' practices through a legislative intervention of the EU.

Keywords: unaccompanied foreign minor, legal identification, volunteer guardian, legal status, age of majority or, minority

1. Introduction: Approach to the topic

Migration to European Unión (Spain and Italy included) has increased considerably in recent years, hence the arrival of immigrants has been considered the cause of the growth of the Spanish population for the second year running, which it now exceeds 47 million inhabitants and according to data provided by the Spanish Home Office, 14% of migrants are minors and about 15,000 are unaccompanied foreign minors (known as "MENA" in Spanish, hereinafter UASC ("Unaccompanied and Separated Children")) from whom it is difficult to obtain reliable data. In many cases minority age is easily verifiable, since they are very young children (babies or children under the age of 12); however, a high percentage of UASC comprise an age range in which it is more difficult to determine the minority but, equally, they are minors ^[1]. This situation, which we can already describe as "a continued and massive arrival of UASC to Spain" has become the center of intervention and subsequent actions by the Spanish Administration regarding immigration.

In practice, it is impossible to know with certainty how many other UASC have arrived in Spain across the borders of Ceuta, Melilla or Algeciras clandestinely ^[2]. According to the Public Prosecutor's Report cited above, at the end of 2018, almost 14,000 children were registered in the UASC Registry under

guardianship or foster care by Spanish protection services, and the vast majority are Moroccans, although nationals of other Member States of the European Union (hereinafter, EU) such as Romania are also listed.

However, we must not forget that Italy is a mere first-time and transit country for most UASC arriving in the EU. In fact, the migrant children who reach our Mediterranean shores have a much broader life project than to stay in southern European countries. By virtue of these ambitions, many of them leave the reception centres that detain them, eager to be able to meet with an acquaintance of theirs in another Member State or simply to realize their own dreams in a country that offers them a better quality of life ^[3].

The situation created with these migratory movements has revealed the shortcomings, inadequacies and gaps of the Spanish legal system designed to accommodate and protect UASC, shortcomings that are exacerbated in the case of migrants who are on the age limit, where it is difficult to determine whether they are minors or adults. And it is in this context that this paper is presented, which aims to critically analyze the current legal procedure in Spain to determine the majority or minority in those "doubtful" cases, especially when UASC carry documentation that due to their appearance may raise doubts about their age.

¹Migration figures in <http://www.ine.es/>. See P. Peláez Fernández, "Estado de la cuestión sobre los derechos de los MENAS en España: entre la protección y el abandono", in *Revista de Educación Social*, (No. 27, 05/2018) pp. 48-57. To the different figures given for UASC in Spain, depending on the body that provides them, we must add those that are outside the system. Under the protection of organizations, in 2017 and according to the Government, there were 6,414 minors supervised by institutions of the different Autonomous Communities, and according to the Public Prosecutor 5.380.

²The arrival of UASC to our shores throughout 2018 showed a very worrying evolution, with an increase of 199%, according to the Prosecutor's Report

corresponding to the 2019 General State Prosecutor's Report 2019, available at https://d3cra5ec8gdi8w.cloudfront.net/uploads/documentos/2019/09/10/_memoria2019_76609dd4.pdf, (consulted on 27/01/2020).

³ N. Pavesi y G. Giulio Valtolina, "Best practices in the Reception of Unaccompanied Minors in Italy", en V. Cesareo, *The Twenty-third Italian report on Migration 2017*, pp. 79-89 (disponible en <http://www.ismu.org/wp-content/uploads/2018/03/XXIII-Report-on-migrations-2017-1.pdf>, consulted on 30/03/20).

And advancing our critical position in this regard, it is appropriate to reflect whether the procedure applied complies with legal requirements and provides legal certainty to the effects of such assessment. As we will try to demonstrate, we consider that this is not the case, it is enough to analyze - in the light of the framework of applicable civil, criminal and administrative norms - the irregularities of the system and the situation of legal uncertainty in which UASC are often found, as the result of a contradictory process that is not always respectful in protecting the “best interests of the child”, as established by international, institutional and autonomous norms of Spanish law, which has led to the U.N. Committee on the Rights of the Child to call on the Spanish State to assume its responsibility in this matter.

II. Age assessment procedures of the individual and private international law

Age is one of the aspects that affects an individual's legal capacity, so for civil effects, and in accordance with Spanish private international law, age assessment is performed according to the subject's personal law. This law is determined by article 9.1 of the Civil Code (hereinafter, CC); personal law, which corresponds to the law of nationality. This law will regulate the following aspects: 1) the intervention of third parties to assess the capacity; 2) the legal effects derived from the legal acts carried out by the minors (such as certain contracts, the causes of emancipation, etc.); and 3) when the person reaches the age of majority.

If we start by ascribing the real importance to the third aspect when the child reaches the age of majority, we will have to rethink the procedure by which the Spanish Administration analyzes whether a minor is actually not a minor in “doubtful” scenarios that may arise from foreign documents that UASC are carrying when they arrive in Spain, or when faced with the doubt generated by the physical build of individuals in that age group where they may look like an adult but the person is actually still a minor. Following this same logic, and despite what the respective personal laws or nationality laws indicate, we cannot forget that the enforcement of foreign laws that discriminate on the grounds of sex, would be contrary to Spanish international public order, by setting different ages between men and women (as happens in Bangladesh, for example).

Apart from that assumption, the Administration - as a rule of thumb - should, and always in accordance with the personal law of UASC, understand and treat individuals who accredit it, as minors, especially if it is taken into account that not all States set the age of 18 as the age of majority, for example Latin American countries such as Honduras, Bolivia or African countries such as Cameroon, Egypt and Guinea, among others, set the age of majority at 21 years. Canada, for its part, in certain States of its territory, sets it at 19 years^[4].

This topic has been discussed by different experts for several years, but unfortunately it remains an unsolved problem and

given the overwhelming figures of UASC that arrive in our country, it is urgent and necessary to place the focus of analysis on them, since the determination of age is a fundamental question that affects each and every aspect related to the life and integration of a minor in our country in a transversal way.

As Durán Ruiz has pointed out, since 2008, and as he presented in his keynote speech at the First International Congress on Migration in Andalusia, minority in the case of UASC constitutes the basis of a more favorable treatment since, first, it prevents the child from being subject to sanctioning measures applicable to foreigners in an irregular situation, such as expulsion. Secondly, it obliges the Administration to recognize the legal situation of helplessness and, consequently, provide for adequate reception and guardianship; and thirdly, in the case of committing crimes, criminal treatment is differentiated^[5].

Despite the importance of determining age for civil, administrative and sometimes for criminal purposes, the Spanish legal system lacks a coherent framework that provides a unified procedure for action with transversal legal effects with respect to all aspects of the life of UASC, and as we will briefly analyze below, we understand that minors are in a situation of dual vulnerability since the same institutions that have to guarantee them protection doubt their minority which places them de facto, in a situation of abandonment^[6].

III. Critical analysis of the legal procedure for determining age in Spain

Before analyzing the current situation, it needs to be pointed out that, until a few years ago, the actions that were carried out in order to determine the age of the children only affected those who did not carry documentation or those who raised doubts because of the “apparent manipulation” of documents.

According to Directive 3/2003 of the Prosecutor's Office, on the origin of the return of foreign minors who intend to enter the country illegally and who do not qualify for the legal situation of homelessness, Spain has been systematically “returning” foreign minors, on the grounds that “precautions must be taken so that the system of rights and guarantees of the States of the European Union (hereinafter, the EU) cannot be fraudulently used by violators of the respective immigration laws with the aim of forcing unwarranted residence rights. An obvious example of what has just been described is reflected in the legal and healthcare treatment that, to date, is taking place in Spain to the avalanche of undocumented foreign minors, who, without family or livelihoods, enter our country illegally by the most varied means. The situation in which these minors find themselves determines, as a general rule, the automatic protection of the Administration and, as a consequence, their future legal residence in Spain”.

At present, these inquiries are made with respect to minors who, despite having the correct documentation from their respective countries, doubts are raised over their validity because the

⁴ See A. Calvo Caravaca and J. Carrascosa González, *Derecho internacional privado*, (Granada, Comares, 2017), Vol II, pp.66-68.

⁵ See F. J. Durán Ruiz, *Derechos de los menores extranjeros y la determinación de su edad: cuestiones sustantivas y procesales*, *Actas del I Congreso Internacional sobre Migraciones en Andalucía*, Granada, (University of Granada/Institute of Migrations, 2011) p. 851-852. And on this same subject, by the same author “Los derechos de los menores no acompañados inmigrantes y solicitantes de asilo en la Unión Europea de las fronteras fortificadas y sus Estados

miembros”, *Revista Trace. Travaux et recherches dans les Amériques du Centre*, (Centro de Estudios Mexicanos y Centroamericanos, No. 60), pp.9-24, text available at <https://journals.openedition.org/trace/1723#text>, (consulted on 30/01/20).

⁶ The situation of vulnerability in which UASC are found was denounced by the ROOTS Foundation (linked General Council of Spanish Law) before the Spanish Parliament, in the Commission on the rights of children and adolescents, available at <http://www.fundacionraices.org/?p=2813>, (consulted on 08/01/20).

institutions of the State of origin do not "offer" guarantees of their issuance, so a basic rule governing international private relations, such as the international effect of foreign documents, is constantly questioned by the Spanish authorities, thereby making UASC victims of irregularities in the system^[7].

At this time, we can say that the institutional situation to deal with this problem is tense, and at times, contradictory. And this is so for two main reasons: first, that since January 2018 the Supreme Court (hereinafter, SC) through Judgment No. 131/2018^[8], rejected appeal No. 2289/2016, lodged by the representation of the abovementioned Roots Foundation, against Judgment No. 236/2016, of June 2, Section 7 of the Contentious Administrative Chamber of the National Court (hereinafter, NC), in the contentious-administrative appeal No. 378/2015 filed against the content of the Framework Protocol on certain actions in relation to Unaccompanied and Separated Children, published by the Cabinet by Resolution of October 13, 2014; and second, it relies on the Observations made by the United Nations Committee on the Rights of the Child to the Spanish State, in March of this year, and which in relation to UASC, reflects in Observation No. 44 two main concerns that directly affect the functions attributed to the Public Prosecutor's Office, through articles 35 of Organic Law 4/2000, on the rights and liberties of foreigners in Spain and their social integration (hereinafter, LOEX^[9]), through article 48 of Act 12/2009, regulating the right of asylum and subsidiary protection (hereinafter, Asylum Law^[10]) and in article 12 of the Organic Law on the Legal Protection of Minors (hereinafter, LOPJM^[11] amended by Law 26/2015, of July 28, on the Modification of the System for the Protection of Children and Adolescents).^[12]

1. Implementation of regulations, the Protocol and State intervention. Result: legal uncertainty for foreign minors

Next, we will explain why we consider these reasons as key factors in sustaining the chaos that we still have in Spain when it comes to establishing the personal status of foreign minors-adults according to their age^[13]. The first reason, the decision of the SC, through its Judgment No. 131/2018, which rejected the appeal lodged by the Roots Foundation against the NC decision No. 236/2016, of June 2, did not take into account any of the motives alleged by the appellant, when changing the decision of another court, on considering that the Protocol of action approved by the Government in 2014 infringes the legal system and which consequently the decision

Of the NC also infringes. The main aspects to be highlighted are:

- The "error in judging" route, on considering that the NC decision infringes what is established in substantive and procedural law with regard to the legal framework of Public Administration, on considering the appeal inadmissible, since the contested act as a circular resolution or internal instruction of the Administration, cannot be sustained in view of the true nature of the contested Protocol framework, whose content exceeds the content that is characteristic of them.
- The NC decision infringes Article 24.1 of the EC regarding the right to effective judicial protection in its modality of the right to access jurisdiction.
- The infringement of articles 22.2nd, 25.1st and 35.3rd of the LOEX and 190.1 and 2 of its Regulations since the Protocol Framework approved in the contested resolution is contrary to the aforementioned provisions in several of its sections: sixth paragraph, paragraph a); section one of chapter II; sixth section, paragraphs two and three of Chapter II and the references to this precept contained in the third section; in Chapter V.
- Likewise, it is understood that the NC decision is contrary to article 12 of the UN Convention on the Rights of the Child, of November 20, 1989 and to articles 9.1 and 10 of the LOPJM, since it omits the regulation to guarantee the right to be heard and the provision of legal assistance to the minor when undergoing tests for the determination of age and does not contemplate the mandatory nature of the minor's consent for the performance of said tests.

The result of the rejection of the SC to the appeal leaves the UASC in Spain in a state of defenselessness, considering that said Protocol lacks a normative nature, without going into the merits of the grounds for appeal. For the appellant, the medical tests that UASC undergo, such as carpal x-rays, analysis of the oral cavity and collarbone x-rays, are outdated and have a wide margin of error. For example, like that of the carpal test with a margin of 4 years apart - and that are based on "Caucasian teenagers". This Foundation also denounces that many times they are also forced to strip down naked to evaluate the development of their genitals and pubic hair and for these tests the minors do not have an interpreter, and are accompanied by a police officer or an occasional guardian, in an invasive act affecting his/her privacy. This contradicts in practice what the Protocol establishes in that UASC must be properly informed about the tests and give their consent.

⁷ Fragment of the Approach of this Inquiry, available at https://www.fiscal.es/memorias/estudio2016/INS/INS_03_2003.html, (consulted on 28/01/20).

⁸ STS 262/2018-ECLI: ES: TS: 2018:262, text of the Spanish supreme Court available at <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=8283962&links=menores%20extranjeros%20no%20compa%C3%B1ados&optimize=20180209&publicinterface=true>, (consulted on 30/08/18).

⁹ BOE N° 10, of 12/01/2000.

¹⁰ BOE N° 263, of 31/10/2009.

¹¹ BOE N° 15, of 17/01/1996.

¹² Text of the Observations, available in English at <https://www.unicef.es/publicacion/observaciones-finales-del-comite-de-los-derechos-del-nino-espana-2018>, (consulted on 10/01/20).

¹³ Read about this critical stance A. Ortega Giménez and L. Heredia Sánchez, "Efectos jurídicos de la determinación de la edad de los menores extranjeros no acompañados. Una polémica que no termina", in A. Calvo Caravaca and J. Carrascosa González, (Dirs), *Protección de Menores y Derecho Internacional Privado*, (Granada, Comares, 2019), pp. 19-34.

2. The content of the Protocol approved by Resolution of the Administration and appealed by the Roots Foundation

To understand this contradiction, let's see what the aforementioned Protocol that has been criticized sets out and why we understand that its content favors legal uncertainty regarding UASC during the age assessment process. Its content can be summarized as follows:

Its purpose is twofold: on the one hand, it has the purpose of coordinating the intervention of all the institutions and administrations involved from the location of the minor or presumed minor until identified, the determination of his/her age, and placing the individual at the disposal of the Public entity for child protection and documentation. On the other hand, the Protocol is aimed at achieving the proper functioning of the Registry of Unaccompanied Foreign Minors (hereinafter, RUASC), since it is the only reliable and complete source of information regarding migrant minors.

Subjects covered by the Protocol will be: 1) a foreigner under the age of eighteen who is a national of a State to which the European Union regime does not apply and who arrives in Spanish territory unaccompanied by a responsible adult, either legally or in accordance with custom, where risk of the minor's vulnerability is appreciated; 2) any foreign minor who once in Spain is in this situation; 3) also, foreign minors who are at risk because they have entered clandestinely or surreptitiously in national territory or intend to cross Spanish border posts accompanied by an adult who, appearing to be their parent, relative or guardian of the child, does not provide accurate or reliable documentation of the alleged relationship, and in addition an objective danger is appreciated for the comprehensive protection of the minor; 4) foreign minors who are in a situation of patent abandonment or lack of protection, because they suffer the risk of being subjected to human trafficking networks; 5) those foreign minors who are found as stowaways aboard a ship, ship or aircraft that is in a Spanish port or airport; 6) UASC that would have been located by the Police or Security Forces on the commission of a criminal act of which they could be charged under Organic Law 5/2000, of January 12, regulating the criminal responsibility of minors^[14]. In relation to the procedure for determining age, an issue that is the object of criticism, two assumptions can be distinguished: a) when the minority of the minor is unquestioned, in which case they are identified, registered and assigned to the corresponding reception and guardianship services of the Administration, and b) doubtful cases, in this case the status of an undocumented minor also includes minors with documentation from their countries of origin, with passports and birth certificates issued by their corresponding embassies and consulates, those that lack legal value for determining the age of UASC; and at the same time there is a lack of guarantees in the procedure for determining age as the Protocol infringes the right to be heard and providing compulsory legal assistance.

Particularly striking is the unappealable nature of the Decrees of the Prosecutor that determine the majority or minority of these

children, and that the document supports the systematic medical tests for determining age, that have so often have been criticized by the Ombudsman, who has ruled against the application of the tests for determining the age in the case of UASC, due to their inappropriate nature and the legal uncertainty arising from the results^[15].

Although Article 190.2 of the LOEX Regulation provides that the procedure for determining the age of minors, only applies in the case of those who are undocumented, the Protocol establishes a "definition of undocumented" in which passports, birth certificates, consular identity certificates, national identity cards, etc. issued by the authorities of countries such as Morocco, Ghana, Mali, Cameroon, Guinea Conakry, Ivory Coast, among others, are invalid.

Regarding the performance of medical tests, the Roots Foundation has been denouncing - as we noted above - that in accordance with the procedure that supports the Protocol under appeal, the Prosecutor's Office systematically submits all unaccompanied foreign minors to intrusive and degrading age tests (such as stripping naked for the exploration of their genitals or carpal x-rays), whose results are highly questioned for their inaccuracy by the scientific community, while not recognizing the validity to the documentation of their countries of origin^[16], which not only goes against the pronouncements of the Spanish Ombudsman, but also against the jurisprudence of the SC in this regard^[17].

The SC prohibits performing tests to determine the age of minor immigrants with a valid passport whose situation in Spain is irregular, as discussed below. In this sense, the judgments of the SC of 2014 resolve the cases of a citizen of Conakry, Guinea and a citizen of Ghana respectively, who despite having passports issued in their countries of origin, accrediting their date of birth and minority, were declared of legal age after undergoing medical tests and ceased to be supervised by the services of the corresponding regional administrations (Provincial Council of Alava and Autonomous Government of Catalonia, respectively). In both cases, the SC provided that they should remain under the protection that the law provides to UASC, marking a clear doctrine: *"the immigrant whose passport or equivalent identity card shows his minority cannot be considered an undocumented foreigner to be subjected to complementary tests to determine his age, since it is not possible to question without a reasonable justification why such tests are performed when a valid passport is held"*. Therefore, the Civil Chamber establishes that when the foreigner is a minor according to the passport, he must avail himself of the child protection services without having to carry out the tests because he is documented. In cases where the reliability of the document is doubted, it provides that the courts will have to make a proportionality judgment on the reasons why the document is considered unreliable and that therefore the tests must be carried out, without forgetting that any doubt based on physical appearance must be resolved in favor of the child.

¹⁴ See Second section of the Chapter of the text of the Protocol, Resolution of October 13, 2014, of the Undersecretariat, which publishes the Agreement for the approval of the Framework Protocol on certain actions in relation to Unaccompanied Foreign Minors (BOE N° 251, 16 October 2014).

¹⁵ Informe de Defensor del Pueblo de España ¿Menores o adultos? Procedimientos para la determinación de la edad. Available at <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2011-09->

Menores-o-Adultos-Procedimientos-para-la-determinaci%C3%B3n-de-la-edad1.pdf, (consulted on 10/01/20).

¹⁶ Complaints collected in <http://www.fundacionraices.org/?p=2754>, (consulted on 10/01/20).

¹⁷ For all Supreme Court judgments STS N° 453/2014, Civil, de 23-09-2014 y STS N° 452/2014, Civil, de 24-09-2014.

Furthermore, the SC reminds us that “whether they are documented or undocumented people, medical techniques, especially if they are invasive, cannot be applied indiscriminately for the determination of age. The Chamber recalls that “an unaccompanied minor is first and foremost a child exposed to a potential danger” and that the protection of children must be the guiding principle of the EU Member States regarding immigration policies”^[18].

3. Observations made by the UN Committee on the Rights of the Child

At the beginning of this section, we affirm that - in our opinion - there are two reasons that support the adverse situation for UASC, from the point of view of determining their age. We have already analyzed the first, a Protocol of action contrary to the rest of the legal system and the pronouncements of our highest Court, and then we will refer succinctly, but equally critical, to the second reason: the Observations made by the Committee of the Rights of the Child of the United Nations to the Spanish State, in March of this year, and which in relation to UASC, reflects two main concerns in Observation No. 44 that directly affect the functions attributed to the Prosecutor’s Office, through Articles 35 of LOEX and 48 of the Asylum Law, as well as Article 12 of the LOPM.

Another of the shortcomings identified refers to border returns (hot returns) contemplated in Organic Law 4/2015, of March 30, on the protection of public safety^[19], by which authorities can repatriate/expel - in a short period of time and with hardly any processing - those foreigners who irregularly access Spain. Daily we see in the news the police raids on the border with Ceuta and Melilla to detect UASC who hide in trucks and other means of transport.

These Observations, addressed with concern to the Spanish State, have resulted in the Office of the State Prosecutor through the Immigration Unit, issuing the “Internal Note No. 2 of 2018, on the follow-up of the review files of the decrees determining the age of undocumented aliens whose minority cannot be established with certainty”. This document (public access through www.fiscalia.es) is the framework from which the concerns expressed by the high international organization, regarding the exclusive competence of the prosecution in this matter are challenged. Considering that this concern “seems to pick up a prejudice seated in a sector of Spanish society”, according to which this institution acts following the orders of the Government on which it depends, in such a way that any of the decisions of prosecutors in immigration matters - as is the application of article 35 LOEX^[20], would be conditioned by the need to protect the immigration policy defined by the Spanish executive.

For the Spanish Prosecutor's Office, this vision is “patently wrong, regardless of the fact that it is unfounded to assume that the Government's immigration policy is contradictory to the safeguarding of the best interests of the child, since it is true that the Spanish Prosecution Service neither receives nor can receive orders from the Government in any area of its activity. On the contrary, the Prosecution Service is only bound to strict compliance with the law in accordance with the provisions of article 124 of the Spanish Constitution and the Organic Statute of the Prosecution Service.”^[21] However, this document clarifies that “*in relation to this issue, it is clear that from our Unit no initiative can be taken to alleviate this feeling of distrust. Given the terms of the Committee's Observation, its only recipients are the powers of the State that have the capacity to promote the suggested legislative changes*”, thus it is quite clear to whom this responsibility corresponds: the State.

The second of the concerns expressed by the UN Committee on the Rights of the Child on the use of intrusive methods of age assessment, even in cases where identification documents appear to be authentic, particularly in the autonomous cities of Ceuta and Melilla, and despite several decisions of the Supreme Court on this practice”, the Prosecutor's Office understands that it directly affects the scope of its activity, especially in two very relevant issues: one, it concerns the Prosecutor’s criteria for assessment of the documentation presented by foreigners for the purpose of decreeing their majority or minority; and the second affects the methods and tests used by doctors for the evaluation of age. In this regard, the Note recalls the principles that order the activity on UASC: the best interests of the minor; the application of the “pro minority” in case of doubt; and as regards the nature of the Public Prosecution Decree, its interlocutory nature stands out, which means that it can be reviewed by the Prosecution Service itself and judicially by any other jurisdiction.

With regard to medical tests, section 6 of the Note refers to them, recalling that Articles 35.3 LOEX and 48.2 of the Asylum Law impose on the “appropriate health institutions” the duty of collaboration with the Public Prosecution Service in its role in determining the age of undocumented foreigners, whose minority cannot be established reliably. In this sense, it is evident that “it is not possible for the Public Prosecutor to impose on a doctor belonging to the appropriate health institutions, what tests need to be carried out, what assessment methods to use or what the content of the opinion should be. The desideratum is that doctors comply with, as stated in the UASC Framework Protocol following the instructions of the Ombudsman, the Recommendations on methods of estimating the age of unaccompanied foreign minors (Document of good practices among Forensic Medicine institutes, 2010)”^[22].

¹⁸ Press release drawn up by the CGPJ Communication Service, published on October 15, 2014 and available at <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-TS-confirma-la-prohibicion-de-someter-a-pruebas-de-edad-a-inmigrantes-menores-con-pasaporte>, (consulted on 19/01/20).

¹⁹ BOE N°. 77, 31 March 2015.

²⁰ This article has a two-fold spectrum of incidence: administrative and civil. This double aspect assumes that if the determination of the age implies that the subject is a minor, the scope will be civil, under the appropriate protection regime. Whereas if the result determines age of majority, it implies a priori the application of the foreigner sanction regime for irregular stay, which can lead to an expulsion order from Spanish territory.

²¹ Available at https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/NOTA%20INTERNA%20NUM%202%20SEGUIMIENTO%20MENAS?idFile=0e9d5d93-d8df-4426-ab3a-51fcfd202df7, p. 1, (consulted on 28/01/20).

²² See Internal Note No. 2, 2018, Regarding the follow-up of the review files of the decrees determining the age of undocumented foreigners whose minority cannot be established with reliability, p. 11. There are difficulties in recognizing minors as such, since the fact that they are immigrants prevails; thus, nationality is put before age and this is, in part, the consequence that before the slightest doubt one tries to set the age of majority. Both forensic specialists, in their Document of Good Practices between the Institutes of Forensic Medicine in Spain and the Ombudsman have expressed their concern about the excessive exposure of minors

It is advisable to analyze a rule of law that, although it is not specifically aimed at minors, serves to support the criticism we have regarding the age determination procedure. This is Act 41/2002, of November 14, a basic regulator of patient autonomy and the rights and obligations regarding information and clinical documentation^[23], whose article 2 recognizes the regard to the dignity of the human person as a basic principle - without distinguishing at any time about age, nationality, race, etc. and at the same time, it recognizes a series of fundamental rights, such as autonomy, information, the right to privacy, which must be guaranteed in the field of health.

As a means of respecting the patient's autonomy, this Act highlights the free and voluntary consent of the patient, in articles 8 and 9, which includes minors, recognizing their right to that effect. So when carrying out medical tests to determine their age, these minors must give their consent under article 9.4 if they are 16 years of age or older, which is precisely the age group that generates most doubts regarding minority. Likewise, it is a requirement of article 12.4 of the LOPJM, meaning that prior informed consent is mandatory for the tests to be carried out on the child, ensuring respect for their dignity and without at any time entailing a risk to their health^[24].

Regardless of the agility governing the procedure for determining age, the right that every person has to be heard can not be ignored, in these cases the presumed minor. However, investigations carried out by the Ombudsman show that the individuals concerned are not informed by the police services about the start of the procedure, its scope nor the nature of the tests to which they will be subjected. Nor is it clear that at this time the consent of the individuals concerned is sought, in all cases, for the performance of these tests. As La Font Nicuesa points out, the most conflictive issue regarding the files on age determination in doubtful cases is how to resolve the contradiction between the date of birth contained in a document that is inconsistent with the result of other tests carried out, undoubtedly a controversial issue^[25].

4. Age as a key criterion for action by the Administration

For the recognition of foreigners' rights acknowledged by the Spanish legal system, age is the criterion that determines the legal regime to be applied to qualify the legal status of the subject depending on whether he is a minor or an adult. The correct identification of minors will be relevant for civil purposes: a minor - who will be so according to his personal law, but not in accordance with Spanish civil law - will be entitled to reception and protection appropriate to taking the best interests of the minor into account, and even, to attempt their repatriation and / or return to family members in their country of origin. The condition of a minor as a situation of special vulnerability is reflected in the regulation that our system tries to reinforce with the creation of numerous institutions that ensure the integral development of the minor as a subject in need of protection of special intensity, as Peláez Fernández rightly points out^[26].

In the criminal field, age has an undeniable importance, since illegal acts committed by a minor or an adult will condition the application of a legal or other regime, since the criminal liability of minors is framed within a very specific age range (from the age of 14 to 18). While those who are considered older for all purposes, will be criminally liable and, therefore, subject to a procedure that may result in imprisonment.

Consequently, the determination of age from the point of view of immigration regulations has an impact on the legal status of the immigrant. If it is determined that he is of legal age, he will become an undocumented foreigner and in an irregular situation, being subject to sanctions proceedings for illegally being in Spain and that will probably lead to his expulsion.

4. The case of Italy

From a systematic reading of the source system currently in force in the international and regional context of the EU, it is clear that there is a particularly chaotic European legal framework, since there is not, to this day, a legal, international and/or European instrument in force on UASC in the EU. The current legislative fragmentation is partially mitigated by the guidelines of the European Asylum Support Office (EASO) and those of the Agency of the United Nations High Commissioner for Refugees (UNHCR). These are, however, soft law instruments that are not binding by their nature. In fact, they themselves achieve an important persuasive force only through the compilation of some of the fundamental principles enshrined in legislative, international and supranational texts, with binding force.

For their part, national legal systems and internal laws developed by the Member States seek to resolve the problems raised by the presence of numerous UASC in their territories. To that end, the Italian legal system is particularly interesting. In the first place, because today Italy is the Member State with the highest number of UASC arrivals. Second, because the Act currently in force, No. 47 of 2017 on provisions on the protection of unaccompanied minors, which is the first unified text in this area across the EU, stands out above the other countries thanks to the novelty, originality and opportunity of the solutions provided. Third, because it implements a holistic-multidisciplinary procedure for identifying UASC that guarantee their fundamental rights; and because it introduces the legal figure of the 'voluntary guardian', that is, volunteer staff previously trained to assume the guard and custody of the UASC that are hosted in the Italian territory^[27]. In short is why the Italian model could be very useful in adopting harmonising regulation in the EU.

In the absence of an international and European harmonising regulatory instrument in this area, national legislators themselves are called upon to regulate these issues, each in their respective domestic legal order. Within the different models currently in place in the EU, one in particular is particularly striking for its originality and new planning: it is the one promulgated by the Italian legislature with the entry into force of Law/Act No. 47 of

to ionizing radiation for forensic purposes only, without prior verification of the data of the Central Registry of Undocumented Minors and without proceeding with a cross-check of data from both the State Security Bodies and health institutions.

²³ BOE N° 274, 15 November 2002.

²⁴ On this aspect, read the analysis performed by P. Peláez Fernández, "Estado de la cuestión sobre los derechos de los MENAS en España..." cited above, pp. 59-

60, text available at <http://www.eduso.net/res/winarcdoc.php?id=1158>, (consulted on 09/01/20).

²⁵ See L. La Font Nicuesa, *La determinación de la edad del presunto menor extranjero. Pasaporte contra pruebas médicas. Aspectos civiles, penales y contencioso administrativos*. (Valencia, Tirant Lo Blanch, 2018) p.29.

²⁶ See P. Peláez Fernández, *cited above*, p. 60.

²⁷ Legge 7 aprile 2017, n. 47, Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati, (17G00062) (GU n.93, 21-4-2017).

2017, a unified text on UASC. The Law/Act No. 47 of 2017 addresses both the problem of the identification and establishment of the UASC minority and the protection and representation of UASC that are hosted on Italian territory. The solutions offered by this law integrate a novel model of UASC protection.

In April 2017 the Italian government adopted the first unified text in Italy and the first in the rest of the EU on UASC. The law applies to any minor who does not hold Italian citizenship or that of a country of the European Union and who is, for any reason, in the territory of the Italian State or, under Italian jurisdiction, without the assistance or representation of his parents or another senior legally liable under the Italian domestic law. Moreover, Law No. 47 of 2017 seems to insist on an absolute ban on the return of UASC. However, if we look at Article 31 of the T.U. on immigration, it is clear that the ban on non refoulement tout court does not exist, since the rule states that the Chief of the Police Station, in cases established by T.U., may apply for expulsion from the UASC before the Juvenile Court^[28].

The article 5 of Law No. 47 of 2017 establishes a homogeneous UASC identification procedure. This phase takes place within the so-called UASC reception system (art. 4 of Law No. 47 of 2017 and Art. 19 of D.lgs. 142 of 201589). Under that system, when a UASC steps up Italian territory, it is housed in a first relief and reception centre (CPSA) for a maximum period of thirty days. In the first ten days, the so-called procedure for identifying the child is launched through a first interview that a qualified and authorized staff makes to the UASC (article 19 of D.lgs. 142 of 2015 states) that the interview is conducted in the presence of organizations, organizations or associations of proven and specific experience in the field of guardianship of minors. During this interview, the minor is invited to express his/her personal and family history, so that the child can be identified. Specifically, general data (name, surname, nationality and date of birth); the presence of other relatives among other migrants and an identity document^[29].

The age determination procedure is usually articulated in two phases: one for the identification of the registration data and, another, of the true establishment of age. Only where the identification in the strict sense (or first phase) has not resulted in a reliable result and there are 'well-founded doubts' about the exact age of the child, will it be necessary to establish the biological age through a procedure that contemplates the development of socio-health techniques. To this end, it is necessary for the minor, or his/her legal representative, to give his/her consent after being adequately informed of the specific medical evidence to which he/she must submit. They will also be informed of the results and the consequences that may arise from

²⁸ See. C. Marino, "La Cassazione si pronuncia sulla competenza per la nomina del tutore dei minori stranieri non accompagnati", (*Rivista Famiglia e Diritto*, 8-9, 2017), sec. Giurisprudenza Minori, pp. 757-763 y Sents. Cass. Civile, sez. IV, 20 dicembre 2016 [RJ 2016/26442] y 26 abril 2017, RJ 2017/10212).

²⁹ Conferenza delle Regioni e delle Province Autonome, Protocollo per l'identificazione e per l'accertamento olistico multidisciplinare dell'età dei minori non accompagnati, 16/30/CR09/C7-C15, p. 15, available https://www.minori.gov.it/sites/default/files/protocollo_identificazione_msna.pdf (consulted on 14/04/20).

³⁰ 'Well-founded doubts may be caused, inter alia, by information collected in other databases; decisions that concern other family members, relatives or legal guardian of the child and physical appearance. In particular, the authority may have well-founded doubts as to the age declared by the child, either because the child is not in possession of a legal identity document, or because, in having them,

the result obtained; or what would happen in the event that the child refused to undergo such a procedure and, finally, is informed of his right to express the reason for an eventual refusal to undergo the test. In any event, in the meantime, the person has not been given an age, the person is presumed to be underage on the basis of the principle of the "benefit of doubt" and must be welcomed in the appropriate facilities for that purpose^[30].

The final decision must be reasoned, written and clear so that the person concerned can understand it. Despite the normative silence in this regard, it is understood that the decision will be given by the juvenile judge of the court whose prosecutor's office requested the verification of age, in the form of a decree. If doubts continue to exist as to the age of the person, the protective principles of the child are again fundamental: *in dubio pro minore* (art. 5.8). Otherwise, if the age of majority were upheld, Law No. 47 of 2017 provides for another important guarantee: the right to an appeal. To this end, Article 5.9 refers to the procedure of voluntary jurisdiction of the arts. 737 and ss. *Codice di Procedura Civile*^[31].

The article 11 of Law No. 47 of 2017 is entitled 'List of Volunteer Tutors'; this is -perhaps- the most interesting novelty within those inserted by Law No. 47 of 2017/100. Prior to the entry into force of Law No. 47 of 2017, in fact, this task was often attributed to an institutional guardian (the Mayor of the City Council where the child was welcomed, the Commissioner or others) who, in the face of the high number of UASC assigned, could not carry out his guardianship functions appropriately to the demands of migrant minors. For these reasons, the Italian legislature decided to institutionalise the figure of the "voluntary guardian", collecting in the legal text what some regions were already developing in practice. The assignment of a legal guardian to the UASC, like the identity determination phase, takes place during the reception phase. In the meantime, the child has not been assigned a guardian, the article 6.3 of Law No 47/2017 provides that an application for a residence permit or an application for international protection may be brought by the host structure^[32].

The guardian pursues the recognition of the rights of the minor, without discrimination. In this sense, the volunteer guardian will file an application for a residence permit for the child and international protection in the event that the host institution has not yet completed it. The guardian must monitor the conditions of reception, security and protection and administer the child's assets. In fact, the tutor participates in the identification phase of the child and follows up on all actions developed for the determination of age (art. 5.3 of Law No. 47 of 2017).

Where a UASC has a family member in another EU Member State, and has not filed an application for international protection, the guardian will request the opening of the family reunification

they may appear false. In both cases, it should be emphasized that the control of authority can not be systematic, but must always be justified by the existence of "well-founded doubts".

³¹ Regio Decreto 28 ottobre 1940, n. 1443 Codice di Procedura Civile, (040U1443) (GU n.253 del 28-10-1940).

³² The figure of the legal guardian had been widely developed in Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on the prevention and combating of trafficking in human beings and the protection of victims and replacing Council Framework Decision 2002/629/JHA (Trafficking Directive). However, this Directive focused on the protection of minor victims of trafficking in human beings and not on the protection of minors tout court.

procedure, provided that this does not pose a risk to the child. With regard to acts of estate, on the other hand, the guardian may freely perform all acts of ordinary administration, but must seek the authorization of the judge in the case of an act of extraordinary administration. It also monitors their education and integration according to their ability, inclination and aspiration and promotes the psychic-physical well-being of the child before the institutions and competent subjects. In particular, the volunteer guardian must register the child in the National Health System and shall request the implementation of a specific programme in the case of a trafficking-trafficking UASC (art. 11). In the face of the many assigned tasks, each tutor can be assigned a maximum number of three minors only, except for exceptions (article 11 of Law No. 46 of 2017, in fine, refers to Book I, Title X of Chapter I of the Cc as regards the rights and obligations of the voluntary guardian) ^[33].

The developments introduced by Law No. 47 of 2017 have been a resounding success, so much so that there is already talk of an "Italian model" ^[34]. The Law No. 47 of 2017 establishes a mechanism for identifying multidisciplinary UASC, that is to say, an age-determining system to mitigate the margin of error dictated by medical-health tests through the provision of other relevant elements. It is apparent that, to this day, the holistic-multidisciplinary approach, as developed by the Italian legal system, constitutes the most appropriate method of identifying and determining the age of UASC for the implementation of an effective UASC rights protection system across the EU. Indeed, Law No. 47 of 2017 provides for the absolute primacy of the principle of the best interests of the child throughout the identification procedure: consider the predisposition of a scale of values that measures the invasion of medical techniques used to determine the age minority; and, also, think of the formal consecration and in absolute terms of the principle *in dubio pro minore*.

In addition, Law No. 47 of 2017 provides that the decision must be written; it has to describe the socio-health mechanisms that have been used and will always indicate what the margin of error is. The possibility of challenging the decision with which the minor age is attributed to UASC or not is not a discounted guarantee: despite constituting a fundamental human right of all persons some Member States (including Spain) continue to maintain that the decision determining the age of an UASC firm, and at no time may it be noted above

As noted above, In the case of Spain, (article 35. 3 of the Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration) provides that "In cases where the State Law Enforcement and Bodies locate an undocumented alien whose minority of age cannot be safely established, you will be given, for the competent services for the protection of minors, the immediate attention you require, in accordance with the provisions of the legal protection of the child,

with the fact in immediate knowledge of the Public Prosecutor's Office, which shall provide for the determination of his age, for which the appropriate health institutions which, with priority character, will carry out the necessary tests". Once the tests have been carried out to determine the child's minority of age, the Public Prosecutor's Office issues a decree that, although not final, cannot be challenged.

5. The role of the European Union.

In the community context, the objective has been to manage the migration phenomenon through the cooperation between the Member States, hence it remains a cyclical problem, since it is they who still have the competence to manage and control the migratory flows within their territories, according to their internal regulations. However, it is necessary to take into account that both the original Law, and the Law derived from the EU include rules, of a different scope, that regulate aspects related to the protection of minors, based on the Charter of Fundamental Rights of the European Union, which in its article 24.2 consolidates the "best interests of the child", as a basic principle that should guide the Member States in their actions regarding children in Europe ^[35].

In secondary law, several rules of private international law give an account of the interest shown by Community institutions regarding key issues in the life of minors in the family sphere, so we have several Community regulations that regulate aspects related to parental responsibility, food, international abduction, among others, which is especially highlighted in Regulation 2201/2003 ^[36], whose focus is on the intended unification of Family Law in the EU. In addition, we must take into account the set of Directives aimed at harmonizing state standards for the eradication of violence against minors, as well as to favor access to agile procedures in the area of asylum and international protection.

The European Convention on the Rights of the Child ^[37], that despite its non-binding nature, expressly recognizes that the minority must be understood as a decisive moment in the life of any person, with the States being obliged to guarantee and defend the rights of minors under any circumstances.

Ultimately, the heart of the problem is, in our opinion, that the EU does not have the competence to directly regulate this issue, its role is to promote and support coordinated action between States to ensure that minors are not in a situation of vulnerability, whether they are foreigners or not. Therefore, it cannot, for the moment, generate norms of direct application since the migratory matter and the regulation of the immigration of foreign minors is the competence of the Member States. This means that Spanish law, although drawing on conventional and institutional sources, continues to leave the solution of the problem to the Spanish Administration.

³³ The rule refers to article 18. 2, 2a and 2b of D.lgs. 142 of 2015 and article 76. 4c of the Decree of President della Repubblica 30 maggio 2002, n. 115, Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia. (Testo A) (GU n.139 from 15-6-2002 - Suppl. Ordinary No. 126). D.lgs. No. 142 of 2015 lays down the general host provisions of UASC while D.p.r. 115 of 2002, on the other hand, lays down the rules on the right to legal aid for UASC.

³⁴ See Tassinari F.... cited above, pp 566-567

³⁵ It is very interesting, for the current and complete content, the analysis performed by J.M. Velasco Retamosa, "La protección de menores extranjeros en la Unión Europea: situación actual y desafíos de futuro", en J.M. Velasco

Retamosa (Dir.), *Menores extranjeros: problemas actuales y retos jurídicos*, (Valencia, Tirant lo Blanch, 2018), pp.85-113. Also, the article published by J. C. De Bartolomé Cenzano, "Nuevos desafíos para la determinación de la edad de los menores no acompañados (un estudio a la luz de los estándares nacionales e internacionales de protección de derechos fundamentales)", *REDF*, (No. 26. 2015), pp.79-109.

³⁶ EC Regulation 2201/2003, *DOCE* of 23 December, 2003.

³⁷ *DOCE* N° C 241, 21 September, 1992.

In fact, the measures taken by a particular national legal order are not sufficient to solve both the problem of identification and the representation of UASC in the EU tout court. In this regard, Italian Law No. 47 of 2017, although it can now be considered the most advanced UASC legislation across the EU, can not in itself successfully protect all migrant children on its territory. The level of regulatory integration achieved by the EU, especially in the area of free movement of persons, means that the legislative response to the phenomenon of UASC must come from an initiative of the European Commission itself, since the need for homogeneous regulation harmonising the national laws currently in force. It is clear that a European regulation common to all Member States would provide much more stable solutions than those offered in isolation by each domestic legal order ^[38].

Within the particularly serious regulatory gaps for the protection of UASC in the EU, within the European Commission two issues in particular are sparking a strong debate. It is, on the one hand, the impossibility of identifying in a reliable way the UASC that come to our territories without any documentation; obstacle due to the inadequate nature of the medical-scientific techniques used to determine the minority of these persons' age. On the other hand, the lack of specialized personnel to address the vulnerabilities posed by these minors. In its Communication of 12 April 2017, the Commission affirms the urgent need to identify and register every minor migrant arriving on EU territory. The Commission recognises that age-determining methods and procedures vary greatly between Member States and that the latter do not always comply with the guidelines issued by EASO. This circumstance, the European Commission states, may lead to 'unnecessary age assessments' and the use of 'invasive means' of age determination. From the first phase of identification and registration of the child, continues, a person responsible for the protection of the child should be present. The Commission denounces the existence of significant deficiencies in the functioning of representation of UASC in the Member States, including: the lack of qualified professionals and the need to prevent commercial interests from prevailing over the protection of minor ^[39].

6. Conclusions

Returning to this topic in the light of the current situation, has allowed us to verify the following conclusions:

First: the situation of legal uncertainty of UASC in Spain, especially those whose minority is questionable, not only because of their physical appearance, but also because of the documentation they carry to prove it, and to which the authorities do not give credibility.

Second: On the one hand, we have the immediate action of the Prosecutor's Office, covered by a Protocol of Action, which, having no regulatory status, guides the intervention of the Public Prosecutor to determine the age of minors, with the case is being investigated whose Decree the UASC becomes aware of when he is notified, while it is subject to inquiries, being reviewed by the Prosecutor's Office itself in case of discrepancy. And, on the other hand, we see that although the doctrine of the SC is clear

regarding the probative value of foreign documents on the accreditation of age and establishing the age of minority of children and adolescents arriving in Spain, practice contradicts this doctrine: they are continuously unobserved and the age determination is systematically carried out through medical tests. Third: Although we have legal norms of a civil nature, of an administrative nature (Immigration Law) and public international law, among others, that commit the Spanish State to the protection of minors at high levels, there is a lack of consistency in the actions to determine their age: preference is often given to the age of majority over minority, with the subsequent legal consequences. The most important of these when considering an individual as an adult, is to proceed to his internment in a facility designed for adults and the real possibility that he will end up being expelled, if not before it was the occasion of a "hot return", with hardly any real opportunity to present arguments in favor of protection.

Fourth: If we look towards the EU, we can see that, today, we do not have nor will we have an institutional regulation specifically applicable by the Member States, on a mandatory and consistent basis, that ensures the rights of UASC; who are, without a doubt, one of the most vulnerable parts of the migratory phenomenon, insofar as minority is an added element to the subject's immigration status, as well as the situation of helplessness in which they find themselves. Unfortunately, the issue over the legal status of UASC is a growing topic of controversy each day. From a systematic reading of the source system currently in force in the EU's international and regional context, it is clear that there is a particularly chaotic European legal framework, since there is not, to this day, a legal, international and/or European instrument in force in the EU. The current legislative fragmentation is partially mitigated by the guidelines of the European Asylum Support Office (EASO) and those of the United Nations High Commissioner Agency for Refugees (UNHCR). These are, however, soft law instruments that are not binding by their nature. In fact, they themselves achieve an important persuasive force only through the compilation of some of the fundamental principles con-sacred in legislative, international and supranational texts, with binding force.

Fifth: The solutions provided by Italian domestic law and, in particular, those established by Law No. 47 of 2017 are particularly interesting in terms of the protection of fundamental human rights recognised to all UASC located on EU territory. Indeed, on the one hand, Law No. 47 of 2017 establishes a mechanism for identifying "holistic-multidisciplinary" UASC that takes into account various factors (including biological, social and cultural characteristics) indispensable for the establishment of the age minority in the most reliable way possible.

Sixth: The aw No. 47 of 2017 establishes a very original system of guardianship based on the competence of the Guarantor Authority for Children and Adolescents. This body has been assigned the fundamental role of training and educating those adults who want to voluntarily assume the protection of UASC hosted in the Italian territory. With this specialization, tutors can

³⁸ Comunicación de la Comisión al Parlamento Europeo y al Consejo, *La protección de los menores migrantes*, COM (2017) 211 final, 12.4.2017, en <https://ec.europa.eu/transparency/regdoc/rep/1/2017/ES/COM-2017-211-F1-ES-MAIN-PART-1.PDF> (consulted on 29/03/20).

³⁹ See about this topic Tassinari F., "La identificación de los menas y el tutor voluntario en italia: ¿un modelo a asumir por la UE? *Cuadernos de Derecho Transnacional* (Marzo 2019), Vol. 11, Nº 1, pp. 545-570

access the Register of Volunteer Tutors: a record that the judges of the minors consult to quickly designate a guardian to each UASC.

Seventh: As long as the powers and actions of Member State authorities and internal representatives do not go beyond state UASC located on EU territory. The EU is increasingly approaching the need for harmonising policy development that encourages collaboration between Member States. In this way only the protection of UASC on EU territory would cease to be a challenge pending and would become a goal achieved

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19. *BOE*, 2015, 77.
20. This article has a two-fold spectrum of incidence: administrative and civil. This double aspect assumes that if the determination of the age implies that the subject is a minor, the scope will be civil, under the appropriate protection regime. Whereas if the result determines age of majority, it implies a priori the application of the foreigner sanction regime for irregular stay, which can lead to an expulsion order from Spanish territory.
21. Available at https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/NOTA%20INTERNA%20NUM%202%20SEGUIMIENTO%20MENAS?idFile=0e9d5d93-d8df-4426-ab3a-51fcfd202df_1, (consulted on 28/01/20).
22. See Internal Note. Regarding the follow-up of the review files of the decrees determining the age of undocumented foreigners whose minority cannot be established with reliability, p. 11. There are difficulties in recognizing minors

- as such, since the fact that they are immigrants prevails; thus, nationality is put before age and this is, in part, the consequence that before the slightest doubt one tries to set the age of majority. Both forensic specialists, in their Document of Good Practices between the Institutes of Forensic Medicine in Spain and the Ombudsman have expressed their concern about the excessive exposure of minors to ionizing radiation for forensic purposes only, without prior verification of the data of the Central Registry of Undocumented Minors and without proceeding with a cross-check of data from both the State Security Bodies and health institutions, 2018, 2.
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 26. See P. Peláez Fernández, *cited above*, 60.
 27. Legge. Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati, (17G00062) (*GU*). 2017; 93:21-4.
 28. See C Marino. “La Cassazione si pronuncia sulla competenza per la nomina del tutore dei minori stranieri non accompagnati”, (*Rivista Famiglia e Diritto*, sec. Giurisprudenza Minori, y Sents. Cass. Civile, sez. IV, 20 dicembre 2016 [*RJ* 2016/26442] y 26 abril 2017, *RJ* 2017/10212). 2017; 8-9:757-763
 29. Conferenza delle Regioni e delle Province Autonome, Protocollo per l’identificazione e per l’accertamento olistico multidisciplinare dell’età dei minori non accompagnati, 16/30/CR09/C7-C15, available https://www.minori.gov.it/sites/default/files/protocollo_identificazione_msna.pdf (consulted on 14/04/20). 15.
 30. Well-founded doubts may be caused, inter alia, by information collected in other databases; decisions that concern other family members, relatives or legal guardian of the child and physical appearance. In particular, the authority may have well-founded doubts as to the age declared by the child, either because the child is not in possession of a legal identity document, or because, in having them, they may appear false. In both cases, it should be emphasized that the control of authority can not be systematic, but must always be justified by the existence of “well-founded doubts”.
 31. Regio Decreto 28 ottobre. Codice di Procedura Civile, (040U1443)GU. 1940; 253:28-10.
 32. The figure of the legal guardian had been widely developed in Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on the prevention and combating of trafficking in human beings and the protection of victims and replacing Council Framework Decision 2002/629/JHA (Trafficking Directive). However, this Directive focused on the protection of minor victims of trafficking in human beings and not on the protection of minors tout court.
 33. The rule refers to article 18. 2, 2a and 2b of D.lgs. 142 of 2015 and article 76. 4c of the Decree of President della Repubblica 30 maggio 2002, n. 115, Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia. (Testo A) (GU n.139 from). D.lgs. No. 142 of 2015 lays down the general host provisions of UASC while D.p.r. 115 of 2002, on the other hand, lays down the rules on the right to legal aid for UASC. 2002; 126:15-6.
 34. See Tassinari F.... cited above, 566-567
 35. It is very interesting, for the current and complete content, the analysis performed by J.M. Velasco Retamosa, “La protección de menores extranjeros en la Unión Europea: situación actual y desafíos de futuro”, en J.M. Velasco Retamosa (Dir.), *Menores extranjeros: problemas actuales y retos jurídicos*, (Valencia, Tirant lo Blanch, 2018), pp.85-113. Also, the article published by J. C. De Bartolomé Cenzano, “Nuevos desafíos para la determinación de la edad de los menores no acompañados (un estudio a la luz de los estándares nacionales e internacionales de protección de derechos fundamentales), *REDF*. 2015; 26:79-109.
 36. EC Regulation 2201/2003, *DOCE* of 23 December, 2003.
 37. *DOCE* N° C 241, 21, 1992.
 38. Comunicación de la Comisión al Parlamento Europeo y al Consejo, *La protección de los menores migrantes, COM 211 final*, 2017. en <https://ec.europa.eu/transparency/regdoc/rep/1/2017/ES/COM-2017-211-F1-ES-MAIN-PART-1.PDF> (consulted on 29/03/20).
 39. See about this topic Tassinari F. “La identificación de los menas y el tutor voluntario en italia: ¿un modelo a asumir por la UE? *Cuadernos de Derecho Transnacional* Marz. 2019; 11(1):545-570.