

SOME BOTTLENECKS RELATING TO THE LEGAL STATUS OF UNACCOMPANIED FOREIGNER MINORS IN BELGIUM WITH A FOCUS ON ASYLUM SEEKERS

*Ludo M. VENY**
*Ivo CARLENS***

Abstract

For the last two decades in Western Europe in general and Belgium in particular, it has been established that asylum seekers are no longer only adults but increasingly also unaccompanied minors. The latter category poses special problems. The current contribution discusses the legal position of the unaccompanied minor asylum seekers and some of the related bottlenecks; consideration can be given to determining the exact age, the protection of this particular group in the asylum procedure, the right of residence, the right to education, medical assistance and the right to health care, social security, etc. Finally, the specific administrative and judicial protection procedure for (minor) asylum seekers is analyzed and a number of conclusions are drawn.”

Key Words: *foreigners law, asylum seekers, unaccompanied foreigner minors.*

JEL Classification: [K38]

1. Introduction

The number of unaccompanied minor asylum seekers has enormously increased in both Belgium and other Western European countries over the last few decades¹. As a result, the regulations regarding this group have also evolved. The question arises as to how their legal status is now regulated. When considering legislation regarding the legal status of unaccompanied minor aliens, asylum seekers and non-asylum seekers, numerous aspects involving different regulatory standards need to be taken into account. After all, there is no coherent set of rules that regulates the legal position of this group.

The present paper seeks to provide insight into these issues and also focuses on a number of bottlenecks.

* Prof., University of Ghent, Department of Administrative Law.

** Drs., University of Ghent, Department of Administrative Law.

¹ The figures from the Belgian Commissioner General for Refugees and Stateless Persons (CGRSP) and the European Migration Network (EMN) indicate that there has been a continued increase in the number of unaccompanied minor asylum seekers since 2006, with a slight decline and then a significant increase since 2015 (see CGRSP 2015, *Asylum Statistics - Overview 2015*. Available from: <https://www.cgrs.be/en/news/asylum-statistics-survey> (13 April 2017)).

2. Definitions

In order to clearly delimit the subject of the present paper, it is necessary to define the preceding concepts on an individual basis.

Legal status. In this article, legal status refers to “*the set of rights and duties of someone in a particular social situation*”. The status of this aforementioned group necessarily concerns the rights and obligations in respect of residence law, rights and obligations as a minor and as an unaccompanied person. Equally, the rights of this target group within the field of administration with regard to a minor, social security, education etc. relate to the legal status.

Unaccompanied foreign minors. The social situation of the target group discussed in this paper is that the persons in question are not accompanied, are minor and are foreign. Not all unaccompanied foreign minors are asylum seekers²; however, minor asylum seekers very often comprise the majority of unaccompanied minors of a foreign nationality who come to *all* Western European countries. The starting point for a definition is therefore the regulation concerning unaccompanied foreign minors. There are several standards under international law defining the concept of “unaccompanied foreign minors”. In particular, Article 2(1), of Directive 2011/95/EU defines an unaccompanied minor as “*a minor³ who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States*”⁴.

² Of the 2,811-new unaccompanied foreign minors in 2012, 1,803 did not apply for asylum (CGRSP 2012, *Asylum Statistics - Overview 2012*, Brussels, CGRSP). Non-asylum seeking foreign minors are not covered by the protection of the Royal Decree of 11 July 2003 regulating asylum procedure (*Moniteur Belge*, 27 January 2004; hereafter, Asylum Procedure Decree), which will be the focus of this paper. The specific situation of the minor as a victim of human trafficking or sexual exploitation does not fall within the scope of this paper.

³ According to (k) of the same article, a minor is a third country national or a stateless person below the age of 18 years.

⁴ 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, *Off. Journ.* L 337/9. Compare, in similar terms, Art. 2, (k) Regulation 2013/604/EU 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), *Off. Journ.* L 180/31, also known as Dublin III Regulation (on this topic, see VIGNALE, F. n.d., *Dublin III Regulation on asylum and unaccompanied minors*. Available from: <https://free-group.eu/2015/04/09/dublin-iii-regulation-on-asylum-and-unaccompanied-minors/> (13 April 2017); Peers, S., Moreno-Lax, V., Garlick, M. & Guild, E., 2015, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Brill Nijhoff, Leiden).

Furthermore, under Belgian law, there are various parliamentary acts and other regulatory norms that determine what is meant by “unaccompanied minors”; those different standards are not unambiguous. This sometimes causes a number of complications.

The Guardianship Act has a very broad definition: “unaccompanied minor” means any person to whom the custody referred to in Section 3, §1, Paragraph 1, applies; that is, being “(a) less than eighteen years old, (b) not accompanied by a person exercising the parental authority or the custody of him or her under the law applicable in accordance with Article 35 of the Act of 16 July 2004 concerning the International Private Law Code, (c) who is a national of a non-member country of the European Economic Area [EEA]⁵, (d) and falls within in one of the following situations: either asked for recognition of the status of refugee, either fails to comply with the conditions of entry and residence on the territory laid down in the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners”⁶. Pursuant to Article 5/1 of the same act, it further concerns a minor national of the EEA or Switzerland⁷ (a) who is not in possession of a legalized document showing that the person who carries out the parental authority or the guardianship has given permission to travel and reside in Belgium, (b) is not registered in a population register and (c) falls within one of the following situations: either an application for a temporary residence permit has been submitted under Article 61/2, § 2, Paragraph 2, of the Parliamentary Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners, or being in a vulnerable state.

What is striking about these definitions is that they are stricter than those contained in the Act of 12 January 2007 on the reception of asylum seekers and certain other categories of foreigners⁸: the latter, however, does not contain the condition that a minor cannot be a national of a member of the three non-EU members⁹ of EEA. Article 2, no. 4, of this law provides that, for the purposes of this Act, the following definition for unaccompanied minors shall apply: a person under the age of 18 who, at the time of entry into the territory of the kingdom, is not accompanied by or, after entering the territory of the kingdom, is no longer accompanied by a person who has the parental authority or guardianship on the basis of the law applicable in accordance with Article 35 of the Act of 16 July 2004 concerning the International Private Law Code, and is in one of the following situations: either has submitted an application in the sense thereof, or

⁵ Regarding the non-discrimination in treatment between unaccompanied minors from a Member State of the EEA and other countries, see Constitutional Court no. 106/2013 of 18 July 2013 (especially B.4.1.-B.4.10); the legislature, and not the administration by circular, must develop a similar protection mechanism for unaccompanied minors from the countries of the EEA.

⁶ *Moniteur Belge*, 31 December 1990; hereafter Aliens Act.

⁷ Conditions (a) and (b) mentioned above also apply to these young people.

⁸ *Moniteur Belge*, 7 May 2007; hereafter Custody Act.

⁹ That is, Norway, Liechtenstein and Iceland.

has failed to comply with the conditions of entry and residence on the territory laid down in the Aliens Act 1980.

However, the definition in the Aliens Act is even more rigid: for the purpose of granting a temporary residence permit to an unaccompanied foreign minor, *inter alia*¹⁰, it is required that, in accordance with Article 61/14 of the act, that the minor is finally identified as an unaccompanied foreign minor by the Guardianship Service before the relevant chapter of the Aliens Act is applicable¹¹.

First bottleneck. By abstracting the restriction to unaccompanied minor asylum seekers in this paper, it is clear that, in administrative practice, the first bottleneck concerns the various definitions of the notion “unaccompanied minors”. For example, an unaccompanied minor may come within the remit of the Custody Act, but not the Aliens Act because he or she has not yet been identified as such by the Custody Service. Likewise, as a Norwegian unaccompanied minor, he or she falls within the scope of the Custody Act, but the Guardianship Act is not applicable to him or her. Although the three laws aim at a different finality, it is not always easy for a non-specialized or legally educated outsider to judge whether a young person must be considered as an unaccompanied minor.

Second bottleneck. The first real issue concerns the exact age of the minor asylum seeker¹². After the asylum application has been submitted and the UM form is filled in, the investigation starts with the identification of the unaccompanied minor asylum seeker. The Guardianship Service will try to confirm the personal data of the minor. This is mainly based on the person’s declaration, identity or travel documents¹³, information of diplomatic posts or any other relevant information. A common problem concerns the authenticity of the provided documents, particularly in relation to the “real age of the minor”.

The Guardian Service¹⁴ can express doubts, especially when no documents are presented, about the age of the minor, since minority age is sometimes misinterpreted¹⁵ in asylum procedures. The Guardianship Service hereby orders

¹⁰ The conditions (a) to (c) of the Custody Act must also be fulfilled.

¹¹ Title II, Chapter VII “Unaccompanied foreign minors”, art. 61/14 up to and including art. 61/25. See also the Circular of 8 May 2015 concerning the signature sheet of the unaccompanied foreign minors and their attendance.

¹² For the procedural aspects, consult Courard, C. 2015, “La ‘procédure’ de détermination de l’âge des mineurs étrangers non accompagnés”, *Journal Droit Jeunes*, no 11, pp. 33-38.

¹³ As far as (still) in the possession of the applicant.

¹⁴ The Guardianship Service is the only service that can “recommend” a medical examination. According to a protocol between the Immigration Service (DVZ), the Guardianship Service and other agencies within the Ministry of Justice and the Home Office, the latter government agencies’ capacity to apply for such an examination was annulled by the Council of State (Council of State no. 229.606 of 28 December 2014, *Ligue des Droits de l’Homme*; for a comment on this verdict, see De La Croix, E. 2015, “Annulation du Protocole de collaboration relatif à l’enregistrement des mineurs étrangers non accompagnés”, *Journal Droit Jeunes*, no 3, pp. 27-28).

¹⁵ An age survey over a four-year period shows that, in about 1/3 of the alleged cases, the asylum seeker was actually younger than 18 years of age (source: The Guardian Service).

an age determination¹⁶, after which a medical examination (a triple radiography of teeth [cf. forensic odontology], clavicle and wrist¹⁷)¹⁸ takes place in a hospital with which the service cooperates. The assessment of these medical tests may only be made by a physician¹⁹. It must be clear that the result of all this is approximate and indicates a range with a margin of error; in case of any doubt, the lowest attested age will be taken in consideration²⁰, while even a second medical examination can be ordered²¹. A medical second opinion must not be ordered, nor should the unaccompanied minor be offered this possibility²².

Furthermore, the procedure of age assessment can take some time; exceptionally, during this time, a so-called “provisional” guardian can be appointed.

As there is controversy around the margin of error regarding medical tests, some NGOs oppose their use; after all, the margin of error may be two years, as well as depend on the socio-economic situation, ethnic and geographical origin, possible illness etc. Therefore, other aspects for determining the right age can and must be involved, such as available documents and statements²³ about the best interests of the youngster²⁴.

3. Special protection

General legal grounds. It cannot be disputed that unaccompanied minor asylum seekers are in an extremely vulnerable position. Therefore, many international declarations, agreements, treaties and other instruments recognize that, in comparison to adults, these minors are entitled to special protection.

¹⁶ According to a collaborative agreement with certain hospitals. In case of any doubt, such medical examinations are mandatory (Council Foreigners’ Dispute of 9 December 2015).

¹⁷ Psycho-affective tests, e.g., personality and intelligence tests, are not in place, due to reliability problems.

¹⁸ For more information about this examination and how to dispute the results, see an Zeebroeck, C. 2007, *Mineurs Etrangers Non Accompagnés en Belgique. Situation Administrative, Juridique et Sociale. Guide Pratique*, Ed. Jeunesse et droit, Liège. For a comprehensive analysis and case law review, see: Fievet, C. & Renuart, N., (2016), “Conseil d’Etat et procédure de détermination de l’âge des mineurs étrangers non accompagnés quand les mineurs l’ont dans l’os”, *Journal Droit Jeunes*, no 10, pp. 18-28; Courard, P., (2015), “Quand l’expertise médicale ne suffit plus à légitimer la décision. La détermination de l’âge des mineurs étrangers non accompagnés”, *Revue du droit Université de Liège* no 3, pp. 587-602.

¹⁹ As determined by Art. 7, §1, Section 1, Programme Act (I). An expert report on this issue cannot therefore be drafted by a dentist (Council of State no. 226.882 of 28 October 2014).

²⁰ For example, a range between 17.5 and 18.5 years can be considered as a minor age, i.e., a person aged less than 18 years. See also Council of State no. 231.491 of 18 October 2015.

²¹ Council of State no. 199.330 of 31 December 2009, Mohamed Ahmed.

²² In this sense, see Council of State no. 232.145 of 9 September 2015, Khusbeen.

²³ For example, see Council of State no. 197.611 of 4 November 2009, Mohamed Ahmed: concerning statements by counsellors in the reception centre.

²⁴ For case law and examples in particular, see Fievet, C. & Renuart, N. 2016, “Conseil d’Etat et procédure de détermination de l’âge des mineurs étrangers non accompagnés quand les mineurs l’ont dans l’os”, *Journal Droit Jeunes*, no 10, pp. 18-28.

Furthermore, when applying the law, authorities must always take into consideration the best interests of these unaccompanied children²⁵.

Like any other person, unaccompanied foreign minors also enjoy a number of fundamental rights. These rights are reflected in a number of treaties, directives, resolutions, regulations etc., such as, in the case of Belgium, legal standards of the United Nations, the Council of Europe and the European Union²⁶. The rights and protection guaranteed under international law are usually in the same vein; meanwhile, with regard to unaccompanied foreign minors, the same subjects and themes always return. They often deal with the expulsion and, linked to this, the residence, legal representation, shelter, education and care of an unaccompanied foreign minor.

Under Belgian law, specific protection for an unaccompanied foreign minor translates into a statute with additional rights. Given that all this only concerns the asylum procedure, such protection is partially included in the Royal Decree of 11 July 2003 governing the operation and enforcement of the Office of the Commissioner General for refugees and stateless persons²⁷, which has determined a special procedure for examining asylum applications of unaccompanied foreign minors.

*Recognition procedure*²⁸. Regarding the handling of the asylum application, an adapted procedure applies: given that these children often end up in a strange country with a strange culture after a traumatic journey, they are very vulnerable and frequently have more difficulty telling their asylum story in a clear way.

The Interviews and Decisions Bureau of the Asylum Directorate of the Immigration Service²⁹ is responsible for registering the request for asylum and checking it in line with the Dublin Convention. If there is no doubt about the age of the child, the Immigration Service informs the Guardianship Service with a specially designed form for unaccompanied foreign minors.

²⁵ Art. 3, UN Convention on the Rights of the Child; Art. 24, EU Charter of Fundamental Rights of the European Union; Art. 37, Custody Act. See, especially for Belgium, Fournier, K. 2013, “La migration des mineurs non accompagnés: quelle(s) réponses(s) européenne(s)?”, *Journal Droit Jeunes*, no 12, 32-36.

²⁶ See, for example, the 1951 Geneva Convention on the Protection of Refugees; 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 (*Off. Journ.* L 180, also known as the Protection Directive); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (*Off. Journ.* L 180 of 29 June 2013, also known as the Reception Directive); Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; see also the Dublin III Regulation and the Directive mentioned in fn 4.

²⁷ *Moniteur Belge*; hereafter, Asylum Procedure Decree.

²⁸ Art. 48 a.f., Aliens Act. The asylum procedure for EU nationals and nationals of so-called “safe countries” is excluded from the scope of this paper.

²⁹ Part of the Home Affairs Department.

*Guardianship*³⁰. Every unaccompanied minor is assigned a guardian at the moment of registration of his or her asylum application in Belgium by the Guardianship Service; this service is part of the Justice Ministry³¹, which is in charge of general coordination and supervision, while the guardian represents the unaccompanied foreign minor's point of contact. The guardian plays a pivotal role in finding a durable solution in the best interests of the unaccompanied foreign minor³² and, together with his or her service, guarantees and ensures the judicial protection of the unaccompanied minor.

More or less, the responsibilities of the guardian can be described as follows³³: he or she ensures the minor has access to suitable care, accommodation, education and health, submits a request for asylum or authorization for residence, assists the unaccompanied foreign minor in the above-mentioned procedures (including attending interrogations and requesting assistance from a lawyer and, if necessary, an interpreter), watches over the fulfilment of the Aliens Act with respect to his or her ward, takes appropriate measures to trace his or her family, applies the rights of the minor in respect of appropriate aid and manages his or her goods. The guardian also highlights any major issue that concerns the minor, provides all useful information and handles all necessary documents (e.g., medical report) to the relevant services.

The guardian also maintains regular contact with his or her ward, develops a relationship of trust, which only occurs only in consultation with the minor, explains and comments on decisions taken, and ensures that the minor's ideological, philosophical and religious convictions are respected.

The guardian cannot consent to the marriage, adoption or emancipation of the minor.

The guardianship will end at the moment the minor becomes 18 or when a durable solution in the interest of the youngster has been found³⁴.

On the other hand, the guardianship does not end with recognition as a refugee³⁵.

³⁰ The guardian's role is legally laid down in Art. 479 of the Guardianship Act. For more information about this, see: Lammerlant, I. 2003, "La tutelle des mineurs étrangers non accompagnés", *Revue Trimestrielle de Droit Familial* no 2, 423-437; Fournier, K. & Freson, D. 2015, "Le système du tutelle pour les mineurs étrangers non accompagnés", *Journal Droit Jeunes*, no 1, pp. 41-45; Dockx, V. n.d., "Les mineurs étrangers non accompagnés" in *Vade-mecum des Droits de l'Enfant*, pp. 1-66, Kluwer, Waterloo.

³¹ As a result, the guardian should enjoy greater independence than a body of the Home Office regarding questions of residence on Belgian territory.

³² On the notion of "best interests", consult X 2013, "La détermination de l'intérêt supérieur de l'enfant", *Journal Droit Jeunes*, no 12, pp. 37-39.

³³ For more comprehensive discussion, see: Guillet, U. 2015, "La place du tuteur dans le parcours d'autonomisation du MENA", *Journal Droit Jeunes*, no 11, pp. 13-18.

³⁴ For example, a family member who can assume custody (District Court Liège 25 May 2005, *Revue du Droit Etrangers*, 2006, no 1, pp. 51, in French).

³⁵ Council of State no. 230.001 of 28 January 2015.

*Handling of the asylum application*³⁶. Upon receipt of an application for asylum, the request is handled by the Office of the Commissioner General for Refugees and Stateless Persons (hereafter Commissioner General or CGRSP). In general, the granting of the status of refugee or subsidiary protection status (see Syrian refugees) is awarded or rejected by the Commissioner General; in addition, this governing body may extend or revoke any granted status. Furthermore, it advises whether a foreigner can still enjoy international protection, as well as decide on the conformity of an expulsion measure with the applicable regulations.

The body is also entitled to consult all the documents and information that are useful to the performance of its assignment on behalf of the Belgian Government or to collect information from the United Nations High Commissioner for Refugees in Belgium.

At the CGRSP office, a team of specialized *protection officers*³⁷ handles asylum applications submitted by unaccompanied minors. The greater interests of the child are decisive in terms of how that the Commissioner General and his or her officials should proceed with regard to the asylum application. They also apply the benefit of the doubt in the broadest sense and in favour of the minor asylum seeker

After submitting the asylum application, the officer calls the asylum seeker on at least one occasion to be heard. The call to be heard in connection with the asylum application and procedure is sent by the service to the guardian, to the place of residence of the minor and to the Guardianship Service. The hearing of the minor takes place in circumstances that ensure adequate confidentiality. Subject to the need for the presence of other persons for an adequate investigation, the hearing of the minor occurs, where appropriate, only in the presence of the protection officer, the minor, the guardian, an interpreter³⁸, the minor's lawyer and a single confidential person³⁹. Of the statements made by the asylum seeker during the hearing, the officer takes notes whose content is described in Article 16 of the Asylum Procedure Decree and, if applicable, a brief description of the

³⁶ Reminder: the asylum procedure has been elaborated in the Royal Decree of 11 July 2003 governing the operation and enforcement of the Office of the Commissioner General for Refugees and Stateless Persons; in the context of the protection of unaccompanied minor asylum seekers, special protection applies to their asylum application. For doctrine, see: Broeckaert, E. & Derluyn, I. 2005, "Unaccompanied foreign minors", *Journal of Youth and Children's Rights* no 1, pp. 12-21 (in Dutch).

³⁷ These officials have received special training with attention, among other things, to national and international legislation, the child's developmental stages and the various levels of maturity, childhood vulnerability indicators, children's position in different cultures and intercultural communication with children, and child-specific forms of prosecution.

³⁸ The interpreter can be "challenged" or report a conflict of interest. In both cases, after examination, the officer judges whether the question can be posed.

³⁹ For example, the social assistant of a public social service (see "the Report to the King in the draft of the Asylum Procedure Decree", *Moniteur Belge* 27 January 2004). For reasons peculiar to the examination of the application or for confidentiality reasons, his or her presence can be refused by the officer.

incidents that occurred during the hearing. The minor asylum seeker is assisted during the hearing by the guardian, who can ask questions and make comments within the framework established by the official.

Additional information may be requested by the Commissioner General or his or her representative; such a request must be brought to the attention of the guardian. If necessary, spelling papers (documentary evidence) in support of the asylum application can be submitted⁴⁰. To the extent that they have been drawn up in a foreign language, the asylum seeker provides a translation or explains the content of the documents during the hearing with the help of the interpreter present. The service itself is never required to ensure an integral translation.

With reference to Article 11 of the Asylum Procedure Decree, and after a reasonable period of time following the application for asylum, the case handling officer may ask the asylum seeker by letter to inform him or her, whether he or she wishes to continue or to withdraw his or her application for asylum. In the case of continuation, the Commissioner General shall evaluate the asylum application on an objective, impartial and case-by-case manner, while taking into account the following elements⁴¹: (a) all relevant facts related to the country of origin at the time of the decision, (b) the statements made and documents submitted by the asylum seeker, together with information on whether the asylum seeker has been exposed to prosecution or serious damage or harm or could be exposed, (c) the individual situation and personal circumstances of the asylum seeker⁴², and (d) whether or not the asylum seeker has exerted activities, since he or she has left his or her country of origin, which could expose him or her to prosecution or serious damage or harm on return.

4. Some elements of the legal status of unaccompanied minor asylum seekers⁴³

Hereinafter, we consider the main elements of the legal status of the unaccompanied foreign minor, namely, the right of residence, the ability to act

⁴⁰ See Art. 10, *juncto* Art. 22 a.f., Asylum Procedure Decree.

⁴¹ Art. 27, Asylum Procedure Decree.

⁴² This may include information on background, gender, age and possible acts or actions that may be prosecuted.

⁴³ This section is, *inter alia*, based on Beys, M. & Fournier, K. 2013, “L’acceuil des mineurs étrangers non accompagnés: un aperçu du cadre juridique face aux pratiques de crise et aux violences institutionnelles”, *Journal Droit Jeunes*, no 12, pp. 18-26; Lewyllie, E. 2013, *The Human Rights of Unaccompanied Foreign Minors*, Diss. Master Law, Ghent University. For a series of recommendations on concrete improvements regarding the legal situation of unaccompanied minors in general, see X 2015, “L’acceuil des mineurs étrangers non accompagnés: chronique d’un drame humain annoncé?”, *Journal Droit Jeunes*, no 11, 24-27; Ghymers, C. 2012, “Le séjour des mineurs étrangers non accompagnés enfin consacré dans la loi”, *Journal Droit Jeunes*, no 1, 36-42; Dockx, V. n.d., “Les mineurs étrangers non accompagnés” in *Vade-mecum des Droits de l’Enfant*, pp. 1-66, Kluwer, Waterloo.

(legal capacity) and the guardianship, the right to education, and the right to social security and legal aid.

4.1. The right of residence

Residence arrangements for unaccompanied minor asylum seekers. It should be reiterated that the procedure for recognition as a refugee for unaccompanied minors is, in principle, the same as that applicable to adult asylum seekers. After submitting an asylum request, the minor must register with the municipality authorities of his or her place of residence within eight days to receive a registration certificate, which is valid for an extended period of three months⁴⁴.

Special residence procedure for unaccompanied foreign minors. Another arrangement applies to the category of non-asylum seekers. Unaccompanied minors who have not submitted an asylum application, whose asylum application has been rejected or who do not have a residence permit and are not entitled to a residence permit on another basis, can rely on a special residence procedure; this arrangement has been available since the insertion of Chapter VII, Title II, of the Parliamentary Act of 12 September 2011, contained in Articles 61/14 to 61/25 of the Aliens Act⁴⁵.

The guardian is allowed to initiate the procedure on behalf of the unaccompanied foreign minor by submitting an application to the Immigration Service.

The aforementioned special residence procedure seeks to find a lasting solution to the situation of an unaccompanied foreign minor, namely⁴⁶:

- *Family reunification in the country where the parents are located*⁴⁷. This solution is preferred and, if this can be met, the mayor will issue a warrant to return to the guardian⁴⁸.
- *Return to the country of origin or to the country where the person is authorized or permitted to stay with guarantees of adequate shelter and care*⁴⁹. In this case, an order for return will be delivered to the guardian. In doing so, the administration must always handle this with sufficient caution and thoroughly check whether the person in question will receive adequate shelter and care in the country of destination. If there is no

⁴⁴ In particular, see Art. 9-13, Custody Act.

⁴⁵ The applicable regulation stipulates that, under the present procedure, a (valid) national passport must be delivered. If this is not transferred and the guardian shows that he has taken the necessary steps to prove the identity of the unaccompanied minor stranger and, in spite of that, has not succeeded, the temporary residence permit may be granted.

⁴⁶ Art. 61/14, 2, Aliens Act.

⁴⁷ Compare Arts. 9 and 10 Convention on the Rights of the Child.

⁴⁸ Art. 61/17-61/18 Aliens Act.

⁴⁹ According to his or her needs, and determined by his or her age and degree of independence, see the currently abrogated Circular of 15 September 2005 concerning the residence of unaccompanied foreign minors.

certainty, the order for return cannot be executed and should be extended. The safeguards of shelter and care are, after all, the modalities of the return, rather than elements of the sustainable solution; as long as these modalities are not put in order, the return cannot be carried out. If a lasting solution is not immediately found, the minor is pending a provisional residence permit⁵⁰ and, as long as the long-term solution is absent, the minor can remain in Belgium with a Model A residence permit of limited duration (Orange Card, or Type A Foreigner or A Certificate). This permit is valid for six months and may be extended for the same duration at the request of the guardian one month before expiration, provided that appropriate documentary evidence and proposals for a sustainable solution are submitted.

- *Authorization to stay in Belgium in accordance with the provisions of the Aliens Act*⁵¹. If the sustainable solution is in Belgium, temporary authorization of residence (Type B Foreigner) will be issued first, which is valid for one year. One month before this temporary residence permit expires, the guardian must apply for an extension upon submission of documentary evidence relating to his/her ward's life project. Three years after issuance of the first temporary residence permit, a residence permit is granted indefinitely. The refusal of a final residence permit must, in this case, be expressly and adequately motivated.

As far as the scope of the above-mentioned provisions with regard to the special residence procedure is concerned, these only apply to unaccompanied minors who have not applied for asylum or any other procedure for protection, authorization or a residence permit. As for the procedure, asylum-seeking minors are treated equally as adults; they will receive the same provisional residence permit pending a decision regarding their application. In addition, those who are involved in a different residence procedure cannot rely on this special residence procedure as long as the first procedure is still pending. The unaccompanied minor may apply for a residence permit on the basis of the new special residence procedure if the application for asylum is refused and/or the other procedures are negatively decided.

It is clear that this arrangement offers more certainty than before for the unaccompanied foreign minor. As a holder of a Model A Certificate, the minor has a more stable residence document than either the declaration of arrival or the extended order for return: such a certificate is valid for six months. If no solution

⁵⁰ Art. 61/17 and Art. 61/19 Aliens Act. As long as no sustainable solution is found and the person concerned continues to comply with the terms of application, he cannot be disclosed; every sustainable solution must be adapted to the situation of the minor (thus Const. Court, no. 106/2013 of 18 July 2013). It should be noted that the Immigration Office is not obliged to renew the temporary residence permit. If the service refuses to renew the AI, the minor will be in an irregular situation. However, in principle, a minor always has the right to shelter.

⁵¹ Art. 61/20-61/22 Aliens Act.

is found during this period, a six-month extension is possible until a lasting solution is found, within a maximum period of three years. In view of each application for extension, the situation and the lasting solution are fully evaluated, which means continued stress for the guardian and a very heavy administrative burden. At this stage, a permanent residence permit must be procured three years after the first residence permit has been issued. Under the old scheme, this was an option, provided that no sustainable solution had been found.

Prior to becoming 18 years of age, an unaccompanied foreign minor, who has obtained a temporary residence permit, is informed by the Minister or his or her representative of the conditions to be fulfilled in order to obtain a new residence permit.

Finally, an unaccompanied minor which may cause public unrest, or harm public policy or national security, will not enjoy access to the above-mentioned special protection procedure.

“Illegal” unaccompanied foreign minors. As a rule, national states are free to remove illegal aliens from their territory. However, this must be met with compliance with the provisions of the European Convention on Human Rights (ECHR). In addition, other international standards must be taken into account, such as the Convention on the Rights of the Child, which stipulates every decision in this context should foreground the highest interests of the child. Furthermore, Belgian jurisprudence regarding unaccompanied foreign minors refers regularly to Articles 3 and 37 of this Convention, which relate to the interests of the child and to the prohibition of inhuman treatment⁵². On the basis of these articles, case law often reverses the administration law, especially with regard to the search for a sustainable solution and the delivery and execution of an order to return.

In addition, the 1997 Council Resolution of the European Union determines that a permanent solution must be found for any unaccompanied foreign minor and that no expulsion should take place, as long as it is uncertain as to whether the minor will receive adequate shelter and care in the country of destination.

All this implies that unaccompanied minors who do not have a residence permit cannot, in principle, be expelled for as long as there are no sufficient safeguards that the minor will be effectively taken care of in the country of destination and receive access to sufficient care facilities. Article 118 of the Royal Decree of the Aliens Act provides that no order to leave the territory may be issued to a foreigner under the age of 18 or who is a minor according to his or her national law.

⁵² Compare ECtHR, n° 30696/09 of 21 January 2011, *M.S.S. v. Belgium and Greece* concerning a transfer to the country of entry into the EU where the asylum seeker was kept in detention in a small room with twenty other detainees with limited access to restroom facilities. Also, ECtHR, n° 22689/07 of 18 December 2012, *De Souza Ribeiro v. France*: “*States Parties should not return children to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the children, “such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention [on the Rights of the Child]”, namely the right to life, physical integrity and liberty*”.

The order to leave the territory is replaced by an order to return. This means that an adult must ensure that the minor reaches the country of destination safely. The removal from the territory of an unaccompanied minor to a country with insufficient guarantees of an adequate reception structure and effective care, adjusted to age and maturity, would constitute a breach of Article 3 of the ECHR⁵³.

In practice, however, the Immigration Service issues the order to leave the territory to foreign minors over the age of 16 if they are mature enough to travel independently.

With the above-mentioned insertion of the new Chapter VII in Title II of the Aliens Act of 1980 by the Act of 12 September 2011, the residence status of the unaccompanied minor non-asylum seeker was legally anchored. The legislator intended to strengthen the precarious legal status of unaccompanied minors by replacing the existing circulars with a statutory provision. The provisional right of residence thus became more stable, while the administrative burden was lifted and stronger legal safeguards were inserted.

Reservation(s). With regard to the residence status of an unaccompanied alien minor, some reservations can be formulated. *Firstly*, the special residence procedure does not apply to unaccompanied foreign minors who are nationals of an EEA state. However, the origin does not affect the principle vulnerability of minors who are both unaccompanied and alien. It can therefore be argued that a different treatment based on nationality is not justified in this context and thus violates the prohibition of discrimination. Nor do these unaccompanied alien minors fall within the scope of the Guardianship Act, thereby de facto denying them the right to an effective remedy, as guaranteed by Article 13 of the ECHR.⁵⁴ *Secondly*, the Identification Service for unaccompanied European minors in a vulnerable situation, established within the Ministry of Justice, was supposed to work out a scheme for placing these unaccompanied minors in temporary care⁵⁵. Any Belgian government department that is aware of the presence of an unaccompanied European minor must immediately inform the Identification Service, as well as the Immigration Office. After verification of the identity and the non-inscription in one of the population registers, the Identification Service must immediately take the necessary measures for a modified social placement under the supervision of an organization that performs social work with this group of minors. The minor can be housed in an observation and orientation centre or be

⁵³ ECtHR, no. 13.138/3 of 12 January 2007, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*. The Court is followed by lower Belgian jurisprudence (President, Tribunal of First Instance, Brussels, 13 January 2006, *Journal Droit Jeunes*, 2006, Vol. 252, pp. 32 with annotation Van Zeebroeck, C.; Tribunal of First Instance of Brussels 7 September 2009, *Journal Droit Jeunes*, 2009, no 6, pp. 36).

⁵⁴ This art. reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

⁵⁵ Circular of 2 August 2007 on unaccompanied European minors in a vulnerable condition, *Moniteur Belge*, 27 September 2007.

accommodated by special youth care provision. However, this arrangement offers no right of residence to unaccompanied European minors. Moreover, the personal scope is extremely limited, as only unaccompanied European minors who are in an extremely vulnerable state⁵⁶ are eligible for placement under custody.

Third bottleneck(s). Unaccompanied minors who do not apply for asylum or whose application has been rejected may receive provisional residence documents as long as no sustainable solution has been found, but under certain conditions and with a lot of uncertainties. They can no longer be expelled, but some will be without any residence status, which prevents access to other rights (leisure time, bank account etc.).

The procedure for a sustainable solution for unaccompanied foreign minors is becoming less used and cannot be cumulated with other residence procedures. The decision on the residence status of unaccompanied minors in Belgium is (still) being taken by the Immigration Service and not by a committee of experts.

Finally, a real threat is likely to arise when the Belgian Government considers taking part in a project involving several European Union Member States with regard to organizing reception centres for minors abroad, possibly in an unsafe country of origin.

4.2. Reception/care⁵⁷

The care of unaccompanied alien minors is governed by the Law of 12 January 2007 on the reception of asylum seekers and certain other categories of foreigners⁵⁸. To repeat, this Custody Act applies a different definition of unaccompanied foreign minor: according to the provisions of this law, nationals from countries belonging to the EEA, on the contrary, cannot be considered as unaccompanied minor aliens within the scope of this law.

For unaccompanied minors, a customized framework will be assured during an observation and orientation phase at a designated centre⁵⁹. The care of unaccompanied minor aliens is provided in three phases.

⁵⁶ The aforementioned circular defines a “vulnerable state” as the situation of a minor who is at risk (in jeopardy) due to an irregular administrative situation, unstable social state, pregnancy, deficiency, poor physical or mental condition, victim of trafficking or human trafficking or a begging state.

⁵⁷ DOCKX, V. n.d., “Les mineurs étrangers non accompagnés” in *Vade-mecum des Droits de l’Enfant*, pp. 1-66, Kluwer, Waterloo.

⁵⁸ The refusal to grant reception and care to an unaccompanied foreign minor in the sense of the Custody Act constitutes inhuman and degrading treatment within the meaning of Article 3 of the ECHR (Labour Tribunal of First Instance, 4 October 2012, *Journal Droit Jeunes*, 2013, no 12, 17).

⁵⁹ See Art. 40 Custody Act; also see the Royal Decree of 9 April 2007 establishing the system and rules of operation for observation and orientation centres for unaccompanied minors, *Moniteur Belge*, 7 May 2007 (hereafter OOC Decree). Without mentioning this in detail, it should be recalled that, according to settled case law of the European Court of Human Rights, unaccompanied minors are not detained and kept separate from adults (ECtHR, 8687/08 of 5 April 2011, *Rahimi v. Greece*; ECtHR, 16384/12 of 15 December 2016, *Khlaifia et al. v. Italy*).

Initially, they are taken care of at one of the two observation and orientation centres in Fedasil⁶⁰. On the one hand, this gives the Guardian Service the opportunity to check whether the young person is actually unaccompanied and underage; on the other hand, in this centre, an initial medical, psychological and social profile of the minor can be made (observation). The goal is to detect possible vulnerabilities in younger children and to orient them towards an (infra)structure that is most adapted to their needs. The maximum duration of stay in such a centre is 30 days, or 15 days, once renewable. During their stay, unaccompanied minors enjoy special protection; at the observation and orientation centres, while youngsters are sheltered, the general rules on the reception of asylum seekers, as provided for in the Custody Act, are generally applicable, unless the Royal Decree deviates⁶¹. In accordance with Article 4 of the OOC Decree, no decision can be taken at this stage before a guardian is appointed under the Guardianship Act and before this person is fully involved in seeking a sustainable solution. This means that unaccompanied alien minors cannot be expelled unless the lasting and sustainable solution comprises returning to the country of origin or a third country, and sufficient guarantees that the minor will receive adequate shelter and care in that country.

Subsequently, after two or four weeks of stay in an observation and orientation centre, Fedasil⁶² refers the minor who submits an asylum application to one of the following structures: a federal shelter centre, a Red Cross centre or a Local Reception Initiative (LRI) managed by a Public Centre for Social Welfare (PCSW)⁶³. The youngsters reside in a separate living group, with their own team of counsellors and educators; they are supervised in their school career and progressively prepared for having more autonomy. In this phase, more stable

⁶⁰ Fedasil (Federal Agency for the Reception of Asylum Seekers) is a public interest organization created by the Programme Act of 19 July 2001 and has been operational since May 2002. It falls under the political responsibility of a Minister or State Secretary charged with migration and asylum policy domains. Fedasil is responsible for the reception of asylum seekers and other target groups, while guaranteeing high-quality reception and conformity within the various reception structures. Fedasil coordinates the various voluntary return programmes, as well as grants material aid to asylum seekers and other categories of foreigners with an equal right to reception (in accordance with the Custody Act of 12 January 2007). Together with its partners, the agency organizes high-quality reception and support services, as well as provides monitoring and guidance for unaccompanied foreign minors. Fedasil is also responsible for the design, preparation and implementation of reception policy, while promoting the integration of reception centres within the local community in the framework of a variety of initiatives.

⁶¹ See Art. 14-35/2 Custody Act, *juncto* Art. 5 and 10 OOC Decree.

⁶² A lack of reception places in such an institution does not release Fedasil from its responsibility to house an unaccompanied foreign minor, as the organization is responsible for dealing with the fact that a young person has to sleep on the street (Labour Tribunal of First Instance, Brussels, 14 March 2011, *Journal Droit Jeunes*, 2013, no 12, 16; also see Labour Tribunal of First Instance, Brussels, 26 March 2012, *Journal Droit Jeunes*, 2013, no 12, 16-17).

⁶³ That is, a municipal social and welfare service.

housing, which is adapted to the needs of the minor in question, is sought. The minor who is not an asylum seeker is, in principle, forwarded/sent to a community institution by Fedasil. He or she may also be placed with a foster family, subject to a placement measure by the Special Youth Care Committee or the Juvenile Judge, or housed in “guided independent living”.

If no shelter is possible within this framework, the final responsibility for these minors will be returned to Fedasil and/or one of the partners with whom Fedasil cooperates.

Finally, in the third phase (this is after four to 12 months), youngsters from the age of 16 are expected to migrate to a more individual shelter structure, e.g., an LRI⁶⁴. They enjoy more freedom and autonomy there, but they still receive the necessary guidance.

The outlined projection pathway is based on the belief that continuity in supervision is required throughout the entire schooling period. Central to this is the importance of the child, with the starting point being the young person and their specific needs. Until the age of 18 years, an unaccompanied foreign minor may not be expelled, regardless of whether or not he or she has applied for asylum. If he or she is recognized as a refugee or has obtained another residence status before his or her 18th birthday, he or she is entitled to financial support from a PCSW.

If the youngster reaches the age of 18 and no decision has been taken regarding his or her asylum application, he or she will move to a shelter for adult asylum seekers. If the youngster reaches the age of 18 and does not have a residence permit, he or she must leave the shelter network.

Fourth bottleneck. The reception of young people remains a utopia. Especially with a large influx of unaccompanied minors at a certain moment, the capacity of the OOC is insufficient⁶⁵ and cannot accommodate all youngsters, with numerous target minors then staying without the necessary psychological and social guidance. Moreover, it cannot be overlooked that only a few psychologists have received specific education and knowledge about this target group. Similarly, when staying at hotels or on the street, limited social assistance will be offered by competent persons to these young people. Furthermore, in the second phase, a majority of young people are housed in an unadapted federal reception structure, instead of a more specialized Community institution with qualified guidance. This is due to a lack of shelter capacity for minors with a protection

⁶⁴ In principle, prior to the transfer (decision), a hearing for the minor should be provided, which in practice is not always the case (cf. Beys, M. & Fournier, K. 2013, “L’acceuil des mineurs étrangers non accompagnés: un aperçu du cadre juridique face aux pratiques de crise et aux violences institutionnelles”, *Journal Droit Jeunes*, no 12, pp. 18-26).

⁶⁵ See also Dockx, V. 2009, “L’hébergement des mineurs étrangers non accompagnés et les insuffisances des structures d’accueil existantes”, *Revue du Droit des Etrangers*, no 145, pp. 214-219; Aussems, G. 2011, “Les obligations positives des Etats parties à la Convention européenne des droits de l’homme en matière d’accueil des migrants mineurs non accompagnés”, *Revue du Droit des Etrangers*, no 153, pp. 162.

status at the level of the Flemish and French communities.

In addition, additional specialized care should be organized for certain categories of unaccompanied minor aliens: minors who are pregnant or already have a child, minors with severe psychological difficulties, very young minors, minor who are victims of trafficking in human beings⁶⁶, child soldiers etc. There is therefore a need for a diversified reception infrastructure and care and guidance provision for unaccompanied minor foreigners, both residential and ambulatory, which are barely available at the moment.

Finally, serious doubts may arise as to whether the place of reception place always responds to the right to privacy, as guaranteed by Article 8 of the ECHR (Article 22 of the Belgian Constitution). A federal ombudsman's report states that, in certain shelters, young adolescents from a foreign culture need to use collective facilities⁶⁷ where (physical) privacy can hardly be guaranteed.

4.3. The right to education⁶⁸

In general. Without going in detail on this topic, the treaty and constitutionally guaranteed right to education not only includes legal residents, but also young people living illegally in the territory⁶⁹.

⁶⁶ The specific national and divergent legal rules for these categories are not discussed in this paper. On this topic, see, in particular, Derluyn, I., Mels, C. Parmentier, S. & Vandenhole, W. 2012, *Remember. Rehabilitation, Reintegration and Reconciliation of War-affected Children*, Intersentia, Antwerp; Wattier, I. 2007, "Reference points in the legal discourse about the sexual abuse of minors" in *The UN Children's Rights Convention: Theory Meets Practice*, pp. 609-620, Intersentia, Antwerp; K. Kelemen, K. & Johansson, M. 2013, "Still Neglecting the demand that fuels human trafficking: a study comparing the criminal laws and practice of five European states on human trafficking, purchasing sex from trafficked adults and from minors", *Eur. Journ. Crime Cr. L. Cr. J.*, no 21, pp. 247-289; Van Zeebroeck, C. 2008, "La protection des mineurs non accompagnés victimes de la traite et du trafic des êtres humains", *Journal Droit Jeunes*, no 11, pp. 13-32.

⁶⁷ For example, open restroom facilities and communal showers.

⁶⁸ Circular ABC/TM/KH of 24 June 1999 on the right to education for children without statutory residence status, not published; Circular DG/2003/03 of 24 February 2003 on the right to education for children without statutory residence status, not published; in particular Van Der Vennet, L. 2013, "L'accès à l'enseignement des MENA en Belgique", *Journal Droit Jeunes*, no 12, pp. 27-31; also Boumal, M. 2016, "L'intégration des enfants migrants dans le système scolaire", *Journal Droit Jeunes*, no 11, pp. 40-45. About this topic, see the following doctrine in the Dutch language: Bouckaert, S. 2007, *Grondrechtenbescherming voor Documentloze Vreemdelingen Doorheen de Belgische en Internationale Rechtspraak Vanaf 1985*, Maklu, Antwerpen; De Groof, J. & Ornelis, F. 1999-2000, "Recht op onderwijs, ook voor illegalen", *Journal for Education Law and Policy*, vol. 5, pp. 333-334; Bouckaert, S. 2007-2008, "Onderwijs voor minderjarige vreemdelingen zonder wettig verblijf: ontwikkelingen in regelgeving en rechtspraak", *Journal for Education Law and Policy*, vols. 5-6, pp. 387-405; X. 2013-2014, "Kinderrechten en onderwijs: ook voor kinderen in kwetsbare situaties", *Journal for Education Law and Policy*, vols. 2-3, pp. 107-216.

⁶⁹ For more on this topic, see: Veny, L.M. 2015, "Dreptul la educație în conformitate cu jurisprundența Curții Europene a Drepturilor Omului" in E.M. Fodor (ed.), *Educație și Drept - Interferențe*, pp. 49-132, Pro Universitaria, București.

For decades, however, there were no specific provisions to accommodate school-seeking migrant children in Belgian educational institutions. It was not until 1969 that the first legal measure was taken to allow schools to set up three additional school hours within the regular curriculum for every 10 students who 1) did not have Belgian nationality, 2) had not undergone primary education in Belgium for at least three years, and 3) was not sufficiently or at all competent in the Dutch or French language.

As of the 1979-1980 school year, a second measure was introduced, which allowed nursery and primary schools with at least 30% migrant pupils to recruit additional teachers. Some school boards themselves took initiatives to address the problem of language deficiency and poor school results among migrant pupils through various pilot projects. These were often poorly structured and ‘loose’ measures, which, in many cases, had little success in the sense that the expected results did not occur.

The problem again found its way onto the political agenda in the early 1990s. Since education had become a community competence in the Belgium federal state structure, in 1991, the Flemish Government worked out an educational programme with the following policy objectives: preventing, counteracting or eliminating educational backwardness (“priority policy in education”), promoting interaction between native and immigrant pupils (“intercultural education”), giving immigrant children the opportunity to build their own identity through education in their own language and culture (OETC) and language-specific reception of new-language newcomers in the context of a thorough “language bath”⁷⁰ with a view to their subsequent flow into regular education (OKAN⁷¹).

During the initial reception phase, unaccompanied minor aliens receive home education, which means that they attend Dutch lessons for half a day and that other activities are organized for the other half day. In the follow-up reception phase, they receive education within the OKAN system, in which they follow a year of intensive lessons in the Dutch language, while their education level is determined. Based on the realistic fact that unaccompanied alien minors are mainly in the age range from 14 to 17 years, it is a policy intention that, after receiving OKAN education, they may progress to a grade at the most appropriate education level; in principle, this can be either general, technical or vocational education.

In a judicial decision⁷², the Belgian state is sentenced to issue a temporary residence document, which will ensure the minor receives appropriate education within the meaning of Articles 28 and 29 of the Children’s Rights Convention and Article 2 of the First Protocol to the ECHR.

In addition to the school system, Article 35 of the Custody Act also provides

⁷⁰ During their first year in primary education, the study material for foreign language-speaking newcomers mainly relates to the teaching the Dutch language.

⁷¹ OnthaalKlas Anderstalige Nieuwkomers (Reception Class Foreign Language Speaking Newcomers).

⁷² Tribunal of First Instance, Brussels, 7 September 2009.

that, without prejudice to compliance with the rules on access to vocational training, courses and training are presented to the beneficiary of the reception centre that is organized by this structure or by third parties. However, this does not matter to the unaccompanied minor because, under the Compulsory Education Act, everyone up to the age of 18 must attend compulsory education.

Fifth bottleneck. Due to the late inflow of many unaccompanied foreign minors (between 15-17 years), they only attend a very limited school course/project in practice; in addition, they have little in the way of a real and realistic view of their future. The education pathway in their home country, as far as can be established, was often chaotic, organized differently and less developed, dramatically reducing their chances of successful outcomes. Many of them find themselves then in part-time education with little expectation of receiving a diploma and finding a (reasonable) job on the labour market. This observation is given further credibility by the fact that, especially in the first period but also afterwards, they are transferred several times from one reception structure to another. As a result of such an unstable living situation⁷³, a school career in the same educational institution is not always guaranteed, which, in any case, requires adaptation to the needs of young people already in a difficult situation.

Expelled and repatriated unaccompanied foreign minors who have reached the age of 18 years cannot, upon expulsion, complete further education (leading to a degree), even though they were obliged to start and follow a course of study on a regular basis under the Compulsory Education Act. Thus, they leave the country without a diploma, which also gives them fewer opportunities in the labour market in their country of origin.

4.4. Social security and social services

A. INTRODUCTION

The Convention on the Rights of the Child stipulates that, among other things, minors have the inherent right to life and their survival and development to the maximum extent possible (Article 6), the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (Article 24). Furthermore, they are entitled to social security, including the right to social insurance (Article 26) and the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27)⁷⁴.

⁷³ On the importance of the stability of residence and real education opportunities, see, in particular, Van Der Vennet, L., (2013), "L'accès à l'enseignement des MENA en Belgique", *Journal Droit Jeunes*, no 12, pp. 27-31.

⁷⁴ About these articles, see: Verhellen, E. 2000, *Convention on the Rights of the Child: Background, Motivation, Strategies, Main Themes*, Garant, Leuven; Lammerlant, I., (2003), "Les mineurs étrangers non accompagnés en Belgique et la Convention relative aux droits des enfants" in *L'Enfant et les Relations Familiales Internationales*, pp. 201-234, Bruylant, Brussels.

In its resolution of 26 June 1997 on unaccompanied minors from third countries, the Council of the European Union adopted some minimum provisions regarding social facilities for unaccompanied alien minors, including the duty of Member States to provide food, clothing and sanitary facilities, access to medical services and psychological counselling⁷⁵.

Finally, Article 23 of the Belgian Constitution guarantees everyone the right to lead a dignified life. This is guaranteed by the legislator through the elaboration of economic, social and cultural rights.

B. HEALTH INSURANCE⁷⁶

By the Act of 13 December 2006, *Littera 22* was inserted in Article 32, Paragraph 1, of the Compulsory Medical Care and Benefits Insurance Act, coordinated on 14 July 1994⁷⁷. Meanwhile, the Royal Decree of 3 August 2007, amending the Royal Decree of 3 July 1996⁷⁸ implementing the Health Insurance Act, came into force on 1 January 2008. Both of these events created a new category of beneficiaries entitled to medical treatment, namely, unaccompanied foreign minors.

Starting from this date, unaccompanied alien minors have the right (and even the duty) to conclude their health insurance. A number of conditions must be fulfilled, especially for at least three consecutive months, such as studying at the basic or second level in an educational institution accredited by the Belgian Government, being exempted from the Commission's mandate for extraordinary education, or (insofar as they are no longer subject to compulsory education) placed in an institution for preventive family support, as recognized by the Belgian Government, and not already entitled to medical care under any other Belgian⁷⁹ or foreign legislation.

Concerning the application of this regulation in practice, there are a few examples from case law, which confirm that there are no significant problems in providing social protection for unaccompanied alien minors.

C. FAMILY ALLOWANCE FOR CHILDREN⁸⁰

In some cases, an unaccompanied alien minor is entitled to child allowance: this is the case if the person concerned is housed with a family member up to the

⁷⁵ In general, see Parusel, B. 2011, "Unaccompanied minors in Europe: between immigration control and the need for protection" in Lazaridis, G. (ed.), *Security, Insecurity and Migration in Europe*, pp. 139-160, Routledge, London and New York, Routledge, 2011.

⁷⁶ Regarding the scope of medical care and psychological assistance, see Art. 22-30 of the Custody Act. See also Van Caillie, A. 2017, "Les soins de santé des mineurs étrangers non accompagnés. Quelles sont les dispositions qui s'appliquent ?", *Journal Droit Jeunes*, no 1, pp. 36-40.

⁷⁷ *Moniteur Belge*, 27 August 1994 (hereafter Health Insurance Act).

⁷⁸ Published in *Moniteur Belge*, 31 July 1997 (hereafter Health Insurance Decree).

⁷⁹ The financial interventions of the PCSW in the cost of medical or maternity care or the financial assistance of Fedasil are not considered to be an insurance scheme for medical care (cf. Art. 128-*sexies* Health Insurance Decree).

⁸⁰ Hereafter child allowance.

third degree and entitled to child allowance, or if the unaccompanied foreign minor is entrusted to a family by a decision of the juvenile court or the government. The minor is then part of a family that is entitled to child allowance, except when the child's right to the allowance is established by a brother or sister of the person concerned. The person who establishes the right to child allowance for an unaccompanied minor alien must meet two conditions: having a relationship with the labour market as an employee, self-employed, or regarded as equivalent to an employee (unemployed, sick, retired or invalid), and having a relationship⁸¹ with the entitled child.

Unaccompanied foreign minors who reside in a reception centre (asylum centres, special youth care centres) are not entitled to child allowance.

Finally, if no one can establish the right to child allowance for an unaccompanied alien minor, the Ministry of Social Security may exceptionally decide to grant child allowance from its reserve fund. A second safety net is provided by PCSWs: if the minor in question is sheltered in a family without the intervention of a cross-sectoral gateway or Juvenile Court, a host family that cannot open a child allowance can apply for a financial support from a PCSW, the amount of which may be equal to the guaranteed child allowance.

D. SOCIAL WELFARE PROVISIONS⁸²

In accordance with Article 23 of the Constitution, everyone has the right to live a life that corresponds to human dignity. This important principle is further elaborated, on the one hand, in Article 1 of the PCSW Act, which states that everyone is entitled to social welfare services and, on the other, in Article 57 onwards, where the precise content of social welfare services and the missions of the PCSW are described in more detail. Relevant (unaccompanied minor) foreigners' welfare services can include: providing information about his or her rights, housing, medical counselling and support, psychological counselling and support, social assistance, legal assistance and a daily allowance.

With the exception of Article 57, §2, 2, no part of the PCSW Act explicitly distinguishes between adult and foreign minors with regard to providing social welfare services. However, the exception in the aforementioned Article 57 §2, 2, does not take account of the situation of foreign minors in illegal residence who are not in the company of their parents or guardian. In the absence of specific provisions regarding unaccompanied minors, the usual regulations must therefore be applied, as is the case with adults.

⁸¹ For example, a blood relative up to the third degree, a foster guardian or an adoptive parent, a person appointed by judicial decision or a "cross-sectoral gateway" placement measure.

⁸² See also Art. 57, §2, 1 and 3 of the Parliamentary Act Concerning the Public Centres of Social Welfare (hereafter PCSW Act). Read also: Van Zeebroeck, C. 2007, *Mineurs Etrangers Non Accompagnés en Belgique. Situation Administrative, Juridique en Sociale. Guide Pratique*, Editions Jeunesse et Droit, Liège.

In that regard, case law considers that, if compliance with the provisions of Article 57, §2, 2, of the PCSW Act and Article 60 of the Custody Act cannot be made with respect to minors in illegal residence, on the grounds that Fedasil does not have enough reception capacity to accommodate a housing demand, these minors are entitled to social welfare services at the expense of the PCSW in order to ensure a life in accordance with human dignity and to provide them with protection; this directly derives from the Convention on the Rights of the Child⁸³.

The right to social welfare services differs depending on the reception phase (see *supra*) in which the unaccompanied foreign minor is involved.

Firstly, in the observation and orientation phase, the material assistance, as defined in the Custody Act, is provided by and within this centre. In fact, this is a practical application of Article 57 onwards of the PCSW Act: the legal provision states that a PCSW is not obliged to offer social welfare services when the (unaccompanied minor) alien is assigned to a shelter structure where he or she already receives all material assistance⁸⁴. After applying for asylum, an unaccompanied minor falls within the jurisdiction of Fedasil and is accommodated within a specific reception structure (*second phase*).⁸⁵ In that case, the aforementioned Article 57 onwards will apply again and the material assistance will be provided in kind within the shelter structure without, in principle, any intervention by PCSW. Exceptionally, an unaccompanied minor may apply to a PCSW for a grant to offset certain costs specific to his or her situation, such as school-related costs not provided in the material assistance package, and therefore not supported by the asylum centre⁸⁶. For this material assistance, the unaccompanied minor must permanently reside in the reception centre; after all, the wording in Article 57 only grants material assistance directly to the asylum centre to which asylum seekers are assigned and only that shelter. Any other form of social welfare service is excluded. Anyone who decides to leave the asylum centre can no longer appeal to the PCSW to receive social welfare services in any form whatsoever. This applies equally to unaccompanied minor asylum seekers.

Finally, once officially recognized as a refugee, the unaccompanied minor must, in principle, leave the asylum centre. From then on, the general rules regarding social services are applicable; the unaccompanied minor refugee can

⁸³ For examples of settled case law, see: Labour Tribunal of First Instance, Namur, 9 November 2011; Labour Tribunal of First Instance, Namur, 27 April 2012, quoted in *POD MI 2014*.

⁸⁴ The Royal Decree of 9 April 2007 laying down the system and operating rules for the observation and orientation centres for unaccompanied minors regulates the material assistance provided in these centres. In principle, the same assistance is granted as that granted to asylum seekers in general under the Custody Act, unless the Royal Decree deviates from this.

⁸⁵ For more detail, see *supra* n°. 24.

⁸⁶ Van Zeebroeck, C. 2007, *Mineurs Etrangers Non Accompagnés en Belgique. Situation Administrative, Juridique en Sociale. Guide Pratique*, Editions Jeunesse et Droit, Liège.

then apply for support from a PCSW⁸⁷, which will provide him or her with the social welfare services that it considers to be most appropriate. This usually means financial support, for example, in the form of taking over (part of) the rental cost of a property.

If the unaccompanied minor has obtained subsidiary protection status, he or she is entitled to financial and social assistance for one year. This support is renewable if the subsidiary protection status is extended.

In the case of a rejected asylum application or the absence of an asylum application, two situations are conceivable: the rejection coincides with an order to return or no such order is taken. Only in the first case can the unaccompanied minor benefit from a limited social welfare service, namely, the service for illegal foreigners referred to in Article 57 §2, 1, of the PCSW Act: providing urgent medical assistance. It should be repeated that, since the legal anchoring of the special residence status for unaccompanied foreign minors in the Aliens Act, unaccompanied minors who have not applied for asylum or whose application has been rejected may still be given a provisional residence permit in the form of either an Immigration A Certificate or a temporary residence permit⁸⁸, so that they can never reside illegally in the territory. As a consequence, they can always make a claim to access common social welfare services.

In practice, however, many unaccompanied minors do not have such a residence permit and thus are forced to remain as an illegal resident in Belgium. A strict application of the PCSW Act must lead to the conclusion that unaccompanied minors, in such a situation, can only enjoy urgent medical care from the PCSW.

However, case law interprets this differently and considers that, in light of the Children's Rights Convention and the Constitutional Court ruling of 22 July 2003⁸⁹, unaccompanied minors are always entitled to common social welfare services. The verdict emphasizes that there is a distinction between illegal residence and irregular, albeit legal, residence. An unaccompanied minor who is not formally in possession of a residence permit, but has made a declaration of arrival, is legally resident in the territory and therefore entitled to use social welfare services. Unaccompanied minors staying illegally in the territory cannot, in principle, be expelled without guaranteeing effective shelter and care in their country of origin; in other words, they face the actual impossibility of leaving the country. For this reason, they also have a right to common social welfare services.

With the exception of the provision, which differs from the general limitation, of urgent medical care for the benefit of underage children who are in illegal residence with their parents, the legislature has until now paid little attention to the specific situation of unaccompanied foreign minors. As a result, as

⁸⁷ See also Van Zeebroeck, C. 2007, *Mineurs Etrangers Non Accompagnés en Belgique. Situation Administrative, Juridique en Sociale. Guide Pratique*, Editions Jeunesse et Droit, Liège.

⁸⁸ *Supra*, n°. 18.

⁸⁹ Const. Court, no. 106/2003 of 22 July 2003.

far as social welfare services are concerned, there is no clear and coherent legal framework for these kinds of services for unaccompanied minor aliens to date; the common application concerning PCSW services also applies to this category of foreigners. In principle, no financial support is granted to underage asylum seekers. This can exceptionally be the case if there are no available places in reception centres due to a mass influx of asylum seekers and in cases of family reunification. Case law⁹⁰ is strictly concerned with those who voluntarily waive the material assistance provided by a settling elsewhere.

Since unaccompanied minors as a rule always have a (temporary) residence permit, the social welfare aid provided must not be limited to urgent medical care. For those minors who really are illegally in the Belgian territory and for whom, in principle, social welfare services are limited to urgent medical care, case law relies on the Children's Rights Treaty, as well as the application of the judgement of the Constitutional Court of 22 July 2003 per analogy with unaccompanied foreign minors, concluding that these minors also have a right to access general social welfare services.

Sixth bottleneck. The legislation on social security in general, and social services for (il)legal foreigners in particular, is such a labyrinth that even a reputable lawyer, albeit one who is not specialized in social law, would struggle to find his or her way through. What does this mean for an unaccompanied minor asylum seeker? The guardian is not always a person who is well-grounded in social legislation; consequently, it is important that, as far as this part of the status of an unaccompanied minor asylum seeker is concerned, the above-mentioned social aid and the assistance or intervention of a social assistant are essential⁹¹. In addition, once a social right has been claimed and acquired, this must be permanently followed up. Often, the rightful claimant is asked in writing for (additional) information in an official language that is unknown to the minor concerned. Failure to answer these questions can lead to the cancellation of a social right; even worse, it could be considered as social fraud.

4.5. Legal aid

*Legal grounds*⁹². Unaccompanied alien minors are entitled to free legal assistance with regard to the procedures concerning their stay. Fedasil or the reception structure concerned should ensure that the unaccompanied foreign minor receives access to legal assistance and also benefits from that form of help. The service in question can conclude agreements with a legal organization specializing in defending the rights of foreigners or a legal assistance office.

⁹⁰ Labour Tribunal of First Instance, Verviers, 27 November 2012, quoted in Veny, L.M., (2014), *Aperçu Jurisprudence Aide Sociale 2012*, POD Social Integration, Brussels.

⁹¹ Also in this sense: Adnet, B. & Damman, M., (2015), "Mineurs étrangers non accompagnés: Des CRACS venus d'ailleurs", *Journal Droit Jeunes*, no 11, pp. 5.

⁹² Art. 33 of the Custody Act.

In general, this concerns the aid referred to in Articles 508/1 to 508/23 of the Judicial Code, in terms of both first- (practical information, legal information, first legal advice, refer to specialized agencies) and second-line (legal aid granted to a natural person in the form of a valid legal advice, assistance whether or not in the scope of a judicial procedure) assistance. More concretely, an unaccompanied minor may appeal to a (free⁹³) lawyer of his or her choice for defence purposes; in the absence of a lawyer who speaks the language of the unaccompanied minor, the assistance of an interpreter should be sought, whose expenses are charged to the government, as the minor pays no legal (court) fees.

Seventh bottleneck. In practice, it is possible to deduce that the ideal situation shown above does not always correspond to reality and often remains an empty gesture. For example⁹⁴, transport costs to and from the chosen or designated lawyer are limited by certain reception structures to a number of transfers per month, as only costs for transfers related to the stay procedure are reimbursed.

5. Judicial appeal

5.1. Council for Alien Law Litigation⁹⁵

In 2006, a new part was added to the Aliens Act, namely, Article 39/1, which came into force on December 2006, creating a specialized independent administrative judicial body known as the Council for Alien Law Litigation (hereafter referred to as CALL), whose function is decide on litigation about aliens' rights in the first and last instance.

According to Article 39/57 of the Aliens Act, a judicial appeal can be presented before the CALL against all negative in-merit decisions of the CGRSP within 30 days. This appeal automatically suspends the decision⁹⁶. Meanwhile, the CALL has a so-called "full judicial review" competence in this case, which allows it to reassess the facts. In other words, the CALL is competent to:

- confirm the negative decision of the CGRSP

⁹³ Labour Tribunal of First Instance, Brussels, 22 February 2011, *Journal Droit Jeunes*, 2013/12, 16: "Whereas, in view of the extreme urgency of the case, it is not possible for the unaccompanied minor to seek legal aid by a separate decision, its request to that effect is well founded."

⁹⁴ Compare: on Beys, M. & Fournier, K. 2013, "L'accueil des mineurs étrangers non accompagnés: un aperçu du cadre juridique face aux pratiques de crise et aux violences institutionnelles", *Journal Droit Jeunes*, no 12, pp. 18-26.

⁹⁵ For doctrine concerning this specialized tribunal, read: Louis, B., (2007-2008), "Le Conseil du contentieux des étrangers: une nouvelle juridiction administrative, hybride et ambitieuse", *Administration Publique Trimestrielle*, no 4, 243-289; C. Franssen and A. Maes, "La compétence de plein du Conseil du contentieux des étrangers", *Revue du Droit des Etrangers*, no 165, pp. 13-40; Coppens, C., (2012), "Conseil du contentieux des étrangers et juridictions civiles: analyse comparée au regard de certaines garanties procédurales et de l'indépendance du juge", *Administration Publiques Trimestrielle*, no 2, 255-289.

⁹⁶ See Article 39/70 of the Aliens Act.

- overrule it by granting refugee or subsidiary protection status
- or annul the decision and refer the case back to the CGRSP for further investigation⁹⁷

As the law does not provide the CALL with any investigative powers, it must make a decision on the basis of the existing case file. This implies that, should it consider important information, it has to annul the decision and send the case back to the CGRSP for further investigation. It must be stressed that all procedures before the CALL are formalistic and essentially written. This makes the intervention of a lawyer necessary. All relevant elements have to be mentioned in the petition to the CALL. A hearing is provided, at which the parties and their lawyer can orally explain their arguments to the extent that they were mentioned in the petition⁹⁸. The CALL must also make an additional written note before the end of the hearing⁹⁹. Taking into account these new elements, the CALL can annul the decision and send it back to the CGRSP for further examination, unless the CGRSP's office can submit a report about its additional examination to the CALL within eight days. The CALL can also leave the asylum seeker with the opportunity to reply on the new element brought forward by the CGRSP with a written note within eight days. When there is no response within those eight days, the complainant is presumed to agree with the CGRSP on this point.

5.2. Council of State

By applying Article 14, §2, of the Council of State Act¹⁰⁰, one can appeal against decisions of the CALL before the Council of State, Belgium's supreme administrative court¹⁰¹. This kind of appeal must be filed within 30 calendar days after the decision of the CALL has been issued; it has no suspensive effect. Under Belgian law, this is a so called "administrative cassation appeal", which means that the Council of State is only allowed to verify whether the CALL respected the applicable legal provisions, substantial formal requirements, and requirements under penalty of nullity, as mentioned in Article 14, §2, of the Council of State Act. Thus, the Council of State cannot make its own assessment and decision on the facts of the case. Appeals before the Council of State are first channelled through some kind of admissibility filter: in this stage, the Council of State filters out those cassation

⁹⁷ See Article 39/2 of the Aliens Act.

⁹⁸ See Article 39/60 of the Aliens Act.

⁹⁹ See Article 39/76 of the Aliens Act, as amended by the Law of 8 May 2013.

¹⁰⁰ Sohier, J., (2014), "Le contentieux de la cassation administrative" in Sohier, J. (ed.) *Manuel des Procédures devant le Conseil d'Etat*, pp. 139-158, Wolters Kluwer, Mechelen; Renders, D & Pijcke, G., (2009), "La procédure en cassation administrative à l'épreuve de la pratique" in Lewalle, P. (ed.), *Le Contentieux Administrative. Questions Actuels*, pp. 65-124, Anthemis, Liège; Cambier, L., (2007), "Le rôle du Conseil d'Etat suite à la réforme du contentieux des étrangers", *Revue du Droit des Etrangers*, no 145, 99-102.

¹⁰¹ See also Article 39/67 of the Aliens Act.

appeals that have no chance of success or are only intended to prolong the procedure. This happens within eight working days¹⁰². If the Council of State annuls a decision, the case is sent back to the CALL for a new assessment of the initial appeal.

Conclusions

International and national regulations are bulging out of good intentions to protect vulnerable, often traumatized displaced and unaccompanied minor (asylum seekers). In theory, both the international institutions (Council of Europe, European Union) and national authorities have an arsenal of instruments and mechanisms to address this vulnerable group and to provide them with (at least, minimal legal) protection.

However, in (administrative) practice, this theoretical picture looks completely different. *Firstly*, in many cases, it is difficult to estimate the minority of a young foreigner. Although the regulations in such a case provide the benefit of the doubt to the younger, there is always the risk that unaccompanied minors may fall through this net. *Secondly*, the right of residence of the unaccompanied minor may be well arranged, in the sense that he or she may never be expelled upon reaching the age of majority. However, if the status of refugee is rejected, the minor, regardless of the number of years he or she has stayed in Belgian territory, will receive an order to leave the country. *Thirdly*, during that stay, and regularly in the first difficult year, it has to be ascertained that no suitable reception for several unaccompanied minors can be found; in multiple cases, in the absence of an adequate shelter, a minor is forced to survive on the street. *Fourthly*, regardless of his or her legal or illegal residence status, a minor should have enjoyed the right to education, but possibly at a school back in the country of origin. That said, on arrival into Belgian territory, the minor's lack of knowledge of the language of instruction and his or her intellectual capacity, as well as an understanding of the equivalence of any foreign studies, should be determined. These young people often do not complete (even vocational) their studies. *Fifthly*, in the maze of social security and social assistance, unaccompanied minor asylum seekers soon lose their way; indeed, their guardian may not know exactly what they are entitled to.

From these experiences and bottlenecks, adjustments in practice are therefore highly necessary.

The following considerations should be taken into account in refugee status determination procedures for children: priority should be given to refugee status applications from children, and every effort should be made to reach a decision promptly and fairly in as short a time as possible after their arrival.

¹⁰² See Article 20 of the Council of State Act.

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