

Age Assessment for Unaccompanied Minors in France



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Table of Contents

Acknowledgments	iv
Executive summary	v
Keywords	vi
Overview of Main findings	vii
List of Abbreviations	viii
1. Introduction	1
2. The International Framework Regarding Age Determination of Unaccompanied Minors	5
2.1 The CRC Provisions and its General Comments Regarding the Use of Medical Examination to Determine the Age of UMs	5
2.2. The Constant Reiteration of the CRC Committee Approach Regarding the Use of Medical Examination to Determine the Age of UMs	7
3. The European Framework Regarding the Use of Medical Examination in Determining the Age of UMs	9
3.1. The European Union Law Regarding the Use of Medical Examination in Determining the Age of UMs	9
3.2. The Council of Europe Law Regarding the Use of Medical Examination in Determining the Age of UMs	10
4. The French Legal Framework for Age Determination of MIEs	14
4.1. The Status of MIEs in French Legislation	14
4.2. The Resort to Bone Testing to Determine the Age of MIEs in French Legislation	15
4.3. The Challenged French Legislation	17
4.3.1. The Lack of Reliability of Bone testing on UMs from a Medical Perspective ..	17
4.3.2. The Lack of Reliability of Bone Testing on UMs from a Human Rights Perspective	18
5. The French Practice of Age Determination of UMs	21
5.1. The Implementation of the French Legislation in Practice	21
5.1.1. The Interpretation of the Status of UMs in Practice	21
5.1.2. The Systematic Resort to Bone Testing in Practice.....	21
5.2. The Challenged French Practice	22
5.2.1. The Use of Bone Testing as a Nationalist Political Tool	22
5.2.2. The Use of Bone Testing as a Discriminatory Tool among MIEs	24
6. The Recent French Constitutional Council Decision in light of the International Framework	25
6.1. The Legal Background of the Preliminary Ruling on Constitutionality	25
6.2. The Constitutional Council Decision	26
6.3. The Discussed Constitutional Council Decision in light of the International and European Children’s Rights Framework	28

7. Conclusion **30**
Bibliography..... **32**

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Executive summary

In France, to be granted the status of unaccompanied minor, three main criteria must be fulfilled: the assessment of the minority, the condition of being a foreigner and the (potential) existence of a danger. Thus, proving an identity that confirms the chronological age is crucial, as age determines the relationship between an individual and the state, and in turn, whether the applicant is entitled to the specific protection and rights provided by the Convention on the Rights of the Child and the relevant regional and domestic legislations. The first issues that receiving states, including France, face when migrants testify to be minors is accurately identifying them often without any (reliable) documentation proving their age, and precisely estimating their age based on their physical attributes. Considering the growing culture of scepticism and suspicion surrounding the entry of undocumented children, in France, the government is eager to ascertain their age. National age assessment policies, requesting the help of physicians (through bone testing), are part of immigration policies to control and deter unauthorised arrivals.

This thesis will assess the French legislation and practice regarding age determination processes undergone on unaccompanied minors, especially the resort to bone analysis, in light with the international and regional children's rights framework. It will analyse the recent decision (21 March 2019) delivered by the French Constitutional Council that approves the legislation, and subsequently the practice, providing such procedures. The research question that will guide this thesis is as follows: To what extent is the recent French Constitutional Council decision approving the domestic legislation, and consequently the domestic practice, that allows the use of bone analysis for determining the age of alleged unaccompanied minors arriving in France, in compliance with the international and European children's rights framework?

This thesis will present a children's rights-based perspective and will be based on (academic) legal literature for most of it. The framework will be set at the international, regional and domestic level. It will aim to point to the French context specifically but will also provide significant insights for many countries resorting to medical age assessment procedures. This thesis aims to ensure that the interests of unaccompanied minors, and their rights remain the priority of France over the interests of national immigration policies. It will develop a critical analysis of the recent Constitutional Council decision, advocating for a legal framework that would ensure the protection of those children's rights.

In chapter 2, this thesis will present the concept and guarantees of age determination within the migration context mainly through the analysis of the Convention on the Rights of the Child and the relevant Committee on the Rights of the Child's General Comments. It will hold that unaccompanied minors have multiple rights and legal safeguards in age assessment processes. I will also explore the reasons why subjecting bone testing to restrictive requirements is meaningful for children. Afterwards, this chapter will highlight the constant reiteration of the Convention on the Rights of the Child's approach vis-à-vis bone testing and unaccompanied minors by additional international human rights bodies. It will point out that additional international human rights bodies have gone even further, when recognising an important element of medical age assessments: their lack of reliability.

In chapter 3, this thesis will identify the European provisions dealing with age determination and unaccompanied minors. It will first look into the European Union framework and will hold that this issue is only embraced under asylum laws, neglecting a considerable part of unaccompanied minors who do not make any request for international protection. It will state that, despite this critic, the European Union tends to align with the international approach on that matter, by acknowledging the necessity to develop guarantees, in order to limit the resort to medical age determination examinations and to be in accordance with the European Union Charter of Fundamental Rights. Next, the Council of Europe's framework will be analysed and its potential on that matter highlighted. Despite the lack of specific provision relation to the rights of non-national children in the context of age determination procedures, this thesis will emphasize the potential influence and relevance of articles 3 and 8 of the European Convention on Human Rights relating to this issue. It will further demonstrate the strong commitment,

at the European level, to comply with the international framework and especially the CRC, despite the lack of specific and elaborated policies on that specific matter.

In chapter 4, this thesis will explore the French legal framework relating to unaccompanied minors. It will define the specific status attached to this category of children, recognized as vulnerable and in need of protection under the law. It will further present the national legislation providing the use of bone examinations under certain restricted conditions. This codified authorization to resort to medical age determination procedures has been highly criticized, at the international and national levels, by professionals. The critics are mainly based on the lack of reliability of such examinations from a medical and human rights perspective, reflecting the international children's rights approach on this matter.

In chapter 5, this thesis will analyse how the French legislation relating to unaccompanied minors and bone testing is instrumentalised in practice by the authorities in charge of its implementation. First, it will highlight the restrictive interpretation of the qualification of unaccompanied minors, and subsequently, the limited recognition of their correlative specific status of protection and rights as children. It will further demonstrate the extensive use of medical examinations as a primary method of age determination of unaccompanied minors. Second, it will present controversial opinions of the implementation of the law in practice, reinforcing the lack of legitimacy of the provision itself. The principal critics developed focus on the instrumentalization of the law which becomes an anti-immigration tool in the hands of the state and a discriminatory provision among unaccompanied minors, targeting adolescents aged above 16 years old. This thesis will, therefore, point out the inadequacy between the French possibility to resort to bone testing in order to determine the age of (undocumented) unaccompanied minors and the international framework.

In chapter 6, this thesis will scrutinize the recent French Constitutional Council decision relating to the constitutionality of the legal provision authorising medical age assessment on unaccompanied minors. First, some background information relating to the case brought before the judicial courts will be enumerated in order to understand the reasons behind the preliminary ruling on constitutionality. Second, the reasoning and the decision adopted by the Council will be analysed from a children's rights perspective. Third, a critical analysis of this ruling will be developed.

In light of the conclusion, this thesis will hold that the rights of unaccompanied minors with regard to age determination should be the primary consideration of France over the interests of its immigration policies. If France does not duly implement its legislation, which appears to be restrictive 'on paper' and does not meaningfully consider the requirements put forward in this thesis, it will continue to lack compliance with the international and regional framework relating to age determination and, therefore, to violate its international obligations.

Keywords

Age determination – Bone testing – Unaccompanied minors – France – Children's rights – Legislation – Practice – Constitutional Council

Overview of Main findings

This thesis aims to advocate for the protection of the rights of unaccompanied children subjected to medical age assessments in France. It presents a complete children's rights approach, considering a recent jurisprudential advancement, which has not been done yet through academic literature. By using such perspective, this thesis offers four main findings and contributions. First, the thesis presents a holistic understanding of the children's rights at stake in age assessments, by analysing the international and European instruments dealing with these procedures. It reaffirms the fundamental guarantees to consider in order to protect, respect and fulfil children's rights in such context, namely the benefit of the doubt and the existing margin of error of medical testing.

Second, this thesis focuses on the French legal framework authorising the resort to bone analysis under limited circumstances. It highlights the numerous guarantees enshrined in the French law, in light of the international and European instruments. While academic discussion in the context of age determination tends to criticize the use of medical techniques, it overlooks the criteria required in the French legislation that, if implemented effectively, would protect children from abuses.

Third, this thesis provides an understanding of the resort to medical age assessments in practice. It demonstrates the numerous abuses faced by children in the context of migration, namely the absence of consent and discrimination when required to undergo bone testing.

Fourth, this thesis analyses the recent decision of the French Constitutional Council approving the legislation on age assessment. It highlights the children's rights perspective adopted by the Constitutional Council. It also contributes by advocating for a reasoning encompassing a study of the (in)effective implementation of the legal guarantees, which would have made the decision more accurate and more in compliance with the international and European children's rights framework.

List of Abbreviations

BIC	Best interests of the child
CRC Committee	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
MIE	Mineur isolé étranger
UM	Unaccompanied minor
UNHCR	United Nations High Commissioner of Refugees

1. Introduction

Migration is a longstanding human behaviour, occurring worldwide. Fleeing a country of origin to settle in a foreign country is not a practice restricted to adults. Indeed, a growing proportion of those crossing borders is composed of children, aged below eighteen years old¹, who, like adults, can be forced to move for different reasons.² Some of these children are accompanied by parents, while others are separated from their families. The latter are commonly qualified as “unaccompanied minors” (hereinafter ‘UMs’).

The Committee on the Rights of the Child (hereinafter ‘the CRC Committee’) has defined this latter category as “children [...] who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”.³

In 2016, statistics have shown that around 65,6 million people had been forcibly displaced worldwide. The estimations have demonstrated that approximately half of these individuals were children.⁴ Each year, a significant number of children apply for asylum, without the presence of parents. In a report developed in 2015, the European Commission estimated that there were 96,465 asylum-seeking or ‘protected’ UMs in the European Union (hereinafter ‘EU’).⁵ Over this past decade, France has been facing an exponential growth of the number of UMs arriving on its territory. Indeed, while, in 2012, 4000 individuals were officially declared UMs through judicial decisions, in 2017, 14,908 were registered as such and were, subsequently, entitled to the assistance and care provided by the national Childcare Protection system (*Aide Sociale à l’Enfance*).⁶ Although this statistical development might be surprising, it should be analysed in conjunction with the number of applicants claiming their minority, who were approximately 25,000 in 2017.⁷

Unaccompanied children have been widely recognised as particularly ‘vulnerable’ and entitled to specific protection, support, and rights from the receiving state.⁸ In addition of living in a relatively difficult situation as minor refugees staying in another country, they also face other important risks because of separation from their respective family and support network, such as exploitation, abuse, traumatic experiences and so forth.⁹ Moreover, children are conditioned by personal experiences, which may have a differential impact on each child’s development, depending on their age and numerous additional factors. Most of UMs who reach Europe are fleeing countries ravaged by war. Thus, substantial evidence has demonstrated that many UMs manifest symptoms of post-traumatic stress disorder and mental

¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, article 1.

² Young Center for Immigrant Children’s Rights, *Framework for Considering the Best Interests of Unaccompanied Children* (2016).

³ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 7.

⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR Global Trends: Forced Displacement in 2016 2* (2016).

⁵ Directorate-General Migration and Home Affairs (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/uam/uam_infographic_a4_en.pdf), last visited (14-03-2019).

⁶ France : Ministère de la Justice, *Rapport Annuel d’Activité 2017 : Mission Mineurs Non Accompagnés 5* (2018).

⁷ Conseil National des Associations de Protection de l’Enfant (CNAPE), *Accompagner et Accueillir les Mineurs Non Accompagnés au Regard de leurs Besoins 4* (2018).

⁸ C. Giner, *The Politics of Childhood and Asylum in the UK*, 21(4) *Children & Society* 249–260 (2007).

⁹ I. Derluyn & E. Broekaert, *Unaccompanied Refugee Children and Adolescents: The Glaring Contrast Between a Legal and a Psychological Perspective*, 31(4) *International Journal of Law and Psychiatry* 319 (2008).

health issues.¹⁰ Hence, there is primordial necessity to develop, in receiving states, special well-elaborated systems of reception and care. However, the vulnerability of UMs is less visibly acknowledged in the EU member states' domestic practice, such as in France.¹¹

The term UM is commonly translated into French jargon as 'isolated foreign minors' ('Mineurs Isolés Etrangers' (hereinafter 'MIE'))¹². The definition of MIE *per se*, has not been expressly developed into any French legislative instruments.¹³ This does not prevent, however, its use by the institutions and professionals dealing with UMs in practice and its inclusion into regulatory standards.¹⁴ Thus, to be granted the status of MIE, three main criteria must be fulfilled: the assessment of the minority, the condition of being a foreigner and the (potential) existence of a danger.¹⁵ The latter condition can be derived literally from the French appellation including the word 'isolation', directly linked to the temporary or permanent absence of a parental authority or legal representative, which constitutes the basis of the danger for children and, therefore, the duty of the state to intervene and protect those minors.¹⁶ In essence, this specific French terminology does not fundamentally differ from the definition adopted by the CRC Committee for UMs.¹⁷ This supposes that the notion of MIE encompasses not only UMs who are seeking international protection but also additional categories of minors such as exploited, runaway, nomadic or hopeful minors.¹⁸ Thus, in France, age determination processes are not conducted solely in the framework of the asylum procedure but as a prerequisite to benefitting from the Childcare Protection system.

Age is a matter of considerable importance in the context of migration in Europe, including thereof, France. Being considered an 'undocumented migrant' and not an 'UM' by the national migration authorities may have significant consequences.¹⁹ In other words, being over or under 18 years old has serious impact. Indeed, the status of UM leads to the protective regime afforded to migrant children which includes the possibility to legally remain in the country (and subsequently the protection from detention and removal), to be appointed a guardian, to be safe accommodated, to get access to health

¹⁰ E. Montgomery, Trauma, Exile and Mental Health in Young Refugees, 124(440) *Psychiatrica Scandinavica* 11-12 (2011).

¹¹ R. Thornbuth Stern, Unaccompanied and Separated Asylum-seeking Minors: Implementing a Rights-based approach in the Asylum Process, in: S. Mahmoudi a.o. (eds.), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* 243 (2015).

¹² In this thesis, the terms "unaccompanied minors" (UMs) and "Mineurs Isolés Etrangers" (MIEs) are used interchangeably.

¹³ This specific terminology is absent from the laws and codes applicable to UMs in France, such as the Social Action and Family Code, the Civil Code, the national legislation for the protection of children, the national legislation for foreigners, the Code of Entry and Residence of Foreigner and the Right of Asylum. The latter instrument refers to the term 'minor unaccompanied by a legal representative' (article L221-5 CESEDA).

¹⁴ See for instance Ministre de la Justice, *Circulaire Relative aux Modalités de Prise en Charge des Jeunes Isolés Etrangers : Dispositif National de Mise à l'Abri, d'Evaluation et d'Orientation*, 31 mai 2013.

¹⁵ D. Senovilla Hernández, Analyse d'une Catégorie Juridique Récente : Le Mineur Etranger Non Accompagné, Séparé ou Isolé, 30(1) *Revue Européenne des Migrations Internationales* 20 (2014).

¹⁶ L. Rochford, Contrepoint Mineur Isolé Etranger = Mineur en Danger, 194(3) *Informations sociales* 117-117 (2016).

See also B. Masson Bénédicte, Mineurs Isolés Etrangers : Le Sens d'une Appellation, 22 *Migrations Société* 115 (2010).

See also France : Code de l'Action Sociale et des Familles, article L.112-3.

¹⁷ See Senovilla Hernandez, supra note 16.

¹⁸ A. Etienne & O. Zanna, Actualiser et Complexifier la Typologie des Motifs de Départ du Pays d'Origine des Mineurs Isolés Etrangers Présents en France 4-13 (2013).

¹⁹ V. Feltz, Age Assessment for Unaccompanied Minors: When European Countries Deny Children Their Childhood 3 (2015).

services and education.²⁰ On the contrary, this protective framework is not available to adults who may be subjected to detention, deportation, homelessness or can remain within the country 'illegally', with very restricted enjoyment of their fundamental rights. Therefore, proving an identity that confirms the chronological²¹ age is crucial, as age determines the relationship between an individual and the state, and in turn, whether the applicant is entitled to the specific protection and rights provided by the Convention on the Rights of the Child (hereinafter 'the CRC') and the relevant regional and domestic legislations.²² The first issues that receiving states, including France, face when migrants testify to be minors is accurately identifying them often without any (reliable) documentation proving their age²³, and precisely estimating their age based on their physical attributes.²⁴ Considering the growing culture of scepticism and suspicion surrounding the entry of undocumented children, across Europe, governments are eager to ascertain their age.²⁵ National age assessment policies, requesting the help of physicians, are part of immigration policies to control and deter unauthorised arrivals.²⁶

An age assessment or age determination processes refer to the procedures developed by a public body to seek to establish the chronological age of an individual lacking legal documentation.²⁷ In a broad sense, these processes significate any attempt to establish an individual's age, including seeking and checking additional documentary evidence. However, in Europe, some countries, such as France, often have a narrower interpretation of this notion, associating it exclusively to the use of medical examinations.²⁸ In France, the most widely used method is the radiological examination of various bones, commonly of the hands and wrists, following the method elaborated by the Greulich and Pyle Atlas, in 1959.²⁹ It is difficult to locate comprehensive data on the frequency and amount of age assessments conducted by states as statistics are unavailable, including in France.

Assessing whether an individual arriving in France is, or not, under 18 years is essential, as this allows the authorities in charge to assess whether a higher level of protection and support should be provided. Such determination is also crucial for the functioning of the Common European Asylum System, which

²⁰ J.F. Martini, À l'Épreuve du Rayon X, 85 *Plein droit* (2010).

²¹ T. Smith & L. Brownlees, Age Assessment Practices: A Literature Review and Annotated Bibliography, UNICEF 7-8 (2011): chronological age is measured in years, months and days from the moment when the person was born. 'Biological age is defined by an individual's present position with respect to his or her potential life span, meaning that an individual may be younger or older than his or her chronological age. Social age is defined by an individual's roles, responsibilities and habits with respect to other members of the society of which he or she is a part. An individual may therefore be older or younger depending on the extent to which he or she shows the age-graded behaviour expected of him by his particular society or culture [...]. Psychological age is defined by the behavioural capacities of individuals to adapt to changing demands and includes the use of adaptive capacities of memory, learning, intelligence, skills, feelings, motivations and emotions for exercising behavioural control and self-regulation.

²² A. Aynsley-Green et. al., Medical, Statistical, Ethical and Human Rights Considerations in the Assessment of Age in Children and Young People Subject to Immigration Control, 102(1) *British Medical Bulletin* 18 (2012).

²³ Council of Europe, Age Assessment: Council of Europe Member States Policies, Procedures and Practices Respectful of Children's Rights in the Context of Migration (2017).

²⁴ C. Mougne & A. Gray, A New Approach to Age Assessment of Unaccompanied and Separated Children: Current Practices and Challenges in the UK (2011).

²⁵ European Union: European Asylum Support Office (EASO), Age Assessment Practice in Europe (2013).

²⁶ M. Loughry & M.A. Kenny, Addressing the Limitations of Age Determination for Unaccompanied Minors: A Way Forward, 92 *Children and Youth Services Review* 16 (2018).

²⁷ See Feltz, *supra* note 20.

²⁸ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe* (2012), page 4.

²⁹ J. Rongé, L'Expertise de Détermination de l'Age : la Vérité Tombe Toujours Sur un Os, 285(5) *Journal du Droit des Jeunes* 33-44 (2009).

See also T. Smith & L. Brownlees, *supra* note 22.

in the context of Eurodac information system requires the fingerprinting of all applicants over 14 years.³⁰ In this situation, it is important to deploy age assessment procedures that are accurate and fair. Immigration authorities face difficulties in determining the age of applicants and in balancing the interests of the state to control immigration at its borders against potential fraud and the interests of the individuals who claim being minors in need of protection. An inaccurate age assessment may have detrimental consequences. On one hand, a child incorrectly qualified as an adult may be in danger if placed within an adult's environment, while in another hand, an adult placed incorrectly in a children's environment may expose children to risk.³¹ The fact that medical techniques seem to provide a 'straightforward' and 'objective' solution to this issue means that authorities are increasingly relying upon them. The widely resort to medical examinations to investigate and assess the ages of children subject to immigration control in France has become subjected to lively and vigorous international debates.³²

These ardent debates have recently been addressed in a decision delivered by the French Constitutional Council. This constitutional body has been convened last December (2018), through a preliminary ruling on constitutionality, submitted by the French Court of Cassation, requesting its advice and position concerning the conformity of the law allowing the resort to medical examination on MIEs with the French Constitution. In March 21st, 2019, through a reasoning based on children's rights, it has approved the legislation currently in force on this matter.³³

To what extent is the recent French Constitutional Council decision approving the domestic legislation, and consequently the domestic practice, that allows the use of bone analysis for determining the age of alleged unaccompanied minors arriving in France, in compliance with the international and European children's rights framework?

This thesis will attempt to answer that question by providing insights into the international and European legal frameworks regarding age assessment processes, especially the use of medical examinations, undergone on UMs. A specific emphasis will be made on the CRC provisions and the rigorous work of its monitoring body which ascertains key-standards and guarantees when dealing with (undocumented) UMs where uncertainty on their minority remains (2). Subsequently, the matter is considered from a European standpoint, reflecting the CRC position (3). This is followed by an analysis of the French legislation (4) and the French national immigration practice, (5) dealing with bone testing and its stance when it comes to fulfilling international standards. Finally, this national position will be studied taking into consideration the recent French constitutional decision, under a critical perspective (6).

The content of this thesis is based on a desk review of the relevant literature regarding UMs and age determination procedures in the context of migration. As the topic is apprehended from a legal point of view, this thesis focuses mainly on legal instruments such as conventions, general comments, legislations and jurisprudence.

³⁰ Council Regulation (EC) no. 2725/2000 of 11 December 2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention; Council Regulation (EC) No. 407/2002 of 28 February 2002: Implementation Rules for Eurodac.

³¹ See A. Aynsley-Green et al., *supra* note 23, page 18.

³² G. Lamarche-Vadel, *Tests Osseux pour les Mineurs Etrangers Isolés*, 63(2) *Multitudes* 151-158 (2016).

³³ Conseil Constitutionnel, Décision n° 2018-768 QPC du 21 mars 2019.

2. The International Framework Regarding Age Determination of Unaccompanied Minors

The international instruments confer on states a duty of care and special protection for UMs, including when their minority is challenged. The CRC provides an important array of rights for UMs and age assessment, which has been reinforced and guided by its monitoring body (2.1.). The clear approach adopted by the CRC Committee has been constantly reused by this body and other international human rights bodies (2.2.).

2.1. The CRC Provisions and its General Comments Regarding the Use of Medical Examination to Determine the Age of UMs

The hosting country must determine whether it is dealing with an adult or a child, as children are granted a legal status guaranteeing special assistance and protection, especially under the CRC.³⁴

First, according to this children's rights convention, a child is any human being under eighteen years of age.³⁵ This definition should be read in conjunction with one of the general principles³⁶ enshrined in article 2 of this instrument, the right to non-discrimination. According to this key-provision, all rights promoted must apply to all children within a state's jurisdiction, without discrimination based on any ground such as their "national, ethnic or social origin". Moreover, the list of the potential grounds provided by this article is not exhaustive as it encompasses the wording "or other status". Therefore, it can be said that children must not be discriminated because of their immigration status. Subsequently, states shall treat UMs as children first and foremost rather than migrants. This means that UMs should be granted equal protection and access to their fundamental rights enshrined in the CRC as national children of the receiving state, and in addition should be entitled to special assistance and care as they are in a (temporarily or permanently) precarious situation, as deprived of their family environment and parental care.³⁷ This allegation has been clearly expressed by the CRC Committee, in its General Comment No. 6, in which it states that "the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and [...] must also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness."³⁸

Consequently, according to article 7 of the CRC, each child must be automatically registered at birth, which is a fundamental prerequisite to enjoy children's rights. Nevertheless, in practice, in many countries worldwide, births are not registered.³⁹ The relevant study conducted by UNICEF in 2013 demonstrated that 35 percent of all births have never been registered, with over 230 million children under the age of five unregistered.⁴⁰ Many UMs come from countries where birth-registration systems are lacking or deficient and, therefore, are unable to produce legal identification documents which would

³⁴ See M. Loughry & M.A. Kenny, *supra* note 28, page 16.

³⁵ See the CRC, *supra* note 1, article 1.

³⁶ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para. 12: the committee has identified four general principles from the convention which are enshrined in article 2, article 3(1), article 6 and article 12.

³⁷ Separated Children in Europe Programme, *supra* note 30, page 5.

³⁸ See the CRC committee General Comment No. 6, *supra* note 3, para. 12.

³⁹ J. Stein, *The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential*, 24(3) *The International Journal of Children's Rights* 602 (2016).

⁴⁰ UNICEF, *Every Child's Birth Right: Inequities and Trends in Birth-Registration* 36 (2013).

prove their age⁴¹ and on which receiving countries relied upon in terms of their immigration policies. Consequently, many UMs arrive at the European borders with no documentation or with identification documents that may be considered fraudulent or unreliable by the authorities. Hence, national immigration authorities of receiving states find themselves having to rely on alternative methods, such as medical age assessment procedures, to determine whether the individual is under 18 years of age. Such practices infringe the approach adopted by the CRC Committee, in its General comment No. 6, according to which minors who lack identification documents, officially determining their age should be given the “benefit of the doubt” until proven otherwise.⁴² Furthermore, the CRC confers on states a duty to care for every child and to ensure their protection from any type of violence.⁴³ In order to fulfil this duty, states are requested to provide special care and protection to children (temporarily or permanently) deprived of their family environment.⁴⁴ Additionally, all UMs have an inherent right to life, survival and development as promoted by article 6 of the CRC. With respect to the child’s right to express their views freely in all matters affecting their life, states’ authorities should assure that their views are being given due weight in accordance with their age and maturity.⁴⁵

Finally, the key-principle of the best interests of the child (hereinafter ‘BIC’) is integral to all decision taken in relation to children and must be guaranteed, as a primary consideration, by states.⁴⁶ Although the CRC does not mention specifically the meaning of BIC regarding the issue of age assessment processes in the context of migration, its monitoring committee in its General Comment No. 6 does develop its position on the question. Indeed, it states that:

“[i]dentification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive, fair manner, avoiding any risk of violation of the physical integrity of the child and giving due respect to human dignity”.⁴⁷

Therefore, all consideration relating to immigration policies or borders control should be considered secondary, following the BIC assessment which should primarily prevail where a child is concerned.⁴⁸ However, it can be observed that in this General Comment No. 6, the children’s rights monitoring body did not expressly mention the reason why states should refrain from relying on medical examinations, notably the lack of reliability of such techniques. In fact, medical-based methods can only ‘estimate’ the age of applicants, which defines the probability of such examinations and their inherent doubts, explaining the vital importance of the benefit of the doubt.⁴⁹ This aspect has been highlighted in further additional instruments.

⁴¹ See A. Aynsley-Green et al., *supra* note 23, page 18.

⁴² See the CRC committee General Comment No. 6, *supra* note 3, paras. 31(i) and 71.

⁴³ See the CRC, *supra* note 1, articles 3(2), 19, 32, 34, 35 and 36.

⁴⁴ *Id.*, article 20(1).

⁴⁵ *Id.*, article 12.

⁴⁶ *Id.*, article 3(1).

See also UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, paras. 36-40.

See also S. Bolton, K. Kaur, S.S. Luh et al., *Working with Refugee Children: Current Issues in Best Practice* (2011).

⁴⁷ See the CRC committee General Comment no. 6, *supra* note 3, para. 31(i).

⁴⁸ See *Separated Children in Europe Programme*, *supra* note 30.

⁴⁹ A. Schmeling et al., *Forensic Age Estimation in Unaccompanied Minors and Young Living Adults*, in D.N. Vieira (Ed.), *Forensic Medicine-From Old Problems to New Challenges* 77 (2011).

2.2. The Constant Reiteration of the CRC Committee Approach Regarding the Use of Medical Examination to Determine the Age of UMs

The guarantees developed by the CRC Committee regarding the status of UMs and age assessment processes through its General Comment No. 6 has been pointed out and reiterated during a Day of Discussion organised in 2012, dedicated to the rights of all children in the context of international migration.⁵⁰ In addition, the CRC Committee through the latter has specifically discussed the topic of age assessment via medical bone analysis. It has insisted on the unreliability and the very wide margins of error of current methods, such as bone analysis, employed on UMs arriving in receiving countries, especially for individuals aged between 16 and 18 years old. The emphasis during this Day of Discussion considers that non-invasive and multi-disciplinary techniques should be the priority and radiological testing the last resort. The CRC Committee has also recalled the presumption of minority in situations of ambiguity concerning the age of an individual who claims to be a child.⁵¹

Furthermore, the CRC Committee together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have recently adopted a Joint General Comment (hereinafter 'Joint General Comment (2017)') on the general principles regarding the human rights of children in the context of international migration.⁵² In this latter text, the committees touched the issue of age determination procedures. These committees recalled the guarantees previously developed by the CRC Committee General Comment No. 6, such as the necessity to conduct physical and psychological assessments, by qualified professionals "in a prompt, child-friendly, gender-sensitive and culturally appropriate manner". Additionally, this Joint General comment puts the emphasis on the lack of accuracy attached to medical examinations, which subsequently leads to wide margins of error of the results obtained, besides their (potential) traumatic impacts on migrant children. Consequently, the committees re-highlighted the fundamental importance of the benefit of the doubt in favour of the individual claiming their minority.⁵³

The CRC Committee has recently repeated its firm position when delivering a decision on an individual communication made against Spain on that specific matter.⁵⁴ This case concerned NBF, a citizen of the Ivory Coast who claimed to be a minor and having been born on March 2000.⁵⁵ The claimant has been arrested by the Spanish National Police on January 26, 2017. The day after, so on January 27, 2017, the Office of the Prosecutor for Minors of the Provincial Court of Granada ordered the use of medical examinations to assess his age. The tests were performed that same day and consisted of bone testing, so a radiography of his left hand. The medical result assessed that the claimant's bone age was "greater than 19 years".⁵⁶ NBF based his (general) claim on numerous violations of the CRC, challenging the legality of the resort to bone analysis to determine his age and, therefore, his exclusion from the national

⁵⁰ UN Committee on the Rights of the Child (CRC), Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September 2012, paras. 30 and 76.

⁵¹ *Id.*, para. 49.

⁵² UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23.

⁵³ *Id.*, para. 4.

⁵⁴ UN Committee on the Rights of the Child (CRC), Individual Communication N.B.F. v/ Spain, 27 September 2018, CRC/C/79/D/11/2017.

⁵⁵ *Id.*, para. 1(1).

⁵⁶ *Id.*, paras 2(1) and 2(2).

child's protection system.⁵⁷ The French Ombudsman (*Défenseur des Droits*) intervened as a third party, to provide an independent opinion.⁵⁸ Through its decision, the CRC Committee has reminded the fundamental importance of age assessment for minors in migration contexts and has repeated the necessary guarantees attached to such procedures as highlighted in its General Comment No. 6.⁵⁹ Moreover, it has expressly referred to the Joint General Comment (2017), emphasising the lack of precision and the existence of margins of error attached to bone testing, the devastating consequences that such results can have on children having been wrongfully determined as adults and, therefore, the necessity to make the principle of the benefit of the doubt a priority in age determination procedures.⁶⁰ The CRC Committee finally recognized the violation of articles 3, 12⁶¹ and 8⁶² of the CRC regarding the age determination process performed on NBF.

In addition, the CRC perspective is supported by other human rights bodies, such as the UN High Commissioner of Refugees (UNHCR)⁶³ and the Special Rapporteur on the Human Rights of Migrants on the Protection of children in the context of migration.⁶⁴ The former has developed guidelines on the issue of age assessment and UMs. It has also expressed its concerns regarding the margin of error in medical examinations and suggests that such determination should take into consideration both the physical and the psychological maturity of the child by emphasising the need for accuracy, safety and dignity in the use of age assessments. It also provides for the benefit of the doubt if the exact age remains uncertain. The latter has made several references to the CRC Committee General Comment No. 6 in its report and has reiterated necessary guarantees in relation to age assessment.

Therefore, the international framework, especially through the work of the CRC Committee, has clearly acknowledged the vulnerability of UMs. It has also recognised the importance to identify migrant minors in a receiving country, which is why medical age determination procedures are not prohibited *per se* and are considered as part of age assessments. However, as the General Comment No. 6, whose approach has been repeated constantly in other international instruments, has pointed out, medical-based methods must be strictly conditioned, following numerous guarantees in order to be in accordance with children's rights. This approach has been developed further by additional texts, discussions and case law that have considered the lack of reliability attached to medical examinations, necessarily leading to the existence of doubts regarding the results obtained. Thus, the lack of precision of medical testing explains the necessity to promote the benefit of the doubt for individuals claiming their minority rights, especially when considering the consequences of being wrongly considered as an adult in such contexts.

⁵⁷ Id., para. 1(1).

⁵⁸ Id., paras. 8(1) - 8(6).

⁵⁹ Id., paras. 12(3) and 12(7): Such as the imperative to develop fair, reliable and multidisciplinary age determination processes in the presence of a representative.

⁶⁰ Id., paras. 12(4) and 12(6).

⁶¹ Id., para. 12(9).

⁶² Id., para. 12(10).

⁶³ UN High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care*, 1994, chapter 8 - section 1; UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para. 5(11); UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, paras. 7 and 75.

⁶⁴ UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, Jorge Bustamante, 14 May 2009, A/HRC/11/7, para. 102.

3. The European Framework Regarding the Use of Medical Examination in Determining the Age of UMs

The European framework reflects the international framework regarding age determination of UMs, by requiring that such procedures must take into consideration children's rights.⁶⁵ This regional framework encompasses the European Union law which deals with this matter specifically within its asylum law (3.1) and the Council of Europe law, which is currently not highly developed on this question but could potentially be used (3.2).

3.1. The European Union Law Regarding the Use of Medical Examination in Determining the Age of UMs

The BIC principle, the rights of the child to be heard, to be cared and to be protected are also promoted under the EU general law, by the Charter of Fundamental Rights of the EU (article 24)⁶⁶ and the Treaty on European Union (article 3(3))⁶⁷. The issue of age determination of UM is treated, specifically, within the framework of EU asylum law. The definition of UMs provided by the CRC has been translated into the regional framework by the EU Qualification Directive.⁶⁸ Children are also considered as a vulnerable group of people which obligates member states to take appropriate protective steps.⁶⁹ UMs are also entitled to specific rights and guarantees within the EU, such as the appointment of a guardian.⁷⁰ Moreover, their best interests and their specific needs must be taken into consideration in national law implementing the EU reception directive.⁷¹

When it comes to scrutinizing the age of an individual, each member state of the EU has procedural autonomy to develop its own framework, policies and practices in light of the EU standards. This autonomy has led to significant variations in the nature and scope of age determination methods applied across the EU. The European Commission, with regard to its Action Plan on UMs⁷², entrusted the European Asylum Support Office to deliver a comprehensive mapping on national legal frameworks and national scientific literature on age assessment, which has been released in December 2018.⁷³ This review showed that most of the states commonly resort to medical examinations, especially to dental and bone examinations.⁷⁴ According to the Dublin regulation which, broadly speaking, determines the

⁶⁵ See A. Aynsley-Green et al., *supra* note 23, page 19.

⁶⁶ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

⁶⁷ European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01.

⁶⁸ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, article 2(l).

⁶⁹ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, article 21.

See also European Union: Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens*, 2 December 2009, 17024/09, paras. 5(1) and 6(1)(7).

⁷⁰ See the EU Reception Directive 2013, *supra* note 79, article 24.

⁷¹ *Id.*, chapter IV, article 24.

⁷² European Union: European Commission, *Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors (2010-2014)*, 6 May 2010, COM (2010) 213/3, para. 4(2).

⁷³ European Union: European Asylum Support Office (EASO), *EASO Practical Guide on Age Assessment Second Edition 106 (2018)*.

⁷⁴ *Id.*

See also European Migration Network (EMN), *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study 76 (2010)*.

country responsible for an asylum application within the EU, the age assessment established by a member state and recorded into the regional databases should be taken for granted by any other member state.⁷⁵

The Asylum Procedures Directive deals specifically with the question of UMs and age assessment. It does not oblige the member states to develop medical age assessment for asylum-seekers claiming their minority once arriving at the borders. However, this instrument does not exclude to resort to such processes either.⁷⁶ The recast directive adds significant guarantees compared to its previous version, ascertaining that medical age assessment should be used “only in case of doubt concerning the applicant’s age”. It should, in addition, be “performed in full respect of the individual’s dignity, selecting the least invasive examination and carried out by qualified medical professionals allowing, to the extent possible, for a reliable result”, with the UM having been informed in a language they can understand and having expressed their consent.⁷⁷ Moreover, the refusal to undergo a medical age assessment examination shall not be the sole reason for rejecting an application for international protection.⁷⁸

Through this asylum framework, the EU recalls the necessity to develop guarantees, as highlighted in the CRC General Comment No. 6. This is specified in order to limit the resort to medical age determination examinations and to be in accordance with article 24 of the Charter of Fundamental Rights of the EU. However, the lack of accuracy and reliability attached to medical-based methods have not been expressly mentioned in various texts.

3.2. The Council of Europe Law Regarding the Use of Medical Examination in Determining the Age of UMs

Firstly, under the law of the Council of Europe, there is no specific provision relating to the rights of non-national children in the context of age determination procedures.⁷⁹ However, invasive medical examination, used in practice to this end, raise concerns under articles 3 and 8 of the European Convention on Human Rights (hereinafter ‘ECHR’).⁸⁰ Indeed, on many occasions, the European Court of Human Rights (hereinafter ‘ECtHR’) has reiterated the obligation of state parties under article 1 of the ECHR, to secure the rights and freedoms provided and protected by the convention for every individual within their jurisdiction. This article needs to be read in conjunction with article 3 which requires states parties to ensure that individuals are not subjected to ill or degrading treatment, including treatment

⁷⁵ European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, article 31(2)(d).

⁷⁶ European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, article 17(5); European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, article 25(5).

⁷⁷ Id., EU Procedures Directive (recast), article 25(5).

⁷⁸ Id., article 25(5)(c).

⁷⁹ European Union: European Agency for Fundamental Rights, *Handbook on European Law Relating to the Rights of the Child* 167 (2015).

⁸⁰ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

administered by private individuals.⁸¹ Moreover, through its extensive interpretation of article 3, the ECtHR has developed a vast array of scenarios, including invasive physical examinations of children, which can be qualified as inhuman or degrading treatment and, subsequently, fall under the protection of article 3.⁸² In addition, any measure performed by public or private individuals on children should respect the BIC principle, their right to human dignity and psychological integrity.⁸³ Furthermore, due to the potential impact of age assessments on the psychological and physical integrity of the child claiming their minority, such procedures could fall under the scope of Article 8 of the ECHR. Thus, immigration authorities could legitimately interfere with a minor's right to privacy and perform age determination procedures if such processes are in accordance with the law⁸⁴ and are necessary and proportionate⁸⁵ to the legitimate aim pursued.⁸⁶

The issue of age assessments performed on UMs has recently been dealt before the ECtHR, through the communicated case *Darboe and Camara v. Italy*.⁸⁷ The case concerned two UMs who, upon arrival in Italy, underwent age determination procedures which resulted in them being registered as having attained the age of majority and placed in a reception centre for adults. Regarding the age assessment, the applicants claimed that there were no procedural guarantees, thus, violations of article 3 and 8 of the ECHR.⁸⁸ The Aire Centre, the Dutch Council for Refugees, and the European Council on Refugees and Exiles have all intervened in this case as third parties.⁸⁹ They have submitted a fruitful and well-detailed collective report on the specific situation of the two boys concerned. The report highlighted their stance on age assessment procedures and the material conditions of reception facilities for children on the move.

It is important, at the European level, to restate the paramount importance of establishing procedures that are fair and effective, promoting the presumption of minority, in order to prevent UMs from being treated as adults, and to guarantee that their rights are protected. Moreover, as the CRC Committee pointed out, age assessment procedures should never be performed routinely, before less intrusive means are considered, and without applying the principle of the benefit of the doubt.⁹⁰ When the specific circumstances in an individual case necessitate an age assessment, a holistic process should be carried out by trained and qualified experts, with due regard to the procedural safeguards provided under articles 3 and 8 of the ECHR.⁹¹ Finally, as the interveners of this communicated case affirmed, following

⁸¹ Council of Europe: European Court of Human Rights, *A. v. the United Kingdom*, No. Application no. 100/1997/884/1096, 23 September 1998, Reports of Judgments and Decisions 1998-VI, page 2699.

⁸² Council of Europe: European Court of Human Rights, *Yazgöl Yılmaz v. Turkey*, No. 36369/06, 1 February 2011.

⁸³ Council of Europe: European Court of Human Rights, *C.A.S and C.S. v Romania*, No. 26692/059, 20 March 2012, para. 82: this case concerns a child subjected to violent sexual assault.

⁸⁴ Council of Europe: European Court of Human Rights, *Malone v. the United Kingdom*, No. 8691/79, 2 August 1984, paras. 66-68; *Hasan and Chaush v. Bulgaria [GC]*, No. 30985/96, 26 October 2000, para. 84.

⁸⁵ Council of Europe: European Court of Human Rights, *Connors v. the United Kingdom*, No. 66746/01, 27 May 2004, paras.81–84.

⁸⁶ See ECHR, *supra* note 91, article 8(2).

See also Council of Europe: European Court of Human Rights, *Coster v. the United Kingdom [GC]*, No. 24876/94, 18 January 2001, para. 104.

⁸⁷ Council of Europe: European Court of Human Rights, *Darboe and Camara v. Italy*, No. 5797/17, 14 February 2017.

⁸⁸ (<https://www.asylumlawdatabase.eu/en/content/ecthr-communicated-case-darboe-and-camara-v-italy-no-579717-communicated-14-february-2017>), last visited (08-04-2019).

⁸⁹ See *Darboe and Camara*, *supra* note 98, Written Submission on Behalf of the Aire Centre (Advice on individual Rights in Europe), the Dutch Council of Refugee (DCR) and the European Council on Refugees and Exiles (ECRE), Interveners, 5 July 2017.

⁹⁰ See CRC Committee General Comment No. 6, *supra* note 3, para. 31

See also CRC Committee Day of Discussion 2012, *supra* note 52, paras. 30 and 76.

⁹¹ *Id.*, paras. 12 and 15.

the approach developed in the Joint General Comment (2017), medical examinations should be avoided due to “their low evidential value, intrusiveness and the risk of a disproportionate interference in the child’s private life that may lead to a violation of article 8 ECHR”⁹². Therefore, wrongful assessment could result in a potential violation of articles 3 and 8 of the ECHR.⁹³ Based on the claims and arguments developed by each party, the ECtHR ordered an interim measure, following rule 39 of its rules of court,⁹⁴ requiring the Italian government to transfer the minors from the reception centre for adults to a facility adapted for children. Its decision is based on the following arguments: the radiological examination did not consider the existing margin of error of such tests; the age assessment was solely based on the result of this medical examination; the medical examination was conducted following the Greulich and Pyle method, which is not the most recent and reliable medical technique available; the results have not been communicated to the applicants; during the age assessment procedure the applicants were treated as adults.

Another communicated case *S.M.K v. France*, related to age assessments, has been brought before the ECtHR, which has delivered its decision on 15 March 2019.⁹⁵ The case concerned a sixteen-year-old girl named Solange. She arrived in Angers (France) in summer 2018, after having fled from Cameroon where she would have been a victim of a forced marriage. Once in the receiving country, she sought the protection of the Childcare Protection service (*Aide Sociale à l’Enfance*). On 25 September 2018, the departmental council in charge of her assistance declared that she was not a minor, based on the lack of official documents of identification. She was, therefore, ordered to leave the accommodation she benefited from under the special protection provided for children and ended up in a dangerous squat. Helped by her lawyer, she challenged this decision and seized the judge for juveniles, asking for an emergency shelter while the decision on her age would be delivered. Convinced by her minority, the judge in charge of the emergency interim proceeding ordered an accommodation, plus immediate care by the Childcare Protection system.⁹⁶ However, this latter decision has been annulled in appeal by the Council of State. Thus, Solange decided to bring the matter before the ECtHR on the basis of rule 39 of the ECtHR rules of court. The European Court asked France to suspend its decision on her removal from a safe accommodation for children until 29 March 2019. Finally, on 27 March 2019, the judge for juveniles ordered her temporary accommodation until the age assessment procedure is finalized and the decision on her minority delivered.

These communicated cases illustrate the role that the ECHR could have regarding age assessments performed in Europe, by applying articles 3 and 8 of the ECHR to such situations. In addition to infringing children’s rights, especially, the privacy of UMs because of their intrusiveness, the lack of reliability of medical examinations adds an additional pitfall to these procedures which could lead to the violation of these European provisions.

Secondly, despite the existence of guarantees in the EU asylum law, no details are given regarding the adequate moment and the appropriate nature of medical examinations. In order to address the lack of practical guidance on that matter, the Separated Children in Europe Programme has produced a framework on best practice for determining the age of UMs subject to immigration control.⁹⁷ It has highlighted that the primary purpose of age assessments should be the protection of UMs rather than

⁹² Id., para. III.

⁹³ Id., para. 16.

⁹⁴ Council of Europe: European Court of Human Rights, Rules of Court, 1 August 2018.

⁹⁵ Council of Europe: European Court of Human Rights, *S.M.K. v. France*, No.14356/19, 15 March 2019.

⁹⁶ (<https://www.lacimade.org/mise-abri-jeune-mineur-danger-cedh-rappelle-france-obligations/>), last visited (13-04-2019).

⁹⁷ See Separated Children in Europe Programme, *supra* note 30.

the promotion of immigration control.⁹⁸ Furthermore, the Council of Europe has also developed a report recently stressing the recommendation to adopt a children's rights based approach age assessment that support the benefit of the doubt.⁹⁹

Finally, the regional policies and implementation tools have demonstrated the strong commitment, at the European level, to comply with the international framework and especially the CRC, when considering age assessment procedures for UMs. However, it has been negatively pointed out by the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, among others, that "considerations relating to security or immigration control tend to routinely outweigh the child's best interests in many national contexts".¹⁰⁰ This allegation has also been made against the French legislation and practice on that matter, which will be developed in the following section.

⁹⁸ See M. Loughry & M.A Kenny, *supra* note 28, page 19.

⁹⁹ Council of Europe, Age assessment: Council of Europe Member States' Policies, Procedures and Practices Respectful of Children's Rights in the Context of Migration, para. 48 (2017).

¹⁰⁰ Council of Europe: Commissioner for Human Rights, Protecting Children's Rights: Europe Should do More 2 (2014).

4. The French Legal Framework for Age Determination of MIEs

The French legal framework provides a specific status of protection for MIEs (4.1). In order to ensure their minority, the French legislation authorizes the use bone examinations in certain circumstances (4.2), which has been highly discussed among professionals (4.3).

4.1. The Status of MIEs in French Legislation

Firstly, it is significant to highlight that the French civil code adopts the same definition of a child as the CRC does in article 1. Indeed, this national text defines a minor as any person, male or female, aged below 18 years old.¹⁰¹ Regarding MIEs, this specific French terminology is not defined expressly in any national legislative instruments. However, the term MIE is commonly and widely used among professionals dealing with this group of children. Moreover, this term has been incorporated into regulatory texts. Indeed, the ministerial order of 2016 defines MIE as any minor who is not, legally, under the authority or responsibility of an adult present on the national territory or, a minor who is under the authority or responsibility of an adult present on the territory, but who does not take care of the minor in an adequate manner.¹⁰² In addition, the circular of 2013 mentions that the proof of an affiliation bond through any official and valid documentation allows the authorities to declare that the minor is not isolated and, subsequently, not in (potential) danger.¹⁰³ However, such documentation must fulfil the conditions and requirements provided in article 47 of the French civil code.

The presence of MIEs on the French territory is not a new phenomenon. Indeed, in the mid-90s the first flows of UMs arrived in France, creating in certain regions 'a social situation of emergency'.¹⁰⁴ In 2017, the French authorities have declared that 14,908 UMs benefited from the Childcare Protection system, which is over three and a half times higher than in 2012.¹⁰⁵ The French authorities consider that MIEs present within their national borders are potentially in danger because of the absence of any familial support.¹⁰⁶ The law of 2007 related to childhood protection (*Loi relative à la Protection de l'Enfance*) has emphasised that every minor, without any distinction based on nationality, must be granted protection from the state, as soon as they are deprived of their family environment.¹⁰⁷ However, the question of caring for these children remains complex as it confronts human rights, especially children's rights, with national migration policies and controls of borders.¹⁰⁸

As it has been previously mentioned, determining the age of migrant minors is crucial as it leads to the specific status of MIE and, therefore, to an array of rights which are more protective than those attributed to adults.¹⁰⁹ Due to their situation of vulnerability, these children benefit from special care and protection under the local authority, in the administrative institution specialised in dealing with childhood, the

¹⁰¹ France : Code Civil, article 388(1).

¹⁰² France : Arrêté du 17 novembre 2016 pris en application du décret No. 2016-840 du 24 juin 2016 relatif aux modalités de l'évaluation des mineurs privés temporairement ou définitivement de la protection de leur famille, No. JUSF1628271A, article 1 (2016).

¹⁰³ Circulaire du 31 mai 2013 relative aux modalités de prise en charge des jeunes isolés étrangers : dispositif national de mise à l'abri, d'évaluation et d'orientation, No. JUSF1314192C, page 5 (2013).

¹⁰⁴ Réseau Européen des Migrations, Politiques, Pratiques et Données Statistiques sur les Mineurs Isolés Etrangers en 2014 6 (2014).

¹⁰⁵ France : Ministère de la Justice, Rapport Annuel d'Activité 2017 : Mission Mineurs Non Accompagnés 5 (2018).

¹⁰⁶ France : Code Civil, articles 375 and 375-5.

¹⁰⁷ France : Loi No. 2007-293 du 5 mars 2007 Réformant la Protection de l'Enfance, article 1.

¹⁰⁸ See Réseau Européen des Migrations, supra note 117.

¹⁰⁹ J.F. Martini, À l'Épreuve du Rayon X, 85 *Plein droit* (2010).

Childcare Protection system.¹¹⁰ Thus, age determination processes are not conducted in the framework of the asylum procedure in France but as a prerequisite to benefitting from the Childcare Protection system. Because they benefit from this specific public assistance, subsequently, MIEs live under a specific status with its special rights. Indeed, they cannot be removed from the territory¹¹¹; they must be represented by an appointed legal guardian in their administrative procedures¹¹²; they must get access to health care,¹¹³ including centres specialized in the care and support of minors living in vulnerable situations¹¹⁴; and they must get access to education.¹¹⁵ MIEs arriving on the French territory are vulnerable and face dangerous situations. Therefore, these children must benefit from specific assistance, care and protection, in accordance with article 20 of the CRC.¹¹⁶

4.2. The Resort to Bone Testing to Determine the Age of MIEs in French Legislation

MIEs are subjected to the same regulations as adults, in their process of entering into the French territory.¹¹⁷ They are under the obligation to provide documentations and visas¹¹⁸, except if they are asylum-seekers¹¹⁹. When there are doubts concerning their age and, therefore, their status of MIE, an assessment protocol sets out the techniques for age assessments procedures.¹²⁰

An examination of bone age is not the only, exclusive and prevailing test to determine the age of MIEs arriving on the French territory. Indeed, other procedures exist to assess their minority, namely the examination of the identification documents presented and the evaluation of the concerned individual's conduct during (psychological) interviews with authorities. The possession and presentation of identification documents proving that the minority should be considered is sufficient proof for the immigration authorities, considering article 47 of the French civil code. In fact, in accordance with this article, a presumption of authenticity exists regarding identification documents.¹²¹ However, this presumption is not irrefragable. This means that in situations where the authorities have serious doubts regarding the authenticity and/or the validity of the documentation presented,¹²² where fraud is

¹¹⁰ J.F. Martini, *Mineurs Etrangers : Le Tri Qui Tue*, 92 *Plein Droit* (2012).

See also Conseil d'Etat, Décisions No. 400055, No. 400056, No. 400057, No. 400058 du 27 juillet 2016: The Council of State recalled the repartition of competences between the state and the départements (regional entities) regarding the care and protection of MIEs.

¹¹¹ France : Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile (CESEDA) [France], 22 February 2005, article L.511-4.

¹¹² *Id.*, at article L.221-5 et L.751-1.

¹¹³ France : Code de la Sécurité Sociale, article L. 115-6.

¹¹⁴ R. Rahmeth et al., *Accueillir et Soigner les Mineurs Isolés Etrangers ? Une Approche Transculturelle*, 80 *Adolescence* 421-432 (2012).

¹¹⁵ Circulaire No. 2012-14152, Relative à l'Organisation de la Scolarité des Elèves Allophones Nouvellement Arrivés (2012).

¹¹⁶ Défenseur des Droits, Décision MDE-2016-052 (2016).

¹¹⁷ See Réseau Européen des Migrations, *supra* note 58, page 13.

¹¹⁸ European Union: Council of the European Union, Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 15 March 2006, OJ L. 105/1-105/32; 13.4.206, (EC) No 562/2006, article 5.

¹¹⁹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, article 31(1).

¹²⁰ (<http://www.infomie.net/spip.php?article1680>), last visited (20-04-2019).

¹²¹ See Défenseur des Droits, *supra* note 131, page 5.

¹²² Conseil d'Etat, Décision No. 329971, *Moundele*, du 23 juillet 2010.

suspected, they can legally resort to a procedure of verification.¹²³ Bone testing can be performed only as a last resort and if continuous doubts remain about the individual's minority.¹²⁴

The age assessment procedure varies if the individual presents themselves and claims minority at the borders or if they do so while already finding themselves in the territory. In the former situation, the interministerial circular of 2005¹²⁵ provides that the borders police services must proceed to investigations to clearly determine their minority. The police will first have to examine the official identification documents presented by the individual and, then, if in doubt or if such documentation is lacking, the police will have to require the health services to undergo medical age assessment examinations which correspond to bone testing. The results will be communicated to the Public Prosecutor who will deliver the final decision on that matter, taking into account the margin of error of medical tests.¹²⁶ In the latter situation, a multi-disciplinary interview is conducted,¹²⁷ in order to gather as much information as possible regarding the interested individual claiming their minority. This has been welcomed by the French Ombudsman which specified in his 2016 decision that a social evaluation should prevail over medical examinations.¹²⁸ The importance of holistic examinations has been recalled by the Court of Appeal of Lyon in 2007.¹²⁹ First, interviews are conducted with the minor in order to get more insight about his/her personal situation and their level of 'social maturity'. The assessment made after the interrogations cannot conclude on a specific age, but the information gathered can help to estimate whether the individual is under 18 as they claim to be.¹³⁰ The assessment of minority is also based on checking the authenticity of the presented identification documents (when such documents are available). If a doubt about the individual's age remains, a medical age assessment can be requested by judicial authorities, with the consent of the individual.¹³¹ Age assessment processes are strictly conditioned by law¹³² and conducted by trained professionals, possessing knowledge and experience relating to migratory issues, geopolitics, situations of the country of origin of migrants reaching France, and children's rights.¹³³

Despite having an important legal framework that seems to be restrictive 'on paper' and in compliance with the international framework, France has been highly criticized among professionals, at the national and international levels, for allowing the systematic resort to bone analysis to determine the age of MIEs arriving on its territory.

¹²³ Cour d'Appel d'Amiens, Décision No. 14/03740 du 5 février 2015.

¹²⁴ Circulaire du 31 mai 2013 (page 5) and Nouvelle Circulaire NOR : JUSF1602101C du 25/01/2016 (pages 3 et 8).

¹²⁵ Circulaire No. CIV/01/05 Prise en Application du décret No. 2003-841 du 2 Septembre 2003 Relatif aux Modalités de Désignation et d'Indemnisation des Administrateurs ad hoc Institués par l'article 17 de la loi No. 2002-305 du 4 Mars 2002 Relative à l'Autorité Parentale (2003).

¹²⁶ Id.

¹²⁷ Circulaire du 31 mai 2013 Relative aux Modalités de Prise en Charge des Jeunes Isolés Etrangers : Dispositif National de Mise à l'Abri, d'Evaluation et d'Orientation (2013).

See also Asylum Information Database, Country Report France 62 (2018).

¹²⁸ See Défenseurs des droits, supra note 107.

¹²⁹ Cour d'Appel de Lyon, Décisions No. 16/0043, 16/00602 et 16/00770 du 11 janvier 2017.

¹³⁰ Decree No. 2016-840 Relating to Reception and Minority Assessment Conditions of Minors Temporarily or Definitely Deprived from the Protection of their Family, 24 June 2016 (2016).

¹³¹ France : Code de l'Action Sociale et des Familles, article L221-2-2, R 221-11 and following ; Code Civil article 388 ; Code de Procédure Civile article 232.

¹³² France : Code Civil, article 388.

¹³³ In France training is provided for under Article R 221-11 and Article 4 of the Decree of 19 November 2016.

4.3. The Challenged French Legislation

Many concerns and critics have been pointed out on the French legislation regarding bone examination. First, at the international level, the CRC Committee in its concluding observations made to France in 2016¹³⁴, reiterated its previous analysis and recommendations made in 2004¹³⁵ on this matter. It highly suggested the French authorities to “put an end to the use of bone tests as the main method to determine the age of children, using instead other methods that are proven to be more accurate”.¹³⁶

In addition, the concerns expressed by the CRC Committee about the French legislation and the use of bone testing have been reiterated in a decision on the merits delivered by the European Committee of Social Rights, against France.¹³⁷ The decision concerned numerous violations of the rights of UMs in France, in contradiction with article 17(1) and 17(2) of the European Social Charter.¹³⁸ One of the shortcomings identified by the committee in the national protection system concerned resorting to medical age determination procedures. Indeed, the Committee concluded that bone testing, as currently applied on UMs, can have detrimental consequences for minors and that the use of bone testing to determine the age of unaccompanied foreign minors is inappropriate and unreliable. The use of such testing therefore violates article 17(1) of the Charter.¹³⁹

Finally, since 2005, the French Ombudsman has strongly encouraged the French government to align with its international obligations and recommended the prohibition of bone testing as an age assessment tool.¹⁴⁰

Second, at the national level the French legislation is still at the heart of lively debates. Indeed, the legal authorization to resort to bone testing, as part of the age determination process for UMs, has been widely criticised, especially, for its lack of accuracy (4.3.1) and its human rights’ implications (4.3.2).

4.3.1. The Lack of Reliability of Bone Testing on UMs from a Medical Perspective

It is fundamental for both the immigration authorities of the receiving state and children that there is an appropriate, consistent and reliable procedure to age assessment. The French government is keen to resort to a ‘scientific’ method (x-rays bone testing) that would provide it with an approximative chronological age of an individual and enable them to act accordingly, in terms of rights and protection. Unfortunately, it is widely accepted today a ‘scientific’ method that can provide such a precise identity date does not exist, especially for the group for whom the issue of age assessment is most salient, namely migrants aged between 15 and 20 years old.¹⁴¹ Indeed, medical age assessment methods

¹³⁴ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding observations on the fifth periodic report of France, 23 February 2016, CRC/C/FRA/CO/5.

¹³⁵ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding observations France, 30 June 2004, CRC/C/15/Add.240.

¹³⁶ Id., para. 74(b).

¹³⁷ *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France Complaint No. 114/2015*, Council of Europe: European Committee of Social Rights, 24 January 2018.

¹³⁸ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35.

¹³⁹ See *EUROCEF v/ France 2018*, supra note 152, para. 113.

¹⁴⁰ Commission Nationale Consultative des Droits de l’Homme, *Avis sur la Situation des Mineurs Isolés Etrangers Présents sur le Territoire National : Etat des Lieux un An après la Circulaire du 31 mai 2013 Relative aux Modalités de Prise en Charge des Jeunes Isolés Etrangers (Dispositif National de Mise à l’Abri, d’Evaluation et d’Orientation)*, 92 Journal Officiel de la République Française 3 (2014).

¹⁴¹ See A. Aynsley-Green et al., supra note 23, page 27.

(notably those using x-rays) for individuals above 15 years old have been criticized extensively by medical professionals, and notably the French Academy of Medicine in 2007¹⁴², as being inaccurate, as well as lacking rigor and preciseness.¹⁴³ According to these experts, x-ray methods only examine physiological maturity, therefore, only allowing an estimation of the percentage of development growth, which cannot be precisely translated into a chronological age due to the lack of accuracy of such methods. In 2014, the French High Public Health Council integrated the critiques regarding this tool, motivated mainly by the margin of error of such methods, estimated at around eighteen months.¹⁴⁴ Moreover, bone testing reliability is impacted by several additional factors, which greatly differ from one individual to another, especially between children from industrialized and developing countries, such as ethnic, socioeconomic, genetic and environmental factors.¹⁴⁵ Indeed, the French National Consultative Ethics Committee for Health and Life Sciences, in its report finalized in 2005¹⁴⁶, pointed that the Greulich and Pyle Atlas (the reference examination method used in France) was never intended to be used for forensic purposes¹⁴⁷ and was based on an American ‘Caucasian’ population from the 1940s. This bias raises a further significant risk of error on children not coming from the same population and background, which is of increased relevance when considering that most UMs seeking entry into Europe are of African origin. Finally, this Committee pointed out that “human diversity is such, in time and space, that it seems futile to believe that it may be possible in the foreseeable future to determine the exact chronological age of a person at any given time, unless their date of birth is known”.¹⁴⁸ These main allegations have been integrated into French case law, such as the ones delivered by the Court of Appeal of Douai in 2013, that emphasised the unreliability of medical examinations of bones for the purpose of age assessment.¹⁴⁹

4.3.2. The Lack of Reliability of Bone Testing on UMs from a Human Rights Perspective

Serious ethical concerns have been raised by the French National Consultative Ethics Committee for Health and Life Sciences regarding the use of bone testing procedures in terms of their invasiveness and their physical and psychological harmful effects on vulnerable children.¹⁵⁰ Indeed, children who

See also H. Crawley, *When is a Child not a Child? Asylum, Age Disputes and the Process of Assessment*, Immigration Law Practitioners’ Association 36 (2007).

¹⁴² J.L. Chaussain & Y. Chapuis, *Reliability of Physical Examination for Determining the Chronological Age of Adolescents Under 15 years*, 191(1) *Bulletin de L’Académie Nationale de Médecine* 139-142 (2007).

¹⁴³ See Feltz, *supra* note 20, page 8.

¹⁴⁴ Haut Conseil de la Santé Publique, *Avis sur l’Evaluation de la Minorité d’un Jeune Mineur Etranger Isolé* (2014).

¹⁴⁵ H. Abbing & D.C. Roscam, *Age Determination of Unaccompanied Asylum-Seeking Minors in the European Union: A Health Law Perspective*, 18(1) *European Journal of Health Law* 20 (2011).

See also International Organisation for Migration, *Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking* (2006).

¹⁴⁶ National Consultative Ethics Committee for Health and Life Sciences, *Opinion no. 88: Age Determination Methods for Legal Purposes 2* (2005).

¹⁴⁷ M.O. Pruvost, C. Boraud & P. Chariot, *Skeletal, Age Determination in Adolescents Involved in Judicial Procedures: From Evidence-Based Principles to Medical Practice*, 36(2) *Journal of Medical Ethics* 71 (2010).

¹⁴⁸ National Consultative Ethics Committee for Health and Life Sciences, *Opinion no. 88: Age Determination Methods for Legal Purposes 5* (2005).

¹⁴⁹ Cour d’Appel de Douai, *Chambre des Libertés Individuelles, Décision No. RG 13/004X9 du 10 juillet 2013*.

See also Cour de Cassation, *Chambre Civile, Décision No. 06-13344 du 23 janvier 2008* ; Cour d’Appel d’Amiens, *Décision No. 1505366 du 28 janvier 2016, No. 15030331 du 25 février 2016, et No. 1601743 du 12 juillet 2016* ; Cour d’Appel de Dijon, *Décision No.1505527 du 12 décembre 2014* ; Cour d’Appel de Bordeaux, *Décisions No. 13BX00428 et No. 13BX00526 du 11 juillet 2013*.

¹⁵⁰ See National Consultative Ethics Committee for Health and Life Sciences, *supra* note 161, page 2.

See also Council of Europe, *Age Assessment: Council of Europe Member States Policies, Procedures and Practices Respectful of Children’s Rights in the Context of Migration 6-7* (2017).

reach Europe without their parents may have suffered trauma. Thus, an intrusive medical examination may add to that trauma.¹⁵¹ This assumption has also been developed by the Court of Appeal of Douai in 2016, which emphasised that due to the trauma that the UMs have suffered before arriving on the French territory and their cultural markers, there are necessarily vulnerable, with uncertain notions of time.¹⁵²

In addition, x-ray examinations to determine the age of UMs generate an exposure to ionizing radiations, which can be repeated and multiplied when a second opinion is required.¹⁵³ The Council of the European Union Directive 97/43/EURATOM of 1997¹⁵⁴ has been transposed in the French Code of Public Health.¹⁵⁵ According to these texts, ionizing radiations can be performed on individuals only for diagnostic or therapeutic research purposes.¹⁵⁶ Yet, UMs do not fall within this category. Moreover, these instruments provide that such radiations can be undertaken only if they show a significant benefit, weighting the benefits they produce for the healthy individual, against the risks associated to such exposure.¹⁵⁷ UMs could have benefits from undergoing x-ray examinations. Indeed, if the medical result concludes that the individual is a minor, then they will get access to the protection provided for children. However, because of the high risks associated with such radiations and the lack of reliability of the test, medical professionals have been radically opposed to such radiological tests when other alternative techniques having the same objective, but involving no exposure to ionizing radiations, could be conducted.¹⁵⁸

Moreover, it is crucial for such examinations to be validly held, to first inform UMs in an adequate, understandable and child-friendly manner about the procedure and its consequences and to receive their free consent.¹⁵⁹ Radiological examinations may jeopardize the right to privacy or physical integrity of UMs. In such circumstances, children involved may not understand the purpose of such examinations, especially considering that health facilities dealing with UMs are quite similar to police headquarters.¹⁶⁰ In reality, medical age assessments are often performed on UMs without having received their prior consent or the consent of their guardian.¹⁶¹ Moreover, the basic requirements of consent, given without any pressure, can be in doubt, considering the challenges UMs face when dealing with the French authorities. Indeed, free consent is often threatened by language barriers and personal trauma suffered by UMs.¹⁶² Concrete examples of highly intimidating age assessments, conducted without the UM's

¹⁵¹ See T. Smith & L. Brownlees, *supra* note 22.

¹⁵² Cour d'Appel de Douai, Décision No. 306/16 du 30 juin 2016, page 2.

¹⁵³ (<https://www.village-justice.com/articles/les-enjeux-juridiques-determination-medico-legale-age-des-jeunes-migrants,23732.html>), last visited (10-04-2019).

¹⁵⁴ Council of the European Union, COUNCIL DIRECTIVE 97/43/EURATOM on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure, and repealing Directive 84/466/Euratom, 30 June 1997.

¹⁵⁵ France : Code de la Santé Publique.

¹⁵⁶ See COUNCIL DIRECTIVE 97/43/EURATOM, *supra* note 144, article 1(2)(d).

¹⁵⁷ *Id.*, article 3(1).

¹⁵⁸ The Royal College of Paediatrics and Child Health, *The Health of Refugee Children: Guidelines for Paediatricians* (1999).

¹⁵⁹ European Union Agency for Fundamental Rights, *Age Assessment and Fingerprinting of Children in Asylum Procedures: Minimum Age Requirements Concerning Children's Rights in the EU 7-8* (2018).

¹⁶⁰ Association Nationale d'Assistance aux Frontières pour les Etrangers, *Des Zones d'Atteintes aux Droits : Rapport d'Observations dans les Zones d'Attente 29* (2015).

¹⁶¹ *Id.*

¹⁶² P.J. Sauer, A. Nicholson & D. Neubauer, *Age Determination in Asylum Seekers: Physicians Should not be Implicated*, 175(3) *European Journal of Pediatrics* 301 (2016).

consent, have been highlighted in France. In Paris, for instance, Human Rights Watch reported in 2009, that children were forced to undergo x-rays tests and were taken to hospital in handcuffs.¹⁶³

Therefore, the French legislation authorising bone testing has been criticised by professionals. Indeed, it has been pointed out that medical-based methods lack precision and reliability in addition to infringing children's rights, namely the right to privacy, their rights to physical integrity and their right to be heard, due to their invasiveness. Thus, France should refrain from relying on medical examinations to be in accordance with the international framework.

¹⁶³ Human Rights Watch, *Lost in Transit: Insufficient Protection for Unaccompanied Migrant Children at Roissy-Charles-de-Gaulle* (2009).

5. The French Practice of Age Determination of UMs

In practice, the French legislation is instrumentalised through its implementation process (5.1), which has led to widespread criticisms (5.2).

5.1. The Implementation of the French Legislation in Practice

The implementation of the national legislation, restrictive 'on paper', is actually interpreted in a way that minimizes the qualification of MIEs to numbers of migrant minors arriving in France (5.1.1). Moreover, the limitation imposed by the interpretation of the terminology is reinforced by the resort to medical examinations, through bone testing, which continue to be relied upon almost exclusively (5.1.2).

5.1.1. The Interpretation of the Status of UMs in Practice

Considering the status of MIEs, the French legal framework is, through the different institutional practices, instrumentalised in a way that its interpretation and implementation deform the safeguards and the protection provided 'on paper'.¹⁶⁴ When it comes to dealing with this vulnerable group of children, one of the crucial issues encountered is the one of the twofold judicial affiliation, status, attached to their category.¹⁶⁵ Indeed, MIEs are, according to their definition, both children and migrants. Thus, these youths are qualified as victims from one point of view, and as impostors from another. In practice, the immigration authorities' tendency is to lean towards the latter point of view; considering them primarily as migrants, rather than as vulnerable children in danger and in need of specific assistance care and protection.¹⁶⁶ The legal and processual treatment of individuals, arriving in France, claiming their minority without parental support is based on three main steps: their identification; the content of their assistance and care; and the establishing (or non-establishing) of a durable sustainable and lasting solution. Their identification process can be realised either at the borders or within the territory. When facing this process, MIEs are subjected to an array of practices implemented by the immigration authorities which are likely to infringe their status of vulnerable children due to their invasiveness and lack of accuracy and, subsequently, the assistance, care and protection that are supposedly attached to this status. Three practices are highly discussed regarding the identification of MIEs in practice: the deprivation of their liberty once they are on the territory; the contestation of their minority, in some instances, even despite the existence of documentation; and the recognition of their situation of isolation.¹⁶⁷ The second practice concerns the topic of this thesis, which in France, corresponds to the resort to bone analysis to determine the age of MIEs.

5.1.2. The Systematic Resort to Bone Testing in Practice

In France, the processes and practices of age determination considerably vary between the institutions coming into contact with MIEs.¹⁶⁸ For instance, a child can be treated differently depending on which

¹⁶⁴ D. Senovilla Hernández, *Analyse d'une Catégorie Juridique Récente : Le Mineur Etranger Non Accompagné, Séparé ou Isolé*, 30(1) *Revue Européenne des Migrations Internationales* 22 (2014).

See also D. Senovilla Hernández, L. Tawfik & W. Berthomiere, *Mineurs Isolés Etrangers et Sans Protection en Europe : Projet PUCAFREU Rapport Comparatif Final* (2013).

¹⁶⁵ B. Masson, *Le Mineur Etranger en Droit Français et Européen (Étude sur les Droits du Mineur Etranger)*, Faculté Jean Monnet, Université Paris-Sud (XI), Thèse Doctorale Dactylographiée 8-12 (2006).

¹⁶⁶ S. Przybyl, *Territoires de la Migration, Territoires de la Protection : Parcours et Expériences des Mineurs Isolés Etrangers Accueillis en France*, Géographie. Université de Poitiers (2016).

¹⁶⁷ See Senovilla Hernández 2014, *supra* note 155, page 23.

¹⁶⁸ France Terre D'Asile, *The Reception and Care of Unaccompanied Minors in Eight Countries of the European Union* 87 (2010).

judicial court hears their claim. Indeed, while numerous courts do not acknowledge the probative value of bone tests presented independently without additional examinations, other courts continue to rely solely and extensively on the medical results to determine the age of individuals claiming their minority before them.¹⁶⁹

Despite these significant differences, medical examinations are, in practice, used quite systematically¹⁷⁰ by national immigration authorities, even in situations where valid identification documents are presented by MIEs because of the culture of scepticism and suspicion surrounding the arrival of (undocumented) individuals who claim minority. Indeed, bone testing is usually required and ordered by the authorities at an early stage of the process. Thus, such examinations are used as the first resort instead of as the last resort.

Moreover, they are used as the only way to determine the age of MIEs, without considering any holistic examinations. The professionals in charge of ordering age assessments are rarely members of the judiciary, as it is required by the legislation (most of the time, they are police officers or social workers for instance).¹⁷¹ Additionally, it is quite generalised, considering the French practice, that such medical examinations lead to the quasi-systematic contestation of the minority claim of individuals, because decisions on their age are solely based on the medical results which, subsequently, leads to their exclusion from the protection system accorded to children.¹⁷² Most of the MIEs concerned by contestation of their minority are adolescents between 16 and 18 years of age. However, some investigations conducted in the field have shown that even minors whose physical appearance and official documentation confirmed their minority, have been declared majors after having been obliged to undergo bone testing.¹⁷³

In addition to excluding the individuals from the childcare system, such tests have additional detrimental consequences. Based on the medical results, dozens of children who benefited from the national protection system have been accused of having lied to the authorities about their age. Subsequently, they have been sentenced to prison or payment of significant monetary compensations to the Childcare Protection system.¹⁷⁴

5.2. The Challenged French Practice

For extensively relying upon bone examinations to determine the age of MIEs arriving on its territory, France has been severely criticised. This practice has been described as a nationalist political tool in the hands of the government to limit immigration (5.2.1), which creates discrimination among MIEs (5.2.2).

5.2.1. The Use of Bone Testing as a Nationalist Political Tool

Doctors of the World (*Médecins du Monde*) have criticised the French legislation as being used as a tool to regulate migration flows, rather than a tool to promote the assistance, protection, and support

¹⁶⁹ UN Children's Fund (UNICEF), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children*, June 2012.

¹⁷⁰ A. Étiemble, *Quelle Protection pour les Mineurs Isolés en France ?* 1251(1251) *Hommes & Migrations* 14 (2004).

¹⁷¹ J. Rongé, *L'Expertise de Détermination de l'Age : la Vérité Tombe Toujours Sur un Os*, 285(5) *Journal du Droit des Jeunes* 33-44 (2009).

¹⁷² See Senovilla Hernández 2014, *supra* note 16, page 23.

¹⁷³ See Senovilla Hernández 2013, *supra* note 179, Investigation PUCAFREU, Field Notes 19 June 2012: A minor who was aged 14 when she arrived on the French territory has mentioned the surprise of the police officers following the results of the bone testing declaring her majority.

¹⁷⁴ (<https://www.gisti.org/spip.php?article5037#nb4>), last visited (10-04-2019).

that MIEs deserve.¹⁷⁵ Indeed, such procedures challenge older applicants and influence them to be part of the adult migration system, which is radically opposed to the international and European approach highlighting the vulnerability of migrant children and promoting their protection by states. In France, there is a growing culture of scepticism and suspicion surrounding the arrival of (undocumented) individuals who claim minority.¹⁷⁶ The research conducted by the European Migration Network shows that not only the reliability of the medical age assessment procedures can be discussed, but also their objectivity.¹⁷⁷ In Paris, for instance, attention has been drawn on the age determination process set up by the authorities, called *Permanence d'accueil et d'orientation des mineurs isolés étrangers* (PAOMIE).¹⁷⁸ The procedure has been criticised as having become a significant filter and a political tool to eliminate the eligibility of as many MIEs as possible for assistance from the Childcare Protection system, especially the adolescents aged above 16 years old.¹⁷⁹ According to the opponents of such practices, age assessment procedures are deployed in order to protect the economic and political interests of municipalities, rather than to protect the interests of the children concerned, by ensuring their care.¹⁸⁰ Moreover, Human Rights Watch has pointed out that due to the subjective and non-holistic manner in which age assessment were performed, this has led to MIEs being wrongfully identified as adults, leaving them in even more vulnerable and dangerous situations. Between 2008 and 2009, the French authorities detained approximately 1500 MIEs at Roissy-Charles-de-Gaulle airport (Paris) in adult facilities. Many of them experienced abuse and violence¹⁸¹. In addition, such instrumentalization of the legislation in practice has been implemented by the French judicial authorities in numerous cases. Indeed, some judges tend to give more weight to the physical appearance of the applicants¹⁸² and to the results of the medical examinations performed,¹⁸³ rather than to the (valid) identification documents presented before the authorities. Thus, through their judgements, the judicial authorities valid an iniquitous selecting system of MIEs.¹⁸⁴

However, the French practice has been numerously criticised by different French judicial authorities, which reminded the migration authorities to carefully and objectively implement the guarantees enshrined in the law, especially the requirement to consider documentary evidence prior to referring a child to medical age assessment, which should be undergone as a last resort.¹⁸⁵

¹⁷⁵ See Feltz, *supra* note 20.

This allegation has also been pointed out by: C. Lormier & A. Bouix, *Mineurs Isolés : Etrangers Jusqu'à l'Os*, 102(3) *Plein Droit* 14-17 (2014).

¹⁷⁶ See Commission Nationale Consultative des Droits de l'Homme, *supra* note 155, page 1.

¹⁷⁷ European Migration Network, *Comparative EU Study on Unaccompanied Minors (2010): in France in 2005-2006*, 25% of individuals who said that they were children were subjected to a medical examination under the order of the Public Prosecutor's Office.

¹⁷⁸ Mairie de Paris, *Accueil et Accompagnement des Mineurs Isolés Etrangers à Paris 19 (2015)* : PAOMIE is managed by the NGO France Terre d'Asile and is funded by the Direction de l'Action Sociale de l'Enfance et de la Santé du Conseil de Paris. It constitutes the only entry point into the childcare protection system for UMs in Paris.

¹⁷⁹ Aide et Défense des Jeunes Isolés Etrangers (ADJIE), *Permanence d'Accueil et d'Orientation des Mineurs Isolés Etrangers (PAOMIE) : Une Moulinette Parisienne pour Enfants Etrangers*, 328(8) *Journal du Droit des Jeunes* (2013).

See also Senovilla Hernández 2013, *supra* note 179, pages 56-63 & 100-102.

¹⁸⁰ C. Lormier & A. Bouix, *Mineurs Isolés : Etrangers Jusqu'à l'Os*, 102(3) 14-17 (2014).

See also (<https://www.gisti.org/spip.php?rubrique625>), last visited (11-04-2019).

¹⁸¹ See Human Rights Watch, *supra* note 178.

¹⁸² Cour d'Appel de Paris, *Décision No. 187 du 26 mars 2015 (No. 187)* ; Cour de Cassation, *Civile 1ère, Décision No. 483 F-P+B du 11 mai 2016*.

¹⁸³ Cour d'Appel de Paris, *Décision No. 2006/22156 du 1 juin 2007*.

¹⁸⁴ (<https://www.gisti.org/spip.php?article5359>), last visited (11-04-2019).

¹⁸⁵ Cour d'Appel de Douai, *Decision regarding Prefect of Saine-Maritime vs. Mr Raphael X. of 8 January 2009 (2nd instance administrative court)*.

5.2.2. The Use of Bone Testing as a Discriminatory Tool among MIEs

Another criticism presented by opponents to bone testing as a tool to determine the age of MIEs is that, in practice, this technique leads to the formation of an additional sub-category of MIEs. This 'new' identified group of MIEs is being discriminated because of their age. Indeed, the practice of controlling and selecting the minors arriving on the French territory primarily excludes adolescents aged between 16 and 18 years old from the protection of the Childcare Protection services.¹⁸⁶ This argument has already been held by the CRC Committee which expressed its concern regarding the unreliability of medical age assessments, specifically when performed on adolescents.¹⁸⁷ To justify the exclusion and (mal)treatment of these adolescents, the relevant authorities usually base their actions on the suspicion of fraud, the possession of fake identification documents, the difficulties for these individuals to adapt to the process, and the significant financial cost of the assistance and care in the context of the current economic crisis.¹⁸⁸ While the financial aspect should neither be mentioned nor prevail over the protection of these children, the critics denounce the lack of will of the institutional authorities to actively protect and take care of MIEs in a multi-disciplinary manner. Therefore, such discrimination violates the principle of non-discrimination enshrined in article 2 of the CRC.

Consequently, the restrictive legislation 'on paper' is actually permissive when implemented in practice. It does not proscribe the authorities in charge of immigration to systematically use such procedures without considering the lack of reliability attached to such testing, as entailed in the French legislation and the international framework.

¹⁸⁶ See Senovilla Hernández 2014, *supra* note 16, page 25.

¹⁸⁷ See the CRC Committee Day of Discussion 2012, *supra* note 52, para. 49.

¹⁸⁸ «We cannot take all the troubles of the world » (« *Nous ne pouvons pas accueillir toute la misère du monde* ») is a formulation that has initially been expressed by M. Rocard in an interview conducted in 1989 in the TV programme 7 sur 7 (TF1). Since then, this wording has been continuously reused by the French politicians when dealing with migration problematics.

6. The Recent French Constitutional Council Decision in light of the International Framework

Critics developed within the previous sections, regarding the French legislation and the French practice of age determination procedures, have been recently presented before the French Constitutional Council, through a preliminary ruling on constitutionality (6.1). The French Constitutional Council delivered its decision on that matter on the 21 March 2019 (6.2). Therefore, its ruling is currently discussed among scholars and professionals (6.3).

6.1. The Legal Background of the Preliminary Ruling on Constitutionality

The studied case concerns a young Guinean national, M. Adama S., whose status as a minor had not been recognised by the French authorities. Upon his arrival in France in 2016, he declared to be 15 years of age. By a judgement delivered by the judge for minors on 20 July 2016, the regional council of l'Ain has been entrusted for the care of this child. By a following judgement, Adama S. has been required to undergo medical tests in order to determine his age. In the first instance, he refused to undergo radiological examinations. Based on his refusal, the judge concerned concluded on the 14 November 2017, that he was, therefore, not a minor and could not benefit from the Childcare Protection system.¹⁸⁹ The young man appealed this ruling. At this stage, he finally accepted that bone testing could be performed on his body. On 3 July 2018, (two years after the first judgement), the Court of Appeal of Lyon estimated his age between 20 and 30 years and confirmed that he could not benefit from the special assistance of the Childcare Protection system.¹⁹⁰ Considering the international framework perspective on that matter, this individual case has not been dealt in a prompt manner¹⁹¹ and the scale of ten years estimating his age is significant.¹⁹² Based on these previous decisions, Adama S. decided to lodge an appeal before the Court of Cassation against the Court of Appeal ruling¹⁹³. To support his plea, his defence brought the case before the Constitutional Council through a preliminary ruling on constitutionality.¹⁹⁴

This preliminary ruling on constitutionality targeted specifically article 388 (paragraphs 2 and 3) of the French civil code which frames, since the legal reform of 2016¹⁹⁵, the resort to medical examinations to determine the age of UMs arriving in France. Indeed, the Court of Cassation expressed serious doubts regarding the compliance of the legislation allowing age assessments with the French Constitution. The Court of Cassation¹⁹⁶ transmitted the judicial request of the applicant to the Constitutional Council which was based on the following arguments. Article 388 of the civil code is unconstitutional because it provides for age determination processes that violate the principle of the BIC in accordance with

¹⁸⁹ Cour de Cassation, Civile 1^{ère}, Décision No. 18-20480 (Question Prioritaire de Constitutionnalité) et No. 1242 (Appel) du 21 décembre 2018, para. 1 (facts).

See also (https://www.lemonde.fr/societe/article/2019/03/11/le-conseil-constitutionnel-saisi-a-propos-des-tests-osseux-pratiques-sur-les-jeunes-migrants_5434573_3224.html), last visited (11-04-2019).

¹⁹⁰ Cour d'Appel de Lyon, Chambre Spéciale des Mineurs, 3 juillet 2018.

¹⁹¹ See CRC Committee Day of Discussion 2012, *supra* note 52, paras. 30 and 76.

¹⁹² *Id.*, para. 49: "[...] substantial discrepancies of up to 5 years between actual age and age determined [...]".

¹⁹³ Referral to the Court of Cassation, No. G 18-20.480, 10 October 2018

¹⁹⁴ See Court of Cassation 2018, *supra* note 204.

¹⁹⁵ France : Loi No. 2016-297, 14 March 2016 Relative à la Protection de l'Enfance.

¹⁹⁶ See Court of Cassation 2018, *supra* note 204.

See also (<https://www.conseil-constitutionnel.fr/les-decisions/decision-n-2018-768-qpc-du-21-mars-2019-decision-de-renvoi-cass>), last visited (11-04-2019).

paragraph 10 of the preamble of the Constitution¹⁹⁷. In fact, the lack of reliability attached to radiological examinations would lead to qualify as adults MIEs that are actually minors, which would exclude them from the guarantees enshrined within protective legal provisions. In addition, article 388 infringes the right to health of these minors and the principle of the protection of their human dignity because it allows to resort to bone testing containing risks for their health, without any medical purpose and the consent of the individual concerned. Finally, this provision is inconsistent with the right to respect for one's private life to the extent that medical examinations would lead to the disclosure of MIEs' medical data, without their given explicit consent.¹⁹⁸ This judicial request brought before the Constitutional body has been highly supported and sparked hope among numerous civil society organisations, including Gisti, la Cimade, Médecins du monde and the Catholic Relief Service.¹⁹⁹ The preliminary ruling on constitutionality has been transferred to the Constitutional Council in December 2018. This constitutional body has decided on these questions on 21 March 2019.²⁰⁰

6.2. The Constitutional Council Decision

On 21 March 2019, the French Constitutional Council delivered its decision.²⁰¹ As France is a monist country, the provisions of international treaties which it has ratified, such as the CRC, have automatic effect in national law and may be directly invoked before the national courts.²⁰² The approach adopted by the Constitutional Council is particularly interesting to analyse under a children's rights perspective, as it has made specific references to children's rights, without necessarily expressly mentioning the CRC.

The first argument analysed by the Constitutional Council was related to the first complaint raised by the applicant, the inherent violation of the BIC through the realisation of radiological examinations. The Council's reasoning on this point was extremely detailed, showing the importance dedicated to this general principle, enshrined in paragraphs 10, read in conjunction with paragraph 11 of the preamble of the Constitution.²⁰³ According to these constitutional provisions, the Council highlighted the demands

¹⁹⁷ France: Constitution 27 October 1946: The preamble of the current (1958) Constitution refers explicitly to the Preamble of the 1946 Constitution.

¹⁹⁸ Conseil Constitutionnel, Décision No. 2018-768 QPC du 21 mars 2019, para. 2.

See also (<https://www.la-croix.com/France/Justice/Migrants-tests-osseux-devant-Cour-cassation-2018-12-21-1200991036>), last visited (16-03-2019).

See also (<http://www.gisti.org/spip.php?article6073>), last visited (11-04-2019).

¹⁹⁹ Association Nationale d'Assistance aux Frontières pour les Etranger (ANAFE) et al., Mineur(e)s Non-Accompagné(e)s : Les Examens Osseux Doivent Être Déclarés Contraires aux Droits Fondamentaux des Enfants (2019).

²⁰⁰ See Conseil Constitutionnel 2019, supra note 213.

²⁰¹ European Database of Asylum Law (EDAL), France: Constitutional Council Decides on the Constitutionality of Bone Tests to Determine Age of Migrant Children (2019).

See also Cour de cassation, Civile 1ère, Décision No. 18-1944 du 23 October 2018: The Constitutional Council also based its decision on the reasoning of this additional national jurisprudence assessing the majority of an individual claiming his/her nationality.

²⁰² J. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86(2) *American Journal of International Law* 310-340 (1992).

See also for the incorporation of the CRC specifically: European Commission for Democracy through Law (Venice Commission), Report on the Protection of Children's Rights: International Standards and Domestic Constitutions, Opinion No. 713/2013 7-8 (2014).

See also the French Constitution 1958 (review 2008), article 55.

²⁰³ See Conseil Constitutionnel 2019, supra note 231, para. 5.

and guarantees attached to the BIC as a primary consideration when balancing the interests at stake.²⁰⁴ This signifies that, MIEs, because of their age, must benefit from the national assistance, care and protection provided for children. Then, the rules framing age assessment processes must be legally and strictly conditioned to avoid the determination of actual minors as adults, considering the detrimental consequences that wrongful assessment can have on MIEs.²⁰⁵ The Council approved the possibility to resort to bone testing as an element of age assessment processes.²⁰⁶ However, it clearly reminded the restrictions attached to such examinations in accordance with article 388 of the civil code. First, the results of radiological tests must mention the significant margin of error associated to bone testing. Then, medical examinations can only be ordered by competent judicial authorities²⁰⁷ where documents of identification are not presented or declared invalid and where the age claimed by the individual concerned is not credible.²⁰⁸ Moreover, medical examinations cannot be performed on an individual without having collected their consent, in a language they understand. Assessing the majority of an individual cannot be based on their refusal to undergo such tests.²⁰⁹ In addition, judicial authorities cannot take into consideration medical examinations as the only element of age assessment. Indeed, the Council reemphasised the importance of multidisciplinary and holistic age determination processes when dealing with MIEs.²¹⁰ Considering these legal guarantees, the Constitutional Council has found no violation of the preamble of the Constitution, meaning that the age assessment process provided by the civil code does not infringe the BIC.²¹¹ Finally, if doubts remain after the multi-disciplinary examinations conducted, the Council has reiterated the importance to prioritize the benefit of the doubt in favour of the applicant claiming their minority, as highlighted within the international framework.

The second complaint scrutinised by the Constitutional Council was the alleged violation of the right to health of MIEs. First, it declared its incompetence in replacing the powers of the legislator regarding the assessment of the potential consequences of radiological examinations on the health of individuals, when such assessment is not manifestly inadequate.²¹² Moreover, it reminded that such examinations are strictly conditioned by law and cannot be performed if medical advice would go against such tests.²¹³ Therefore, the Constitutional Council did not retain the unconstitutionality of article 388 of the civil code on this ground.

Finally, the Council analysed the last complaint, related to the human dignity and the inviolability of the human body. It expressly mentioned the specific importance attributed to this principle within the preamble of the 1946 Constitution which has achieved a constitutional value.²¹⁴ Furthermore, it pointed out that radiological examinations, within the context of migration, are performed in order to determine the age of individuals arriving in France, and with their consent. In addition, such tests do not include any internal corporal intervention and do not contain any process which would be harmful, intrusive or

²⁰⁴ Service du Conseil Constitutionnel, Décision No. 2018-768 QPC Article 388 du code civil Dossier documentaire 10 (2019).

See also Council of Europe: European Court of Human Rights, *Mugenzi c. France*, No. 52701/09, 10 July 2014, para. 45; *Popov c. France*, Nos. 39472/07 et 39474/07, 19 January 2012, para. 139.

²⁰⁵ Id. para. 6.

²⁰⁶ Id. para. 7.

²⁰⁷ Id. para. 8.

²⁰⁸ Id. para. 9.

²⁰⁹ Id. para. 10.

²¹⁰ Id. para. 11.

²¹¹ Id. para. 13.

²¹² Id. para. 14.

²¹³ Id. para. 15.

²¹⁴ Id. para. 17.

prejudicial to the human dignity.²¹⁵ Therefore, the last argument presented by the applicant has not been convincing enough according to the Constitutional Council to declare article 388 of the civil code unconstitutional.

6.3. The Discussed Constitutional Council Decision in light of the International and European Children's Rights Framework

The ardent debate surrounding medical age determination processes has been vigorously reiterated following this controversial decision adopted by the French Constitutional Council.²¹⁶

Comments can be developed about the reasoning adopted by the Constitutional Council. According to the French Constitution, through a preliminary ruling on constitutionality, the Constitutional Council has the prerogative to analyse the conformity of a statutory provision, considered as infringing the rights and freedoms guaranteed by the Constitution during proceedings in progress before a court of law, with the Constitution itself.²¹⁷ The Constitutional body has scrutinised the contested article 388 of the civil code in light of the three constitutional provisions highlighted by the Court of Cassation. Therefore, on that point, the Council has fulfilled its obligations. Regarding its reasoning, it has recalled the numerous guarantees related to age assessments, as enshrined in the legislation. Those legal guarantees are in compliance with the guarantees required by the international framework, such as the necessity to develop multidisciplinary age assessment procedures, the resort to medical assessment only as a last resort and so on. Additionally, the Constitutional Council has highlighted the crucial constitutional value dedicated, through the decision, to the protection of the BIC. Moreover, the Constitutional Council has also pointed out the importance dedicated in article 388 to the margin of error attached to medical testing, which must be recognised by the authorities in charge. Thus, it can be interpreted that the Council has adopted the elaborated international approach regarding age assessments on UMs, by declaring that article 388 is textually well-conditioned and restrictive, eliminating any possibility of abuse from the authorities in practice. In consequence, children's rights are duly protected by this article, which should not be removed considering the necessity to control the flows of individuals reaching France within the European 'migratory crisis' occurring since 2015.²¹⁸ By recalling the legal safeguards applicable to radiological examinations as highlighted in article 388, the Constitutional Council explicitly warned the judicial authorities dealing with age assessments against an abusive use and an excessive trust to these tests.²¹⁹

However, this decision, to a certain extent, infringes the rights of unaccompanied children.²²⁰ Indeed, it can be argued that the Constitutional Council did not duly consider the vulnerability, rights and subsequent need of protection of these children through its reasoning. First, the constitutional body re-

²¹⁵ Id., para. 18.

²¹⁶ (https://www.gisti.org/spip.php?article6129&utm_source=ECRE+Newsletters&utm_campaign=8fe0afd7ec-EMAIL_CAMPAIGN_2019_03_25_01_06&utm_medium=email&utm_term=0_3ec9497afd-8fe0afd7ec-422328189), last visited (20-04-2019).

²¹⁷ French Constitution 1958 (review 2008), article 61(1).

²¹⁸ (https://www.lemonde.fr/societe/article/2019/03/21/le-conseil-constitutionnel-valide-les-tests-osseux-pour-les-jeunes-migrants_5439373_3224.html), last visited (12-04-2019).

²¹⁹ Service du Conseil Constitutionnel, Décision No. 2018-768 QPC du 21 March 2019 : Communiqué de Presse

²²⁰ European Council of Refugees and Exiles (ECRE), France: Bone Tests to Determine Migrant Age Ruled Constitutional: a "Disgraceful" Decision according to NGOs (2019).

See

also, (https://www.gisti.org/spip.php?article6129&utm_source=ECRE+Newsletters&utm_campaign=8fe0afd7ec-EMAIL_CAMPAIGN_2019_03_25_01_06&utm_medium=email&utm_term=0_3ec9497afd-8fe0afd7ec-422328189), last visited (13-04-2019).

affirmed the restrictive possibility to resort to bone testing, only where documents of identification are not presented or declared invalid and where the age claimed by the individual concerned is not credible. It did not give any detailed guidance regarding the underlying meaning of the lack of credibility of such claim. Therefore, by not giving any precision regarding the ways in which authorities can intervene and order medical age assessment, the Council left the door open to further unfavourable interpretations of this provision and, subsequently, to abuses by the authorities which will play the 'lack of credibility card' as a justification to resort to medical examinations.

Second, it is unfortunate that the Constitutional Council did not attach any consideration to the (in)effective implementation in practice of the legislation. The French practice, based on article 388, has been widely criticized, not only by NGOs, but also by academics and human rights bodies, as being a nationalist political tool against immigration.²²¹ It is, therefore, a shame that the Constitutional Council limited its reasoning to the text of article 388 of the civil code, without exploring its concrete and abusive implementation in practice. For instance, even though the lack of reliability of bone testing has been acknowledged by the Constitutional Council as recognised by the French legislation, this characteristic is, in practice, not effectively given due consideration as the authorities extensively relied upon medical assessments when determining the age of migrants, without giving due weight to margins of error. Moreover, the Constitutional Council affirmed that radiological examinations are neither harmful nor intrusive as they do not consist of any corporal internal intervention. By this allegation, the Council has not paid attention to the situation of such children, their specific vulnerability and, therefore, the potential traumatic impact that such testing may have on these children, as highlighted by the international framework.²²² Finally, it should be admitted that because medical age determination procedures lack accuracy and reliability, there is necessary doubt considering the results of such testing.

Consequently, the decision made by the Constitutional Council can be understood considering the contents of its mandate, which limit its work to only the interpretation of a legislation considering the Constitution. However, it is unfortunate that, regarding UMs, such interpretation does not go beyond the analysis of the legislation itself, by considering its implementation in practice. It seems that the Council has forgotten that the law is a living instrument, which should be contextualized and adapted to each specific situation. This decision, therefore, does not properly reflect the legislation in practice, which leads to abuse and numerous violations of children's rights.

²²¹ See section 4.2.1 of this thesis.

²²² See the Joint General Comment, *supra* note 54, para. 4.

7. Conclusion

UMs and its French equivalent appellation MIEs, have been widely recognised as a vulnerable group of children, in need of special assistance, care, protection and support by receiving states. Recently, the use of age assessment processes, through the resort to bone testing, on UMs has raised numerous questions and challenges, becoming the basis of a lively debate on the international, regional and French stages.

At the international level, the CRC and its monitoring body have developed a clear and rigorous framework on that matter. Indeed, in order to be in accordance with the international standards, states should only administer medical examinations as a last resort, and if doubts subsist regarding the age of the individual, the presumption of minority must prevail. Additionally, such procedures must comply with the rights of the child and especially the BIC, and must be deployed following certain guarantees, such as the requirement of the child consent. The CRC Committee approach has been reiterated and developed even further through a Day of Discussion, a Joint General Comment and an individual communication, dedicated to that matter. Indeed, these latter instruments have emphasised the lack of reliability of medical-based methods to determine the age of individuals, which then render the results of such testing doubtful and necessitate the systematic promotion of the benefit of the doubt principle, in favour of individuals claiming their minority. In addition, this children's rights position has been followed by several other international bodies, such as the UNHCR.

At the regional level, the European framework reflects the international framework, showing a strong commitment to impose the international children's rights standards at the regional level. Within the EU law, the question of age assessment of UMs is dealt with, specifically, within the field of EU asylum law. Due to the procedural autonomy left to the member states on that matter, they are free to implement the EU provisions nationally in the manner they see fit. This had led to significant variations in the nature and scope of age assessment processes among member states, despite the common resort to medical examinations, especially to bone testing. Under the Council of Europe law, no specific textual provision exists relating to the rights and guarantees of UMs concerned by age determination procedures. However, medical examinations, due to their invasiveness and lack of reliability, might raise concerns under article 3 and 8 of the ECHR. Two recent communicated cases brought before the European Court, *Darboe* and *Camara v. Italy and S.M.K v. France* have shown the potential interests for the ECtHR in dealing with age assessments issues within the migration context. Despite these regional provisions, the international standards have not been translated at the European level as clearly as they appear in the international framework, lacking some guidance for member states. Thus, guiding documents have been developed by regional institutions and organizations in order to help member states in implementing the EU and international provisions on that matter within their national legislations.

At the national level, France has translated the notion of UMs into a specific national terminology: MIEs. MIEs are also considered as a vulnerable group who must benefit from the assistance, care and protection provided by the Childcare Protection system. The meaning of MIE does not differ *per se* from its international equivalent UM. However, it implies that age determination processes are not conducted solely in the framework of the asylum procedure but as a prerequisite to benefitting from the Childcare Protection system. Moreover, the French legislator has expressly mentioned, in the civil code, the possibility to resort to medical age assessments. Numerous guarantees and the recognition of the lack of accuracy and reliability of bone testing have been established in the law to avoid significant infringements to children's rights when resorting to such medical age assessment processes. Thus, the legislation provides numerous legal safeguards, is restrictive and appears to comply with the requirements established by the international and European framework.

However, the French legislation and, subsequently, the French practice have been significantly discussed among professionals. The main arguments presented by the opponents to medical age assessment procedures are that bone examinations lack reliability and are intrusive, violating numerous rights of the MIEs concerned. Indeed, discussions in the literature and the French institutions have demonstrated that there is no 'silver bullet' method which would give an objective and scientific result to determine the age of an individual. Therefore, bone testing is not a reliable and precise method by which the age of an individual arriving in France can be accurately assessed. Furthermore, such processes have been criticised from a human rights point of view as they violate children's rights by being too invasive, harmful and neglecting their right to be informed and to freely consent. Therefore, the lack of reliability of such methods leads *de facto* to the existence of doubts, which should justify the promotion of the benefit of the doubt in favour of applicants claiming their minority when uncertainty prevails.

Moreover, the extensive resort to such examinations as a primary procedure, in practice, has been described as constituting an 'anti-immigration' tool in the hands of the government, and as creating a discriminated sub-category of MIEs, because of their age. Indeed, facing the 'migration crisis', the French tendency has been to develop a culture of suspicion and scepticism among individuals coming from abroad. Therefore, the political response has delivered a narrative that many of these individuals who pretend to be minors, arriving without their parents or caregivers, are not children and do not deserve any help or protection from the national authorities. Bone testing has been used as an organised practice, rather than as a last resort, even where documentary evidence was presented. Such an approach has been highly criticised by scholars and by the French judicial system which has, again and again, called the national migration authorities to order regarding their practices.²²³

By resorting to bone testing to assess the age of individuals arriving on its territory, the French legislation, ineffectively implemented in practice, does not comply neither with the international and European standards nor with France's obligations under the international and European treaties that the country had ratified. This has been expressed by the CRC Committee and the European Committee of Social Rights in their respective observations addressed to France.²²⁴

An individual case brought before the national courts has led to a preliminary ruling on constitutionality presented before the French Constitutional Council in December 2018. Through his request, the applicant challenged the compliance of article 388 of the civil code allowing the resort to medical examinations with the country's Constitution. The arguments presented were mainly based on the violation of the BIC, the right to health and to human dignity. Despite widespread criticism in France and within the international and European community, the Constitutional Council delivered its decision on the conformity of bone testing in age assessment procedures with the French Constitution.²²⁵ Therefore, this recent decision is currently in the spotlight and highly challenged.²²⁶ Indeed, while the reasoning adopted by the Constitutional Council can be interpreted as following the legal safeguards required by the international framework, this decision is not truly child-friendly, lacks some fundamental guidance and overlooks the implementation of article 388 in practice. More specifically, by not explaining the circumstances in which the authorities in charge can resort to bone testing; by neglecting the traumatic consequences that such examinations may have on child migrants; and by omitting to consider the in(effective) implementation of the legal safeguards in practice, the Council has regrettably left the door open for instrumentalizations and abuses, violating the international and European children's rights framework.

²²³ See *supra* notes 195 and 200.

²²⁴ See CRC Committee Concluding Observations 2016, *supra* note 149; European Committee of Social Rights, *supra* note 152.

²²⁵ See Conseil Constitutionnel 2019, *supra* note 213.

²²⁶ See *supra* note 235.

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