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Critical Analysis of the Process of Determination of the Age of Unaccompanied Foreign Minors in Spain*

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Abstract: The purpose of this article is to perform a critical analysis of the procedure for determining the age of unaccompanied foreign minors in Spain and the detrimental effects that may arise from establishing the legal status of these minors. One of the basic aspects dealt with is that relating to the assessment of the age of the foreign individual, which in accordance with current regulations, will be performed according to the personal law applicable; an issue that is infringed by the Spanish Administration in this process. Furthermore, it approaches the most controversial issues that have come to light in the procedure to determine age in doubtful cases and whether or not they are related the doctrine established by the Spanish Supreme Court, which the Public Prosecutor's office repeatedly fails to implement through its ignorance of the legal effects of foreign documents and by systematically carrying out medical tests on minors.
Keywords: unaccompanied foreign minor, age, legal uncertainty, legal status, age of majority, minority.

1. Approach

Migration to Spain has increased considerably in recent years, hence the arrival of immigrants has been considered the cause of the growth of the Spanish population for the second year running, which it now exceeds 47 million inhabitants and according to data provided by the Spanish Home Office, 14% of migrants are minors and about 15,000 are unaccompanied foreign minors (known as "MENA" in Spanish, hereinafter UASC ("Unaccompanied and Separated Children") from whom it is difficult to obtain reliable data. In many cases minority age is easily verifiable, since they are very young children (babies or children under the age of 12); however, a high percentage of UASC comprise an age range in which it is more difficult to determine the minority but, equally, they are minors (Peláez Fernández, P. (2018)"Estado de la cuestión sobre los derechos de los MENAS en España: entre la protección y el abandono", in *Revista de Educación Social*, Nª. 27, 05, pp. 48-57). This situation, which we can already describe as "a continued and massive arrival of UASC to Spain" has become the center of intervention and subsequent actions by the Spanish Administration regarding immigration.

In practice, it is impossible to know with certainty how many other UASC have arrived in Spain across the borders of Ceuta, Melilla or Algeciras clandestinely[1]. According to the Public Prosecutor's Report cited above, at the end of 2018, almost 14,000 children were registered in the UASC Registry under guardianship or foster care by Spanish protection services, and the vast majority are Moroccans, although nationals of other Member States of the European Union (hereinafter, EU) such as Romania are also listed.

The situation created with these migratory movements has revealed the shortcomings, inadequacies and gaps of the Spanish legal system designed to accommodate and protect UASC, shortcomings that are exacerbated in the case of migrants who are on the age limit, where it is difficult to determine whether they are minors or adults. And it is in this context that this paper is presented, which aims to critically analyze the current

* This article has been preceded by a paper presented by the authors in the framework of the Conference on Child Protection, organized by the University of Murcia, which took place on 21 May and 1 June 2018.

[1]The arrival of UASC to our shores throughout 2018 showed a very worrying evolution, with an increase of 199%, according to the Prosecutor's Report corresponding to the 2019 General State Prosecutor's Report 2019, available at https://d3cra5ec8gdi8w.cloudfront.net/uploads/documentos/2019/09/10/_memoria2019_76609dd4.pdfl, (consulted on 27/01/20).

legal procedure in Spain to determine the majority or minority in those "doubtful" cases, especially when UASC carry documentation that due to their appearance may raise doubts about their age.

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

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

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

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

Apart from that assumption, the Administration - as a rule of thumb - should, and always in accordance with the personal law of UASC, understand and treat individuals who accredit it, as minors, especially if it is taken into account that not all States set the age of 18 as the age of majority, for example Latin American countries such as Honduras, Bolivia or African countries such as Cameroon, Egypt and Guinea, among others, set the age of majority at 21 years. Canada, for its part, in certain States of its territory, sets it at 19 years (Calvo Caravaca, A. and Carrascosa González, J. (2017) *Derecho internacional privado,* Granada, Comares, Vol II, pp.66-68.).

This topic has been discussed by different experts for several years, but unfortunately it remains an unsolved problem and given the overwhelming figures of UASC that arrive in our country, it is urgent and necessary to place the focus of analysis on them, since the determination of age is a fundamental question that affects each and every aspect related to the life and integration of a minor in our country in a transversal way.

As Durán Ruiz has pointed out, since 2008, and as he presented in his keynote speech at the First International Congress on Migration in Andalusia, minority in the case of UASC constitutes the basis of a more favorable treatment since, first, it prevents the child from being subject to sanctioning measures applicable to foreigners in an irregular situation, such as expulsion. Secondly, it obliges the Administration to recognize the legal situation of helplessness and, consequently, provide for adequate reception and guardianship; and thirdly, in the case of committing crimes, criminal treatment is differentiated (Durán Ruiz, F. J. (2011) Derechos de los menores extranjeros y la determinación de su edad: cuestiones sustantivas y procesales, *Actas del I Congreso Internacional sobre Migraciones en Andalucía,* Granada, Universty of Granada/Institute of Migrations, p. 851-852. And on this same subject, by the same author "Los derechos de los menores no acompañados inmigrantes y solicitantes de asilo en la Unión Europea de las fronteras fortificadas y sus Estados miembros*", Revista Trace. Travaux et recherches dans les Amériques du Centre*, (Centro de Estudios Mexicanos y Centroamericanos, No. 60, pp.9-24, text avaialble at https://journals.openedition.org/trace/1723#text, consulted on 30/01/20).

Despite the importance of determining age for civil, administrative and sometimes for criminal purposes, the Spanish legal system lacks a coherent framework that provides a unified procedure for action with transversal legal effects with respect to all aspects of the life of UASC, and as we will briefly analyze below, we understand that minors are in a situation of dual vulnerability since the same institutions that have to guarantee them protection doubt their minority which places them de facto, in a situation of abandonment (The situation of vulnerability in which UASC are found was denounced by the ROOTS Foundation (linked General Council of Spanish Law) before the Spanish Parliament, in the Commission on the rights of children and adolescents, available at http://www.fundacionraices.org/?p=2813, consulted on 08/01/20).

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

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

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

At present, these inquiries are made with respect to minors who, despite having the correct documentation from their respective countries, doubts are raised over their validity because the institutions of the State of origin do not "offer" guarantees of their issuance, so a basic rule governing international private relations, such as the international effect of foreign documents, is constantly questioned by the Spanish authorities, thereby making UASC victims of irregularities in the system (Fragment of the Approach of this Inquiry, available at https://www.fiscal.es/memorias/estudio2016/INS/INS_03_2003.html, consulted on 28/01/20).

At this time, we can say that the institutional situation to deal with this problem is tense, and at times, contradictory. And this is so for two main reasons: first, that since January 2018 the Supreme Court (hereinafter, SC) through Judgment No. 131/2018 (*STS* 262/2018-ECLI: ES: TS:2018:262, text of the Spanish supreme Court available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8283962&links=menores%20extranjeros%20no%20acompa%C3%B1ados&optimize=20180209&publicinterface=true, consulted on 30/01/20), rejected appeal No. 2289/2016, lodged by the representation of the abovementioned Roots Foundation, against Judgment No. 236/2016, of June 2, Section 7 of the Contentious Administrative Chamber of the National Court (hereinafter, NC), in the contentious-administrative appeal No. 378/2015 filed against the content of the **Framework Protocol on certain actions in relation to Unaccompanied and Separated Children**, published by the Cabinet by Resolution of October 13, 2014; and second, it relies on the Observations made by the United Nations Committee on the Rights of the Child to the Spanish State, in March of this year, and which in relation to UASC, reflects in Observation No. 44 two main concerns that directly affect the functions attributed to the Public Prosecutor's Office, through articles 35 of Organic Law 4/2000, on the rights and liberties of foreigners in Spain and their social integration *BOE* Nº. 10, of 12/01/2000 (hereinafter, LOEX), through article 48 of Act 12/2009, regulating the right of asylum and subsidiary protection (*BOE* Nº. 263, of 31/10/2009, hereinafter, Asylum Law) and in article 12 of the Organic Law on the Legal Protection of Minors (*BOE* Nº. 15, of 17/01/1996, hereinafter, LOPJM amended by Law 26/2015, of July 28, on the Modification of the System for the Protection of Children and Adolescents).[2]

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

Next, we will explain why we consider these reasons as key factors in sustaining the chaos that we still have in Spain when it comes to establishing the personal status of foreign minors-adults according to their age (Ortega Giménez, A. and Heredia Sánchez, L. (2019)"Efectos jurídicos de la determinación de la edad de los menores extranjeros no acompañados. Una polémica que no termina", in A. Calvo Caravaca and J. Carrascosa González, (Dirs), *Protección de Menores y Derecho Internacional Privado*, Granada, Comares, pp. 19-34).

The first reason, the decision of the SC, through its Judgment No. 131/2018, which rejected the appeal lodged by the Roots Foundation against the NC decision No. 236/2016, of June 2, did not take into account any of the motives alleged by the appellant, when changing the decision of another court, on considering that the Protocol of action approved by the Government in 2014 infringes the legal system and which consequently the decision of the NC also infringes. The main aspects to be highlighted are:

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

- The "*error in judging*" route, on considering that the NC decision infringes what is established in substantive and procedural law with regard to the legal framework of Public Administration, on considering the appeal inadmissible, since the contested act as a circular resolution or internal instruction of the Administration, cannot be sustained in view of the true nature of the contested Protocol framework, whose content exceeds the content that is characteristic of them.

- The NC decision infringes Article 24.1 of the EC regarding the right to effective judicial protection in its modality of the right to access jurisdiction.

- The infringement of articles 22.2nd, 25.1st and 35.3rd of the LOEX and 190.1 and 2 of its Regulations since the Protocol Framework approved in the contested resolution is contrary to the aforementioned provisions in several of its sections: sixth paragraph, paragraph a); section one of chapter II; sixth section, paragraphs two and three of Chapter II and the references to this precept contained in the third section; in Chapter V.

- Likewise, it is understood that the NC decision is contrary to article 12 of the UN Convention on the Rights of the Child, of November 20, 1989 and to articles 9.1 and 10 of the LOPJM, since it omits the regulation to guarantee the right to be heard and the provision of legal assistance to the minor when undergoing tests for the determination of age and does not contemplate the mandatory nature of the minor's consent for the performance of said tests.

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

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

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

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

Subjects covered by the Protocol will be: 1) a foreigner under the age of eighteen who is a national of a State to which the European Union regime does not apply and who arrives in Spanish territory unaccompanied by a responsible adult, either legally or in accordance with custom, where risk of the minor's vulnerability is appreciated; 2) any foreign minor who once in Spain is in this situation; 3) also, foreign minors who are at risk because they have entered clandestinely or surreptitiously in national territory or intend to cross Spanish border posts accompanied by an adult who, appearing to be their parent, relative or guardian of the child, does not provide accurate or reliable documentation of the alleged relationship, and in addition an objective danger is appreciated for the comprehensive protection of the minor; 4) foreign minors who are in a situation of patent abandonment or lack of protection, because they suffer the risk of being subjected to human trafficking networks; 5) those foreign minors who are found as stowaways aboard a ship, ship or aircraft that is in a Spanish port or airport; 6) UASC that would have been located by the Police or Security Forces on the commission of a criminal act of which they could be charged under Organic Law 5/2000, of January 12, regulating the criminal responsibility of minors (Second section of the Chapter of the text of the Protocol, Resolution of October 13, 2014, of the Undersecretariat, which publishes the Agreement for the approval of the Framework Protocol on certain actions in relation to Unaccompanied Foreign Minors ,*BOE* Nº 251, 16 October 2014).

In relation to the procedure for determining age, an issue that is the object of criticism, two assumptions can be distinguished: a) when the minority of the minor is unquestioned, in which case they are identified, registered and assigned to the corresponding reception and guardianship services of the Administration, and b) doubtful cases, in this case the status of an undocumented minor also includes minors with documentation from their countries of origin, with passports and birth certificates issued by their corresponding embassies and

consulates, those that lack legal value for determining the age of UASC; and at the same time there is a lack of guarantees in the procedure for determining age as the Protocol infringes the right to be heard and providing compulsory legal assistance.

Particularly striking is the unappealable nature of the Decrees of the Prosecutor that determine the majority or minority of these children, and that the document supports the systematic medical tests for determining age, that have so often have been criticized by the Ombudsman, who has ruled against the application of the tests for determining the age in the case of UASC, due to their inappropriate nature and the legal uncertainty arising from the results (Informe de Defensor del Pueblo de España ¿Menores o adultos? Procedimientos para la determinación de la edad, Available at https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2011-09-Menores-o-Adultos-Procedimientos-para-la-determinaci%C3%B3n-de-la-edad1.pdf, consulted on 10/01/20).

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

Regarding the performance of medical tests, the Roots Foundation has been denouncing - as we noted above - that in accordance with the procedure that supports the Protocol under appeal, the Prosecutor's Office systematically submits all unaccompanied foreign minors to intrusive and degrading age tests (such as stripping naked for the exploration of their genitals or carpal x-rays), whose results are highly questioned for their inaccuracy by the scientific community, while not recognizing the validity to the documentation of their countries of origin, which not only goes against the pronouncements of the Spanish Ombudsman, but also against the jurisprudence of the SC in this regard (Complaints collected in http://www.fundacionraices.org/?p=2754, consulted on 10/01/20).

The SC prohibits performing tests to determine the age of minor immigrants with a valid passport whose situation in Spain is irregular, as discussed below. In this sense, the judgments of the SC of 2014 resolve the cases of a citizen of Conakry, Guinea and a citizen of Ghana respectively, who despite having passports issued in their countries of origin, accrediting their date of birth and minority, were declared of legal age after undergoing medical tests and ceased to be supervised by the services of the corresponding regional administrations (Provincial Council of Alava and Autonomous Government of Catalonia, respectively).

In both cases, the SC provided that they should remain under the protection that the law provides to UASC, marking a clear doctrine: *"the immigrant whose passport or equivalent identity card shows his minority cannot be considered an undocumented foreigner to be subjected to complementary tests to determine his age, since it is not possible to question without a reasonable justification why such tests are performed when a valid passport is held"*. Therefore, the Civil Chamber establishes that when the foreigner is a minor according to the passport, he must avail himself of the child protection services without having to carry out the tests because he is documented. In cases where the reliability of the document is doubted, it provides that the courts will have to make a proportionality judgment on the reasons why the document is considered unreliable and that therefore the tests must be carried out, without forgetting that any doubt based on physical appearance must be resolved in favor of the child.

Furthermore, the SC reminds us that "whether they are documented or undocumented people, medical techniques, especially if they are invasive, cannot be applied indiscriminately for the determination of age. The Chamber recalls that "an unaccompanied minor is first and foremost a child exposed to a potential danger" and that the protection of children must be the guiding principle of the EU Member States regarding immigration policies" (Press release drawn up by the CGPJ Communication Service, published on October 15, 2014 and available at http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-TS-confirma-la-prohibicion-de-someter-a-pruebas-de-edad-a-inmigrantes-menores-con-pasaporte, consulted on 19/01/20).

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

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

Another of the shortcomings identified refers to border returns (hot returns) contemplated in Organic Law 4/2015, of March 30, on the protection of public safety (*BOE* Nº. 77, 31 March 2015), by which authorities can repatriate/expel - in a short period of time and with hardly any processing - those foreigners who irregularly access Spain. Daily we see in the news the police raids on the border with Ceuta and Melilla to detect UASC who hide in trucks and other means of transport.

These Observations, addressed with concern to the Spanish State, have resulted in the Office of the State Prosecutor through the Immigration Unit, issuing the "Internal Note No. 2 of 2018, on the follow-up of the review files of the decrees determining the age of undocumented aliens whose minority cannot be established with certainty". This document (public access through www.fiscalia.es) is the framework from which the concerns expressed by the high international organization, regarding the exclusive competence of the prosecution in this matter are challenged. Considering that this concern "seems to pick up a prejudice seated in a sector of Spanish society", according to which this institution acts following the orders of the Government on which it depends, in such a way that any of the decisions of prosecutors in immigration matters - as is the application of article 35 LOEX (This article has a two-fold spectrum of incidence: administrative and civil. This double aspect assumes that if the determination of the age implies that the subject is a minor, the scope will be civil, under the appropriate protection regime. Whereas if the result determines age of majority, it implies a priori the application of the foreigner sanction regime for irregular stay, which can lead to an expulsion order from Spanish territory)- would be conditioned by the need to protect the immigration policy defined by the Spanish executive.

For the Spanish Prosecutor's Office, this vision is "patently wrong, regardless of the fact that it is unfounded to assume that the Government's immigration policy is contradictory to the safeguarding of the best interests of the child, since it is true that the Spanish Prosecution Service neither receives nor can receive orders from the Government in any area of its activity. On the contrary, the Prosecution Service is only bound to strict compliance with the law in accordance with the provisions of article 124 of the Spanish Constitution and the Organic Statute of the Prosecution Service" (Available at https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/NOTA%20INTERNA%20NUM%202%20SEGUIMIENTO%20MENAS?idFile=0e9d5d93-d8df-4426-ab3a-51fcfd202df7, p. 1,consulted on 28/01/20).

However, this document clarifies that "*in relation to this issue, it is clear that from our Unit no initiative can be taken to alleviate this feeling of distrust. Given the terms of the Committee's Observation, its only recipients are the powers of the State that have the capacity to promote the suggested legislative changes*", thus it is quite clear to whom this responsibility corresponds: the State.

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

With regard to medical tests, section 6 of the Note refers to them, recalling that Articles 35.3 LOEX and 48.2 of the Asylum Law impose on the "appropriate health institutions" the duty of collaboration with the Public Prosecution Service in its role in determining the age of undocumented foreigners, whose minority cannot be established reliably. In this sense, it is evident that "it is not possible for the Public Prosecutor to impose on a doctor belonging to the appropriate health institutions, what tests need to be carried out, what assessment methods to use or what the content of the opinion should be. The desideratum is that doctors comply with, as stated in the UASC Framework Protocol following the instructions of the Ombudsman, the Recommendatios on methods of estimating the age of unaccompanied foreign minors (Document of good practices among Forensic Medicine institutes, 2010)" (See Internal Note No. 2/2018, cited above, Regarding the follow-up of the review files of the decrees determining the age of undocumented foreigners whose minority cannot be established with reliability, p. 11. There are difficulties in recognizing minors as such, since the fact that they are immigrants prevails; thus, nationality is put before age and this is, in part, the consequence that before the slightest doubt one tries to set the age of majority. Both forensic specialists, in their Document of Good Practices between the Institutes of Forensic Medicine in Spain and the Ombudsman have expressed their concern about the excessive exposure of minors to ionizing radiation for forensic purposes only, without prior verification of the data of the Central Registry of Undocumented Minors and without proceeding with a cross-check of data from both the State Security Bodies and health institutions).

It is advisable to analyze a rule of law that, although it is not specifically aimed at minors, serves to support the criticism we have regarding the age determination procedure. This is Act 41/2002, of November 14, a basic regulator of patient autonomy and the rights and obligations regarding information and clinical documentation (*BOE* Nº 274, 15 November 2002), whose article 2 recognizes the regard to the dignity of the human person as a basic principle - without distinguishing at any time about age, nationality, race, etc. and at the same time, it recognizes a series of fundamental rights, such as autonomy, information, the right to privacy, which must be guaranteed in the field of health.

As a means of respecting the patient's autonomy, this Act highlights the free and voluntary consent of the patient, in articles 8 and 9, which includes minors, recognizing their right to that effect. So when carrying out medical tests to determine their age, these minors must give their consent under article 9.4 if they are 16 years of age or older, which is precisely the age group that generates most doubts regarding minority. Likewise, it is a requirement of article 12.4 of the LOPJM, meaning that prior informed consent is mandatory for the tests to be carried out on the child, ensuring respect for their dignity and without at any time entailing a risk to their health (Peláez Fernández, cited above, pp. 59-60).

Regardless of the agility governing the procedure for determining age, the right that every person has to be heard cannot be ignored, in these cases the presumed minor. However, investigations carried out by the Ombudsman show that the individuals concerned are not informed by the police services about the start of the procedure, its scope nor the nature of the tests to which they will be subjected. Nor is it clear that at this time the consent of the individuals concerned is sought, in all cases, for the performance of these tests. As La Font Nicuesa points out, the most conflictive issue regarding the files on age determination in doubtful cases is how to resolve the contradiction between the date of birth contained in a document that is inconsistent with the result of other tests carried out, undoubtedly a controversial issue (La Font Nicuesa, L. (2018) *La determinación de la edad del presunto menor extranjero. Pasaporte contra pruebas médicas. Aspectos civiles, penales y contencioso administrativos.* (Valencia, Tirant Lo Blanch, p.29).

3.4. The role of the European Union.

In the community context, the objective has been to manage the migration phenomenon through the cooperation between the Member States, hence it remains a cyclical problem, since it is they who still have the competence to manage and control the migratory flows within their territories, according to their internal regulations. However, it is necessary to take into account that both the original Law, and the Law derived from the EU include rules, of a different scope, that regulate aspects related to the protection of minors, based on the Charter of Fundamental Rights of the European Union , which in its article 24.2 consolidates the "best interests of the child", as a basic principle that should guide the Member States in their actions regarding children in Europe (It is very interesting, for the current and complete content, the analysis performed by Velasco Retamosa, J. (2018)"La protección de menores extranjeros en la Unión Europea: situación actual y desafíos de futuro", en J.M. Velasco Retamosa (Dir.), *Menores extranjeros: problemas actuales y retos jurídicos*, (Valencia, Tirant lo Blanch, pp.85-113. Also, the article published by De Bartolomé Cenzano, J. (2015) "Nuevos desafíos para la determinación de la edad de los menores no acompañados (un estudio a la luz de los estándares nacionales e internacionales de protección de derechos fundamentales, *REDF*,No. 26., pp.79-109).

In secondary law, several rules of private international law give an account of the interest shown by Community institutions regarding key issues in the life of minors in the family sphere, so we have several Community regulations that regulate aspects related to parental responsibility, food , international abduction, among others, which is especially highlighted in Regulation 2201/2003 (EC Regulation 2201/2003, *DOCE* of 23 December, 2003) whose focus is on the intended unification of Family Law in the EU. In addition, we must take into account the set of Directives aimed at harmonizing state standards for the eradication of violence against minors, as well as to favor access to agile procedures in the area of asylum and international protection. And finally, the European Convention on the Rights of the Child (*DOCE* Nº C 241, 21 September, 1992), that despite its non-binding nature, expressly recognizes that the minority must be understood as a decisive moment in the life of any person, with the States being obliged to guarantee and defend the rights of minors under any circumstances.

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

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

For the recognition of foreigners´ rights acknowledged by the Spanish legal system, age is the criterion that determines the legal regime to be applied to qualify the legal status of the subject depending on whether he is a minor or an adult. The correct identification of minors will be relevant for civil purposes: a minor - who will be so according to his personal law, but not in accordance with Spanish civil law - will be entitled to reception and protection appropriate to taking the best interests of the minor into account, and even, to attempt their repatriation and / or return to family members in their country of origin. The condition of a minor as a situation of special vulnerability is reflected in the regulation that our system tries to reinforce with the creation of numerous institutions that ensure the integral development of the minor as a subject in need of protection of special intensity, as Peláez Fernández rightly points out (Peláez Fernández, P. *cited above*., p. 60).

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

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

Conclusions

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

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

Second: On the one hand, we have the immediate action of the Prosecutor's Office, covered by a Protocol of Action, which, having no regulatory status, guides the intervention of the Public Prosecutor to determine the age of minors, with the case is being investigated whose Decree the UASC becomes aware of when he is notified, while it is subject to inquiries, being reviewed by the Prosecutor's Office itself in case of discrepancy. And, on the other hand, we see that although the doctrine of the SC is clear regarding the probative value of foreign documents on the accreditation of age and establishing the age of minority of children and adolescents arriving in Spain, practice contradicts this doctrine: they are continuously unobserved and the age determination is systematically carried out through medical tests.

Third: Although we have legal norms of a civil nature, of an administrative nature (Immigration Law) and public international law, among others, that commit the Spanish State to the protection of minors at high levels, there is a lack of consistency in the actions to determine their age: preference is often given to the age of majority over minority, with the subsequent legal consequences. The most important of these when considering an individual as an adult, is to proceed to his internment in a facility designed for adults and the real possibility that he will end up being expelled, if not before it was the occasion of a "hot return", with hardly any real opportunity to present arguments in favor of protection.

Fourth: If we look towards the EU, we can see that, today, we do not have nor will we have an institutional regulation specifically applicable by the Member States, on a mandatory and consistent basis, that ensures the rights of UASC; who are, without a doubt, one of the most vulnerable parts of the migratory phenomenon, insofar as minority is an added element to the subject's immigration status, as well as the situation of helplessness in which they find themselves. Unfortunately, the issue over the legal status of UASC is a growing topic of controversy each day.

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