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Unaccompanied minors and asylum procedures : prospects for UNHCR

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Introduction

Spanish asylum legislation does not prescribe any specific procedure for dealing with applications from unaccompanied minors, who are therefore normally subject to the same admissibility criteria as adults¹. Particular importance accordingly attaches here to contributions from international organisations, NGOs and independent experts working in the whole area of minors' rights, whose recommendations are helping establish and consolidate good practices in this field.

As regards unaccompanied minors seeking asylum, it is important to point out that owing to their particular vulnerability they are protected as asylum-seekers not only by the provisions of the Geneva Convention and by all extant human rights conventions but also, and primarily, by all available regional, national and international legislation specifically concerned with protecting children's rights, such as:

- The Declaration on the Rights of the Child, 1959
- The Convention on the Rights of the Child (CRC), 1989
- Optional Protocol 1 to the CRC on the sale of children, child prostitution and child pornography, 2000
- Optional Protocol 2 to the CRC on the involvement of children in armed conflict, 2000
- ILO Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour
- UN Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"), 1985.

And the list could go on.

States are likewise required to take into account the recommendations and guidelines of international agencies working in this field, eg the UNHCR 1994 Guidelines on protection and care of refugee children, the latest 2004 edition of the Statement of Good Practices UNHCR-Save the Children for unaccompanied children in Europe, and the Council of Europe's recommendations.

BASIC PRINCIPLES

A number of the basic principles underpinning the Statement of Good Practices UNHCR-Save the Children must be taken into account in processing any asylum application lodged by an unaccompanied minor.

1. Best Interests²

The best interests of children shall be a primary consideration in all actions concerning children³.

¹ Save the Children, "*Informe sobre la situación de los menores no acompañados en España*" (Report on the situation of unaccompanied minors ["separated children"] in Spain), 2003, p.21.

² CRC, Article 3 (1): In all actions concerning children... the best interests of children shall be a primary consideration.

³ Statement of Good Practices UNHCR-Save The Children, Third Edition 2004, p.7.

http://www.savethechildren.net/separated_children/good_practice/SGP_3ed_print.pdf.

The children's best interests must be the main consideration in all actions concerning minors.

The Convention on the Rights of the Child does not spell out the meaning of this broad concept, with the result that some of the decisions taken in accordance with this instrument may be based on inappropriate legal interpretations. With an eye to securing a uniform interpretation, the UNHCR is preparing a document entitled "*UNHCR Guidelines Formal Best Interest Determination*"⁴, which includes a series of guidelines and principles to be followed in determining the minor's best interests.

2. Non-discrimination⁵

Separated children are entitled to the same treatment and rights as national or resident children. They should be treated as children first and foremost. All considerations of their immigration status should be secondary⁶.

Every child subject to a country's jurisdiction enjoys all the rights guaranteed to it by the Convention on the Rights of the Child regardless of any other consideration⁷.

3. Right to participate⁸

The views and wishes of separated children should be sought and taken into account whenever decisions affecting them are being made. Measures should be put in place to facilitate their participation in line with their age and maturity⁹.

4. Confidentiality¹⁰

Care should be taken not to disclose information about a separated child that could endanger the child's family members in her or his home country. The permission of separated children should be sought in an age-appropriate manner before sensitive information is disclosed to other organisations or individuals. Information should not be used for purposes other than for those for which it was given¹¹.

As we all know, confidentiality is a basic principle in all asylum applications. Its absence may endanger the life of the asylum-seeker or that of his or her family members in the country of origin.

For this reason, the confidentiality principle must be particularly borne in mind in the case of unaccompanied minor asylum-seekers, irrespective of the need to trace their family. In some cases, attempts to trace family members will have to be postponed until a decision has been taken on the minor's asylum application.

⁴ Draft, Monday 3 October 2005, "*UNHCR Guidelines Formal Best Interest Determination*".

⁵ CRC, Article 2: The rights of the CRC apply to all children without discrimination of any kind and irrespective of their parents or their own race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

⁶ Statement of Good Practices, UNHCR-Save the Children, *op.cit.*, pp. 7-8.

⁷ Refugee Children: Guidelines on Protection and Care, 1994, p. 23.

⁸ CRC, Article 12: The views of children are to be given due weight in relation to their age and maturity and children shall have the opportunity to be heard in all proceedings affecting them.

⁹ Statement of Good Practices UNHCR-Save the Children, *op.cit.*, p.10.

¹⁰ CRC, Article 16: Children have the right to protection from arbitrary or unlawful interference with their privacy, family, home and correspondence.

¹¹ Statement of Good Practices UNHCR-Save the Children, *op.cit.*, p.9.

Before sensitive information is disclosed to other organisations or persons, the permission of unaccompanied minors must be sought in a manner appropriate to their age. Under no circumstances must contact be made with the country of origin's diplomatic representation while the minor's asylum application is being processed.

5. Information¹²

Separated children should be provided with accessible information about, for example, their entitlements, services available, the asylum process, family tracing and the situation in their country of origin¹³.

Lack of information is undoubtedly one of the main reasons for the paucity of asylum applications by minors in Spain as compared with the huge numbers of unaccompanied foreign minors dealt with every year. In this connection, an examination of the statistics for unaccompanied minor asylum-seekers is revealing.

It must first be said that our data are incomplete because of shortcomings in the computer software used. In previous years the official studies¹⁴ confined the minors category to persons below the age of 17 (rather than 18). For a minor to be included in the statistics it was also necessary for his or her case to be still pending on 31 December of the year of applying for asylum. Despite all these problems, which we have been trying to resolve for some time, there is a manifest lack of asylum applications by unaccompanied minors. According to available figures, out of the 9 490 unaccompanied minors who arrived in Spain in 2001 only two applied for asylum, with only one asylum application from among the 6 310 who arrived in 2002.

Ignorance of asylum as an institution is the main reason for the lack of information for minors. In the first place, most minors are unaware that they are entitled to apply for asylum, and even when they have some inkling of this right, they fail to understand its implications and the importance that refugee status could have for their lives. In the second place, we have found in various training courses organised by our office that, with the exception of the few centres specialising in minor asylum-seekers, persons in daily contact with the minors, ie those best acquainted with their personal circumstances and needs in terms of protection, frequently do not even know that asylum exists as an institution. Some of them are even convinced that minors are not entitled to asylum, believing that it is an institution intended for adults only.

II. Procedural aspects

Where unaccompanied minors are concerned, Spanish asylum procedure involves certain practices that are at variance with the above-mentioned basic principles in that they block access to the refugee protection system provided for under both international and Spanish legislation.

¹² CRC, Article 17: States shall ensure that children have access to information from a diversity of international and national sources. CRC, Article 13.

¹³ Statement of Good Practices UNHCR-Save the Children, *op. cit.*, p. 10.

¹⁴ One in 2002 and two in 2001.

1. Age assessment tests

Anyone present in Spanish territory whose under-age status is in doubt must immediately take an age test. The results may restrict access to the legal and welfare protection available to potential minor asylum-seekers in Spain¹⁵.

This practice raises two fundamental problems:

A. Type of test

The UNHCR considers that the age test currently employed in Spain, consisting of a bone-measurement test performed via an x-ray of the left wrist and interpreted according to the Greulich and Pye Atlas, is unsuitable. This method was devised in the 1930s as a means of detecting growth problems in young people of white race. Its results should not therefore be regarded as either appropriate or conclusive¹⁶ when used 70 years later to establish the real age of applicants¹⁷ of any nationality. The UNHCR has made known its attitude to the need for and the unreliability of these tests on numerous occasions¹⁸. On the basis of the UNHCR's comments, the Basque Institute of Forensic Medicine (Instituto Vasco de Medicina Legal) organised a seminar for forensic scientists from all over Spain in San Sebastián in March 2004¹⁹.

B. Lack of a uniform interpretation

In Spain, powers to protect minors are delegated to the Autonomous Communities. On certain matters, such as how to interpret proofs of age, the criteria employed differ from one Community to another. The UNHCR feels that this type of discrepancy should be abolished and recommends that both the tests and their interpretation be approved at national level.

As age assessment is not an exact science and involves a considerable margin of error, minors must be given the benefit of the doubt. Public Prosecutor's Instruction 2/2001 corroborates the UNHCR's opinion on this point and orders the results of the age test to be interpreted as follows:

"As medical tests never indicate an exact age but always fix a fairly broad range between whose extremes the subject's true age may be calculated with a minimal margin of error, in the absence of other data and in order to determine whether the subject is an adult or a minor, it must be presumed that his or her age corresponds to the lower limit of the range."

¹⁵ Reference was also made to this point by the Special Rapporteur on the human rights of migrants in her 2004 report – see above.

¹⁶ Included in the final comments of 13 October 2004 on the draft Aliens Regulation.

¹⁷ The bone-measurement test compares the average development of the wrist bone of sub-Saharan or North African male and female minors with that of white males (of Caucasian origin) belonging to the US middle class in the 1930s.

¹⁸ In this connection, see paragraph 5.11 of the UNHCR's 1997 Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, section C.8 of the 2004 Statement of Good Practices UNHCR-Save the Children and Article 4.3.b of the Resolution of the Council of the European Union on unaccompanied minors.

¹⁹ Symposium on the forensic assessment of age in undocumented minors, 4 and 5 March 2004. We would direct the reader to the Recommendations on methods of forensic age diagnosis in minors without papers in the legal environment, 5 March 2004. In this connection, see also paragraph 5.11 of the UNHCR's 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, section C.8 of the 2004 Statement of Good Practices UNHCR-Save the Children and Article 4.3b of the Resolution of the Council of the European Union on unaccompanied minors.

Nevertheless, on 29 December 2004 the Madrid Community issued a Circular containing instructions that largely contradict those of the Public Prosecutor's Office²⁰. The following quote from the third section may be taken as an example:

"If the x-ray report refers to chronological age with a 4-year interval, the criterion of average age shall be applied as the STANDARD AGE."

The criteria for interpreting the above-mentioned instrument, which was in force in the Madrid Community until mid-2005, tended to raise significantly the age of the supposed minor in breach of the principle set out in Implementing Act 1/1996 on the Legal Protection of Minors to the effect that the best interests of the minor must override any other legitimate interest that may be present²¹, and contrary also to the benefit of the doubt applied in any legal matter which, if not properly verified, may have adverse consequences for the person concerned. In this connection, the UNHCR feels it should point out that the regulation of this type of question by the Autonomous Communities causes unaccompanied foreign minors to be treated differently in different Communities, with the result that minors in Autonomous Communities which receive a greater number of unaccompanied minors are generally less well protected.

However, according to our information, this Autonomous Community has started to carry out a series of complementary tests over the past few months involving more thorough examinations than just the wrist x-rays practised until recently, thus ignoring the December 2004 Circular. This Delegation has been unable to assess this practice in view of its very recent adoption.

3. Minor asylum-seekers and compatibility with the immigration route

The chief obstacle for potential minor asylum-seekers when taking a decision to apply for asylum is undoubtedly the incompatibility between asylum and immigration procedures²². This incompatibility, which has been repeatedly highlighted and condemned by institutions responsible for the care of minors, is the decisive factor in minors' failure to ask for asylum when approaching the age of majority, and constitutes one of the main reasons for the low rate of applications.

According to Spanish aliens legislation²³, unaccompanied minors in the care of the State for an uninterrupted period of nine months are entitled to a residence permit. The body actually caring for the minor is responsible for obtaining the permit, which should be granted retroactively after the nine-month period has expired.

The lack of specific provisions on minor asylum-seekers makes it necessary to have recourse to Article 92 of the Aliens Regulation, which concerns unaccompanied immigrant minors. An erroneous interpretation of that article leads some of the bodies responsible for obtaining permits to believe that processing of the residence permit nine months after the

²⁰ Instruction 2/2001 of the Public Prosecutor concerning the interpretation of the current Article 35 of Implementing Act (Ley Orgánica) 4/2000 on the rights and freedoms of foreigners in Spain and their social integration.

²¹ Article 3 CRC; Article 2 of Implementing Act 1/96 on the Legal Protection of Minors.

²² In its comments of 13 October 2004 on the draft Aliens Regulation, the UNHCR expressly requested that these procedures should not be regarded as incompatible. The UNHCR holds that the minor's best interests override those of family reunion, and that in any case it is unfair for a minor who has already waited for his/her asylum application to be processed to have to wait a further nine months before a start is made on regularising his or her situation.

²³ Article 92, Royal Decree 2393/2004 of 30 December 2004 approving the Regulation applying Implementing Act 4/2000 of 11 January 2000 on the rights and freedoms of foreigners in Spain and their social integration.

minor was placed in State care is possible only when the appropriate steps have been taken to trace his or her family. In the case of under-age asylum-seekers, any attempts to obtain information are blocked by the confidentiality principle, which means that calculation of the nine-month period does not start until the asylum application has been rejected.

It should be noted that the fact of a minor holding documents to the effect that (s)he is an asylum-seeker is not the same as having a residence permit. This may have disastrous consequences if the asylum application is ultimately rejected. The following example illustrates the negative effects of an incorrect interpretation of Article 92: *The case concerns a minor, a native of Angola, who arrived in Spain in July 2002 and lodged an application for asylum in December 2002. He was refused refugee status a year later, in January 2004, but by then he had already turned 18. The failure to process his asylum application earlier means that a minor who has spent more than a year and six months in the care of the Spanish authorities will very probably have to leave the country.*

In response to a complaint from this Delegation, the Children's Ombudsman of the Madrid Autonomous Community stated that he shared its concern and had taken action urging *"an end to the inflexibility of the administrative services which, when asylum has been refused, frequently after a year or more, require observance of the nine-month period stipulated in the regulations on aliens before the procedures for obtaining a residence permit can begin"*²⁴.

Subsequently, in reply to our request for information on this issue and other aspects relating to asylum and minors, the Children's Ombudsman of Madrid Community asked the authorities concerned for information on their attitude to such matters. We have recently received this information²⁵, which shows that our interpretation of the act tallies with that of the chief public bodies involved, for example the Madrid Government Representation²⁶, the Madrid Institute for the Minor and the Family²⁷ and the Directorate General for Internal Policy²⁸. From this we may conclude that, although there is general agreement on the theory,

²⁴ 16 December 2004, File 0974/04, N/Ref GT-MR-0974/04/1s.

²⁵ 12 July 2005, File 0974/04, GT-MR0974/04/8s.

²⁶ Madrid Government Representation (Assistant Government Representative), *"A correct interpretation of Article 92.7 of the Regulation applying the Aliens Act would establish that, since it is not possible to attempt repatriation in the case of minor asylum-seekers because of the non-refoulement principle and the condition constituted by the phrase "if this was not possible" in the Article mentioned, the minor must be granted the residence permit referred to in the Aliens Act nine months after he was placed in the care of the appropriate child-protection services regardless of the processing of his asylum application, since if the latter is subsequently granted it will be more favourable for the minor than the said residence permit. On the other hand, if the asylum application is rejected, the interest to be protected, ie the status of minor, will be safeguarded and it will be possible to avoid pernicious effects that might prevent the minor from regularising his situation if, for example, he has already attained his majority or if less than nine months remains before he will reach it, which would constitute a fresh obstacle to the mandatory criterion for obtaining a Spanish residence permit. The procedure remaining open to him would be to apply for a residence permit on the grounds of exceptional circumstances (Article 92.5) and he would come under Article 40j of the Aliens Act, which excludes the need to take the national employment situation into account in granting a work permit."*

²⁷ Madrid Institute for the Minor and the Family (Instituto Madrileño del Menor y la Familia). *"If a minor withdraws his asylum application or it is refused, the body in whose care the minor has been placed will submit the minor's documentation for the purpose of the residence permit without starting another period of nine months."*

²⁸ Directorate General for Internal Policy. *"As regards the situation arising from the application of Article 92.5 of the new Aliens Regulation... this Directorate General sees no objection to the nine-month period in the said Article being calculated at the same time as processing of the asylum application starts since, the minor being an asylum-seeker, the non-refoulement principle applies and his or her repatriation therefore cannot be attempted."*

malfunctions occur in practice that prevent the attainment of a lawful outcome capable of protecting the rights of under-age asylum-seekers.

Final considerations

Nevertheless, apart from the aforementioned problems on which progress is still needed, we would point to the following improvements over the past few months:

- repeal of Public Prosecutor's Instruction 3/2003, under which any unaccompanied foreign minor aged 16 years or over arriving in Spain was considered as being of full age and had therefore to receive the same treatment as any adult expellable from Spanish territory, in breach of his entitlement under the legal child protection system. This Instruction was revoked by Instruction 6/2004 of November 2004;
- possibility of submitting an official asylum application to the Asylum and Refuge Office, regardless of whether the minor is in the care of the child protection services, in order to avoid unnecessary delays in submission of the application. This guarantees non-refoulement without making this basic and fundamental right of every asylum-seeker dependent on placement in care, a process which can take several months.
- automatic provisional acceptance of asylum applications by minors in the first phase of the border-crossing asylum procedure as soon as the young person in question is proved to be under age. The aim is to ensure that the claims made by the minors can be examined with care and attention and to avoid summary procedures in respect of minors, as recommended by the international organisations and NGOs.
- accelerated examination of minors' applications by the Asylum and Refuge Office in order to reduce the harmful effects of the current incompatibility between aliens' and asylum legislation.

Finally, we wish to record the marked change in the sensitivity shown by some of the main authorities dealing with unaccompanied minors, and the great commitment shown by such institutions as the Ombudsman, the Madrid Children's Ombudsman and non-governmental organisations (eg Amnesty International, Spanish Red Cross, CEAR (Spanish Commission for Assistance to Refugees) and Save the Children).
