

**SEARCHING FOR BEST INTERESTS OF UNACCOMPANIED CHILDREN. A COMPARATIVE  
STUDY: UNITED KINGDOM AND FRANCE**

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## **ABSTRACT**

Since the refugee crisis in 2015, thousands of children have come to the Europe alone and in need of asylum. It is an enormous task to project an accurate figure for the number of unaccompanied children seeking asylum as the numbers are not quite consistent. There is no real data despite the existence of several monitoring systems that are presently in place. Many unaccompanied children have disappeared whilst navigating their way across various geographic terrains as they flee persecution in their country of origin, predominantly as a result of conflict. Resultantly, some cross borders in search of their parents, while others become victims of child trafficking.

This study centres on a comparative analysis of the rights of UMs in the United Kingdom(UK) and France and is done via the vantage point of migration and asylum processes. The study contributes to the discussion regarding the compliance of states on the primary consideration for the best interests of the child, presenting a prescriptive view in reviewing the application of the CRC and the EU acquis. This is carefully done taking into account the asylum laws and procedures of the State and the EU into account. This study, while analysing the implementation of the best interests of the child, tries to understand in whose best interests are policies and laws are created - the state or the child. The thesis concludes with the summation of reasons of noncompliance with the CRC recommendations, and the infringement of the principle rights of the child during age assessment procedures. It also acknowledges increasing disobedience by the UK in comparison to France due to the current and changing political situation, specifically Brexit and the impact it has had on the policies regarding unaccompanied children in the UK.

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## **LIST OF ABBREVIATIONS**

|      |                                       |
|------|---------------------------------------|
| BIA  | Best interest assessment              |
| BID  | Best interest determination           |
| CEAS | Common European Asylum System         |
| CRC  | Convention on the Rights of the Child |
| DR   | Dublin Regulation                     |
| EASO | European Asylum Support Office        |
| QD   | Qualification Directive               |
| RCD  | Reception Conditions Directive        |
| UMs  | Unaccompanied minors                  |

## TERMINOLOGY

It is important to clarify the definitions that are pertinent to the study, as unaccompanied children are defined under various legal instruments.<sup>1</sup>

Unaccompanied children- They are ‘third-country nationals or stateless persons below the age of 18’.<sup>2</sup> They are outside the territory of their country of origin for various reasons.<sup>3</sup> They could be stateless and seeking asylum after having crossed international borders. They are on their own and entirely separated from their parents, guardians, or caretakers.

Unaccompanied minors- Term employed by states in their national legislation.

Best interests of the child- Consideration given to the primary interests of the child under international law, national law, and EU law. In this study, it primarily concerns children that are outside their country of origin and in the EU.

<sup>1</sup> Article 1A of the 1951 United Nations Convention Relating to the Status of Refugees defines refugees as those that are in need of international protection, and are in well-founded fear of persecution.

UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189. P 137. Article 1A(2)

<sup>2</sup> Article 2(i) (2004/83/EC) Council 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 .

<sup>3</sup> Article 2(k) (2004/83/EC)

Council 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 .

## INTRODUCTION

This chapter introduces the general theme of this study, and the objectives it seeks to accomplish.

### Objectives and Background to the Study

This study utilizes the data on the treatment of UMs seeking asylum in the EU following the 2015 refugee crisis.<sup>4</sup> The study recognises the additional complications spawning from the COVID-19 pandemic, which has increased the risks facing the lives and security of unaccompanied minor migrants at risk.<sup>6</sup> Since the advent of the crisis surrounding refugees, things have not improved; instead there are new challenges confronting these children.<sup>7</sup>

The reasoning behind comparing the UK and France is twofold. First, both of these states are currently EU member states,<sup>8</sup> it enables this study to inform of the accountability arising from the *jus cogens* principles from an EU perspective in reference to the UMs.<sup>9</sup> Second, Brexit, the UK's withdrawal from the EU, although is still in its transitory phase, has already had repercussions on the fate of the unaccompanied children. The draft of the Brexit bill sought an arrangement between the government and EU over the continuance of reuniting these children

<sup>4</sup>The study focuses on children below the age of 18 who are third country nationals, and therefore not EU citizen  
<sup>5</sup>90,000 UMs applied for asylum in 2015, after refugee crisis. Eurostat report 2016. In 2018 almost 20,000 minors were registered in the EU, according to the Eurostat 2019 report

<sup>6</sup> Helena Smith, 'Finally, At Last': Vulnerable Migrants To Leave Greece For UK' (the Guardian, 2020)  
<<https://www.theguardian.com/global-development/2020/may/11/finally-at-last-vulnerable-migrants-to-leave-greece-for-uk>> accessed 5 June 2020

<sup>7</sup> 'European Countries Must Act Urgently To Help Unaccompanied Children In Greek Refugee Camps - World' (Relief Web, 2020) <<https://reliefweb.int/report/world/european-countries-must-act-urgently-help-unaccompanied-children-greek-refugee-camps>> accessed 5 June 2020

<sup>8</sup> The UK left the EU on January 31, 2020. There is a transitory period of eleven months, where the EU's laws and rules are still applicable to the UK

<sup>9</sup> Most of these children come from Sudan, Algeria, Afghanistan, Pakistan, Bangladesh, Ivory Coast, Gambia, Mali, Senegal, Sierra Leone, Cameroon



with relatives in the UK.<sup>10</sup> Due to the alterations made by Prime Minister Boris Johnson, the family reunification provision is unclear and would now only require the present government to issue a statement concerning the unaccompanied children after Brexit.<sup>11</sup> This move was opposed by the Labour party who sought an amendment to the bill and which was later overturned.<sup>12</sup> This disregard from any accountability presented the tell-tale signs of the degrading rights of the unaccompanied children in the UK. This study discusses the laws the UK is bound by currently, and its performance in abiding by considerations for the best interests of the child. France another EU member State, is under an obligation to abide by the peremptory norms of international law as well as the EU. Although France accepts UMs, the number of accepted applicants is quite meagre when compared to the number of children that file asylum applications, and are recognised as unaccompanied children.<sup>13</sup> The stringent asylum laws, policies, and the French bureaucracy in general, is quite complicated, and arguably remains a system that often dissuades asylum seekers from applying. Those who are recognised as unaccompanied children are treated relatively well in terms of the care received. The study analyses the general reception towards unaccompanied asylum seekers, assessment of their application, accommodation and the procedures involved. It also addresses the absence of any solemn, orderly, or legal apparatus, or policy, to determine the best interests of the child in the UK and France.

<sup>10</sup> 'European Countries Must Act Urgently To Help Unaccompanied Children In Greek Refugee Camps - World' (*ReliefWeb*, 2020) <<https://reliefweb.int/report/world/european-countries-must-act-urgently-help-unaccompanied-children-greek-refugee-camps>> accessed 5 June 2020.

<sup>11</sup> 'Boris Johnson Branded 'Inhumane' After Dropping Protections For Child Refugees From The Brexit Bill' (Business Insider, 2020) <<https://www.businessinsider.com/boris-johnsons-government-drops-protections-for-child-refugees-2020-1>> accessed 5 June 2020.

<sup>12</sup> Dubs-amendment demanded reassurance that after Brexit UMs would be able to join family in the UK. 'Government Defeated By Peers Over Child Refugees' (BBC News, 2020) <<https://www.bbc.com/news/uk-politics-51194109>> accessed 5 June 2020.

<sup>13</sup> 40,000 young people arrived in France in 2018. Only 17,000 received asylum, recognition as UMs, and could access welfare. Source: French Ministry of Justice – Unaccompanied Minors Department 'Dpmie - France Terre D'asile' (France-terre-asile.org, 2020) <<https://www.france-terre-asile.org/refugies-col-280/dpmie>> accessed 5 June 2020.

The study presents various arguments, inclusive of the critical understanding of the CRC,<sup>14</sup> based on the parameters of what constitutes the best interests of the child and the compliance of states with the CRC in their asylum procedures, and other reception conditions.

While the topic of unaccompanied asylum seekers has benefitted from intense scrutiny from several children's rights advocates and researchers. Few researchers have delved on the relationship between the application of peremptory norms of international law and the European political situation regarding the issue of migrants when explaining the treatment of UMs in the EU. The study broadens on the existing argument presented by Barbara Gornik regarding the political nature of the CRC and limitations it presents in providing children with autonomy in making choices for their well-being.<sup>15</sup> This aids in understanding the application of the CRC while taking the political situation in the UK and France into consideration. The study takes notes of the practice of states in taking views of the child under consideration which is stipulated under Article 12 of the CRC.<sup>16</sup> This is illustrated in Chapter 3, when asylum officers do not take child's views into consideration when assessing the child for the determination of his age, and pronouncing him as a minor. This is one of the few examples in the thesis that proves the failure of the states to adequately implement the CRC.

<sup>14</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Available on line at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 5 June 2020)

<sup>15</sup> Barbara Gornik, 'At The Crossroads Of Power Relations The Convention On The Rights Of The Child And Unaccompanied Minor Migrants', in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied Children in European Migration and Asylum Practices* (2017) 17-21

<sup>16</sup> 'The views expressed by children may add relevant perspectives and experience and should be considered in decision making, policymaking and preparation of laws and or measures as well as their evaluation'. Article 12 CRC Committee on the Rights of the Child (2005): General Comment no 12 on the The right of the child to be heard, CRC/C/GC/2009/12 of 1 July 2009

Departing from the CRC, the study looks at the EU instruments that focus on the best interests of the child principles. As the Common European Asylum System (CEAS)<sup>17</sup> moved to the second phase whilst recasting the instruments pertinent to determining the best interests of the child, it is important to note the second phase includes more reformed rights pertinent to the protection of the child. Ciara Smith raises the question of whether the CEAS has provisions that are age-bound, and if they necessarily protect the UMs.<sup>18</sup> This is a reflection from the part about the CRC, that even though provisions regarding the protection of the unaccompanied child exist, the incapacitation of these states puts into serious question on the drafting, relevance, authority, and effectiveness of these provisions. This is demonstrated in the third and fourth chapters, which looks at some of the individual practices of the relevant states in complying with the best interests of the child.

The paper also considers other scholarly opinions; for example, Jyothi Kanics' critical assessment of the CRC is of imminent importance to this study.<sup>19</sup> The assessment practices in the UK and France are supported by the critical analyses of Corentin Bailluel and Marie Benedicte Dembour, and the facts are supported by the comparative analysis in the project 'In Whose Best Interests? Exploring Unaccompanied Minors' Rights through the Lens of Migration and Asylum Processes'.<sup>20,21,22</sup>

<sup>17</sup> 'Migration And Home Affairs' (*Migration and Home Affairs - European Commission*, 2020) <[https://ec.europa.eu/home-affairs/index\\_en](https://ec.europa.eu/home-affairs/index_en)> accessed 5 June 2020.

<sup>18</sup> Ciara Smyth, *European Asylum Law And The Rights Of The Child* (Routledge 2016) 14

<sup>19</sup> Jyothi Kanics, 'The best interests of unaccompanied and separated children: a normative framework based on the Convention on the rights of the Child', in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied Children in European Migration and Asylum Practices* (2017) 16-30

<sup>20</sup> Corentin Bailluel, 'Coping strategies of UMs lacking protection within the French context: the key role of political and civil society mobilisation', in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied Children in European Migration and Asylum Practices* (2017) 134-138

<sup>21</sup> Marie Benedicte Dembour, 'Surely not! Procedurally lawful age assessments in the UK', in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied Children in European Migration and Asylum Practices* (2017) 155-159

<sup>22</sup> Research was based on national reports and carried out in Slovenia, Austria, the UK and France in 2014 and 2015, and was co-funded by the PPUAM 2013 of the EU.

The research question, therefore, focuses on investigating how do France and the UK governed by the CRC and the EU acquis oblige with the principle of the best interests of the child for UMs seeking asylum. The arguments presented here validate the rights- based approach of the CRC, but at the same time, presents a failure of these states in granting equal protection to UMs seeking asylum because of their citizenship status.

### **Structure of the thesis**

The object of the study is unaccompanied children and adolescents below the age of 18 who are asylum seekers. The study is divided into four chapters. Chapter 1 provides an introduction to the rights of the child in the CRC, a basic criticism of its effectiveness. It also gives an insight into the relevant EU legal instruments pertinent to the rights of the unaccompanied children. The latter part of the chapter is a discussion on . Chapter 2, gives a preliminary understanding of national in the two case study states relevant to UMs.

The thesis further elucidates this in Chapters 3 and 4, through application of the CRC and its limitations in the case study states , and relocates it in the discourse amidst the political situations in the UK and France while analyzing the age assessment procedures and reception conditions involving accommodation. The conclusion summarizes the main arguments presented in the thesis, and succinctly summarises the findings and provides an answer to the research question.

## Chapter 1

### INTERNATIONAL and EUROPEAN FRAMEWORK

This chapter briefly introduces the international law and the EU law instruments pertaining to the thesis.

International law stipulates the best interests of the child, but it is up to states and the governments to construe and interpret the best interests of the child in their own national legislation. This includes making space for the application of the principle amidst their asylum and migration system, welfare system, and laws. The thesis focuses on the two states - the UK and France, and their state obligations in the protection of the UMs. Children seeking asylum are divided into two categories. The ones that are accompanied by their guardian, parents or carers; and the children that have had taken the journey by themselves. This study specifically deals with UMs.<sup>23</sup> Children below the age of eighteen who are migrants and, thus non-EU citizens.<sup>24</sup> In 2017, the European Migration Network recorded 31,975 applications by UMs.<sup>25</sup>

#### 1.1. International legal instruments

The best interests of the child principle forms an important part of international law and the EU acquis. Under Article 3(1) CRC 1989, it is mentioned as a right, principle, and a rule of procedure. <sup>26</sup> It forms an important caveat of rights that a child is entitled to under international

<sup>23</sup> The thesis specifically looks at unaccompanied. It does not look at minors from EEA states.

<sup>24</sup> The Charter of Fundamental Rights of the European Union per Article 24(2) defines UMs as “a third-country national or stateless person below the age of 18 years, who arrives on the territory of the States unaccompanied after they have entered the territory of the States”.

<sup>25</sup> Approaches To Unaccompanied Minors Following Status Determination In EU Plus Norway’ (2020) European Migration Network Inform 2020

<sup>26</sup> Article 3 refers to the ‘best interests of the child’ principle. *‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.*

and EU laws.<sup>27</sup> These rights range from education to family reunification, healthcare, to best reception assessment.

The CRC's mention of the best interests principle under Article 3 is significant not only because primary consideration to the child's rights is mentioned, but also because the Convention reiterates that all children are deserving of sufficient safety and security regardless of their immigration status. The Convention does not separately address the rights of migrant children, as the rights stipulated under Article 3 are for all children regardless of their status<sup>28</sup>.

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>29</sup>

While implementing the best interests principle in their asylum procedures, states must be mindful of the individual needs of each child applicant and, at the same time, ensure that their systems have safeguards in place for the implementation of rights under the BIC principle.

General Comment 14:

On 29 May 2013, the CRC issued the General Comment 14.<sup>30</sup> This was in direct reference to Article 3(1) of the CRC and asserts that the interests of the child should be of primary concern when dealing with the child's matters administratively, judicially, or any other operation regarding the welfare of the child concerned. The rights of the child are defined as a ternary notion: first, as an absolute claim which gives the best interests of the child prime deliberation;

<sup>27</sup>Barbara Gornik Mateja Sedmak, and Birgit Sauer, 'Introduction – Unaccompanied minor migrants in Europe: between compassion and repression', in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds) *Unaccompanied Children in European Migration and Asylum Practices* (2017) 1-15

<sup>28</sup>Fabrice Langrognet, 'The Best Interests of the Child in French Deportation Case Law', (2018) 18 HRLR 567

<sup>29</sup>Article 3(1) of the CRC.

<sup>30</sup>Committee on the Rights of the Child (2005): General Comment no 14 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/14 of the 29<sup>th</sup> May 2013.

second, as a legitimate or legal rule; third, as a decree of conduct in terms of making the best possible decisions for the concerned child.

#### General Comment 6:

General Comment 6 (2005) navigates the application of the best interests of the child when unaccompanied outside their native country. It relies on the general aim of the CRC, which is to protect the rights of the children focusing on the rights of unaccompanied children. It puts focus on the best interests of the child, his or her right to an opinion, and non-discrimination in attaining rights.<sup>31</sup> General Comment 6 explains scenarios for the child to be unaccompanied such as separation from parents, fleeing conflict, or victim of child trafficking. It also focuses on the mistreatment of these vulnerable children during the process of asylum assessment and the bigotry they might face when trying to access healthcare, housing, or education, among other services.

The application of provisions provided in General Comment 6 provides for legal obligations for states with respect to the applicability of the Convention in their treatment of unaccompanied children and can be divided into four sections: positive obligation of the state in the identification of children, non-discrimination by state authorities in the application of the children's rights, best interests of the child, and the asylum and protection needs.

## **1.2. EU Legal Instruments**

The provisions of EU Law that are applicable to UMs are categorised under various headings and qualified under directives. This would imply that the states hold a prerogative in choosing

<sup>31</sup>Committee on the Rights of the Child (2005): General Comment no .6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 of the 1st September 2005.

how to implement the conditions set out in the directive. The relevant directives concerning the best interests of the child principle are the Asylum Procedures Directive (2013/32/EU), the Reception Conditions Directive (2013/33/EU), the Qualification Directive (Article 31(3)), Family Reunification Directive(2003/86/EC) Return Directive (2008/115/EU).<sup>32,33,34,35, 36</sup>

These directives form the guidelines on how member states are supposed to deal with UMs seeking asylum. This ranges from the entire process to the provision of welfare services, from housing arrangements to the identification of victims of trafficking.<sup>37</sup>

Unaccompanied minors are also granted subsidiary protection under the Qualification Directive if they are unable to prove a well-founded fear of persecution. Under Article 2(f) of this directive states, ‘Substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm...’.<sup>38</sup>

<sup>32</sup> Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

This directive encourages member states to make fair decision ,and taking the best interest of the child into consideration when making a decision on the minor child’s asylum application.

<sup>33</sup>Article 23 of the Reception Conditions Directive 2013/33/EC of 26 June 2013

This Directive guides the states in offering adequate accommodation, education, health care facilities for the unaccompanied children. It also sets guidelines for acceptable detention conditions, and helping children trace their families. Article 23 of this directive lays out the guidelines for assessing the best interest of the child. This directive provides very specific guidelines regarding accommodation facilities for the minors under Article 24: “Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed:

- (a) with adult relatives;
- (b) with a foster family;
- (c) in accommodation centres with special provisions for minors;
- (d) in other accommodation suitable for minors.”

<sup>34</sup>The Council 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 (the Qualification Directive)

<sup>35</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification This directive establishes the right of non-EU citizens to be reunited with their families in the EU. This directive takes the best interests of the child principle into consideration

<sup>36</sup>Article 10 of the Return Directive makes an exception to consider the best interests of the child before returning them to their state of origin.

<sup>37</sup>Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

<sup>38</sup> Article 2(f) of The Council 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



Article 24 on the *Charter on the Fundamental Rights of the EU* highlights the importance of taking into consideration the views of the child. It also stipulates that the states should consider the child's best interests when deciding on the his or her asylum application, education, accommodation, and other decisions with regards to the child's well-being.<sup>39</sup>

The best interests of the child principle is mentioned in these directives under various pretexts. They provide states with a procedural framework for assessing the best interests of the child. They also provide member states with guidance regarding housing, education, healthcare, family reunification, security conditions, and taking the child's views into consideration. Furthermore, states are expected to take the best interests of the child into primary consideration, when following all the mentioned directives.

Another instrument used to asserts the best interests of the child is the Dublin Regulation (604/2013/EU).<sup>40</sup> This law determines which EU state is responsible for investigating applications for people seeking asylum in the EU. The Dublin Regulation has contains certain provisions that are directly applicable to UMs. The law stipulates that it should be noted if the minor has any family in any other member state before determining where the application should be processed.<sup>41</sup> The Dublin Regulation also asks states to take into consideration certain factors when determining the best interests of the child. These include considering the chances of family reunification for the child, taking into deliberation the views of the child, considering

<sup>39</sup> Charter of Fundamental Rights of the European Union 2012/C 326/02. All of the EU-member states have ratified the Charter on the Fundamental Rights of the EU

<sup>40</sup> Regulation (EU) No 604/2013 of the parliament and of the council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

Paragraph 13 : '...the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor...'

<sup>41</sup> Article 8 of the Dublin Regulation: 'Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.'

the safety and security and welfare of the child<sup>42</sup>. Ciara Smith illustrates that the Dublin Regulation does not provide specific assurances regarding UMs.<sup>43</sup> It only specifies which state has the responsibility to process the asylum application of the unaccompanied minor and makes no mention of considering the best interests of the child.

As mentioned in the introduction, the second phase of the CEAS provides more focus on the child's rights, a significant development in the CEAS. However, the second phase of the CEAS is not necessarily a reflection of the advancement of the child's rights, unless it is ardently followed by EU member states. Smith makes an important assessment, which is quite relevant to the substance of the thesis, to identify the capacity of these rights in general and against the backdrop of asylum law and the practices of the mentioned states. This is a move forward from the myopic vision of simply analyzing the provisions of the CRC. It is revealing as Smith asserts that it is only EU member states, and not the EU itself, that are party to the CRC. EU states can use this legal loophole while presenting their periodic report to the CRC committee, and state that they cannot entertain any complaints because they are bound by the EU law above the CRC and are thus not accountable for any CRC violations.<sup>44</sup> Therefore, based on Smith's argument the best interests of the child stipulated under the CEAS are also pertinent to the relevant asylum laws for unaccompanied children seeking asylum, perhaps more than the ones stipulated in the CRC.

<sup>42</sup> Article 6 Dublin Regulation : In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor's well-being and social development;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor, in accordance with his or her age and maturity.

<sup>43</sup> Smyth n(18) 17

<sup>44</sup> Smyth n(18) 44

### 1.3. Preface to the Best Interests of the Child Principle and Best Interests Determination

This section discusses the components of the best interests of the child principle. This is a pre-requisite in understanding its application in the two case study states, as discussed in the following chapters.

The best interests of the child principle is given a primary consideration under the CRC and EU law.<sup>45,46</sup> This means that the best interests of the child is considered as a claim, doctrine, and a policy that is stipulated in the aforementioned laws. The best interests of the child should be given a primary deliberation by the authorities conducting initial assessments, that is before the asylum is granted, and the same should be considered when determining the housing, education, and other needs of the child.

Although BIC is invariably applicable to all states that have ratified the CRC and are part of the EU, its applicability should shoulder the balance between the interests of the UMs and that of the state involved.<sup>47</sup> A number of considerations need to be addressed when assessing the application of BIC principles during the asylum procedures, *inter alia*, determining the location, conditions, and duration of the interview, conducting an age assessment, and choosing an interpreter to help the child during the interview. These are all procedural matters, but trivialization of the sensitiveness with which these matters must be dealt could harm the child psychologically. Carefully assessing the unaccompanied minor's application and handling the child's needs with care is the first step in the BIC pathway. The process branches out further and the number of relevant actors involved increases significantly after the initial assessments is made. The asylum authorities are the first to handle

<sup>45</sup> n (24)

<sup>46</sup> CEAS Article 24 Charter of Fundamental Rights of the EU states that 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.

<sup>47</sup> The UMs are quite susceptible and, therefore are prone to ill-treatment on their way to the asylum-seeking country. They could be victims of human trafficking who were separated from their families in their native country. They could significantly suffer from various mental and psychological issues stemming from the trauma they underwent. Dealing with such children would require a certain amount of knowledge, sensitivity, and expertise.

the application of the unaccompanied minor and conduct assessments with regards to the child's origin, age, migration status, and citizenship. This then paves the way for various legal and procedural outlets.

After the asylum authorities handle the application, other stakeholders, such as lawyers and civil society organisation are engaged to charter the legal route for the child. Social workers make further assessments with regards to the child's mental and physical health, the conditions the child was faced with in their country of origin, specific health or safety risks he or she might be exposed to, or the possibility of the child being a victim of child trafficking.<sup>48</sup> There is a non-exhaustive list of the child's best interests under both the CRC and the EU acquis. This study would specifically focus on the following aspects of BIC and BID – age assessment, status determination, and accommodation offered to unaccompanied children.

'The BIC is a primary consideration that may need to be balanced with the interests of others, including the state'.<sup>49</sup> The obligation of EU states have in the implementation of the CEAS is supported by guides like the European Asylum Support Office (EASO) practical guide on the best interests of the child in asylum procedures, which supports member states in considering best the interests of the child.<sup>50, 51</sup> However, this does not cover the fact that states lack a formal legal framework for placing the best interests of the child in consideration, especially when it comes to UMs. The provisions of the CRC mentioned earlier in the chapter are additional instruments for states to follow in cases of unaccompanied children. Barbara Gornik underscores the importance of these provisions, and the inadequacy of the states in giving primary consideration to the best interests of the child.<sup>52</sup> In response to this, the study illustrates the lack of the implementation of the best interests of the child principle while discussing the

<sup>48</sup> Article 32 and 39 CRC

<sup>49</sup> European Asylum Support Office *EASO practical guide on the best interests of the child in asylum procedures* (2019)<sup>15</sup>

<sup>50</sup> The CEAS has a legal structure which provides guidelines for uniform application of asylum law across the EU

<sup>51</sup> 'Practical Tools European Asylum Support Office' (*Easo.europa.eu*, 2020) <<https://www.easo.europa.eu/practical-tools>> accessed 5 June 2020.

<sup>52</sup> Gornik n(15) 18

asylum assessment processes, and the reception conditions in the two case study states. Gornik traces the incompetency of states to their national interests and the current status quo of the asylum and migration policies in the EU which unequivocally affects UMs seeking asylum. Although its true there is no standard definition of the best interests of the child, there are certain guidelines mandated for the authorities. Provisions in the Universal Declaration of Human Rights provide the definitive credentials and security prerequisites for the administrative authority on which to base their decision on regarding the best interests of the child.<sup>53</sup> Despite whatever the prerequisites or requirements exist for the application, and the security, psychological and physical health of the child is of primary consideration. This rights-based approach is essential and indispensable, but as the study presents, UMs seeking asylum are devoid of rights until the state acknowledges them. Although the mentioned states have ratified to CRC, they are hesitant in following the principle of non-discrimination, and, as Gornik confirms, this ‘irregularity of resident status’ has far-reaching consequences and contributes to the discrimination that unaccompanied children face.<sup>54</sup> They have limited access to basic children’s rights, and the conduct of the state in the provision of education, employment, accommodation, is significantly different from the resident children.<sup>55</sup> This is attributed to the fact that these children are treated as migrants first and then as minors.<sup>56</sup> Gornik attributes the inability of states to apply children’s rights effectively can be attributed to the current political situation in Europe.<sup>57</sup> The study uses a similar argument when referring to the asylum policies in France and the UK, and their dissension from adopting the CRC effectively.

<sup>53</sup> UNHCR- United Nations High Commissioner for Refugees (2008): *UNHCR Guidelines on determining the best interest of the child*, 80

<sup>54</sup> Gornik n(15)10

<sup>55</sup> Jacqueline Bhabha, ‘Seeking Asylum Alone: Treatment Of Separated And Trafficked Children In Need Of Refugee Protection’ (2004) 42 International Migration

<sup>56</sup> Gornik n(52) 16

<sup>57</sup> ‘Is Europe Responsible For The Refugee Crisis?’ (*Eyes on Europe*, 2020) <<https://www.eyes-on-europe.eu/the-eu-and-the-actual-refugees-situation/>> accessed 5 June 2020.

Gornik locates the emergence and application of the CRC within the European moral imperialism. The study disagrees with the relevance of the emergence of the CRC with the inability of the EU states to grant protection without discrimination to UMs seeking asylum. However, this argument could, however, be effective in debating the temporary status that states like the UK offer to the minors, where they are supported only while they are minors, and not offered the protection and the prospect of a secure life that the Convention seemingly promises.

### *Chapter Summary*

This chapter provided an understanding of the international and EU instruments involved and used by the two case study states in the protection of UMs. The implementation of these legal instruments by the UK and France within their domestic policies concerning the best interests of the child is discussed in the next chapter. A trajectory will be drawn to illustrate the application of the best interests of the child principle of these two states when conducting assessments and when making reception conditions for unaccompanied children.

## Chapter 2

### PRELIMINARY UNDERSTANDING OF NATIONAL LEGISLATION SURROUNDING UNACCOMPANIED MINORS

An enquiry into the perceptions regarding UMs and the heterogeneity in the fundamental notions of applying law illustrates the distinctiveness of primary approaches of the two case study states, which in the case of this study is central for the examined research problem in the study. This chapter, therefore, presents a preliminary interpretation of the terms and laws associated with unaccompanied children, in the UK and France. This will help in comparing the procedures associated with the determination of best interests two states and will determine the functional equivalents in the two states.

#### 2.1. The Denotation of Unaccompanied Minors in the UK and France

Article 375 of the French Civil Code recognises unaccompanied children as ‘children at risk’ and are addressed as *mineur isolé étranger* <sup>58, 59, 60</sup>. Children seeking asylum are considered as UMs if they are below 18 years of age and are not French nationals. The minors are entitled to protection which is handled by the children’s welfare office, an institution that specifically deals with the welfare of children. In the French context, it is referred to as *Aide sociale à l’enfance* (ASE), which roughly translates to social assistance for children.<sup>61</sup> Articles L 221-1 to L 221-9 of the Social Action and Family Code refers to the care and taking care of the

<sup>58</sup>Bailluel n(20) 138

<sup>59</sup>Mateja Sedmak and others, 'Comparative Analysis Of The National Reports On The State Of The Art' (2015). [online]. University of Primorska, Science and Research Centre. [Accessed 5 June 2020]. Retrieved from: <https://repozitorij.upr.si/IzpisGradiva.php?lang=eng&id=8390>

<sup>60</sup>Mineurs Isolés Étrangers' (*France terre d'asile*, 2020) <<https://www.france-terre-asile.org/mineurs-isoles-etrangeurs-col-280/infosmigrants/mineurs-isoles-etrangeurs>> accessed 5 June 2020.

<sup>61</sup>‘Aide Sociale À L'enfance (ASE)’ (*France Diplomatie - Ministère de l'Europe et des Affaires étrangères*, 2020) <<https://www.diplomatie.gouv.fr/fr/adopter-a-l-etranger/faq-glossaire-textes-de-reference/le-glossaire-de-l-adoption/article/aide-sociale-a-l-enfance-ase>> accessed 5 June 2020.

interests of the minors.<sup>62,63</sup> The laws regarding French minors, and non-EU minors remain the same in addressing welfare benefits.

Article 352 of the British Immigration Rules sets out the procedure for determination of an unaccompanied child and provisions for 'leave to remain'.<sup>64</sup> Under Article 352 ZD, an unaccompanied child is defined as a child who:

- a) is under 18 years of age when the asylum application is submitted.
- b) is applying for asylum in their own right, and;
- c) is separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so<sup>65</sup>.

As the UK revoked its CRC reservation in 2008 (examined below), it has no direct applicability since as it has not been included in the national legislation.<sup>66</sup> This means that the best interests of the child principle is sparingly used and is only applicable to minors seeking asylum.

## **2.2. Implementation of the CRC in the national legislations in the UK and France**

The UK the Convention on the Rights of the Child (CRC) in 1991.<sup>67</sup> The government did make certain reservations regarding having effective control over the immigration process; however

<sup>62</sup> 'Code De L'action Sociale Et Des Familles Legifrance' (*Legifrance.gouv.fr*, 2020) <<https://www.legifrance.gouv.fr>> accessed 5 June 2020

<sup>63</sup> Code de Action Social et des Familles was consolidated on May 7, 2020 and contains legal provisions regarding the child welfare services and its implementation for the UMs

<sup>64</sup> 'Settled Status, Permanent Residence And Indefinite Leave To Remain - Richmond Chambers' (*Richmond Chambers*, 2020) <<https://immigrationbarrister.co.uk/settled-status-permanent-residence-and-indefinite-leave-to-remain/>> accessed 5 June 2020.

<sup>65</sup> 'Immigration Rules Part 11: Asylum - Immigration Rules - Guidance – gov.uk' (*Gov.uk*, 2020) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>> accessed 5 June 2020.

<sup>66</sup> The UK incorporated the best interests of the child principle in The Borders, Citizenship, Immigration Act 2009

<sup>67</sup> Shamsuz Zaman, *The United Nations Convention On The Rights Of The Child: How Legislation Underpins Implementation In England* (Children's Rights and Participation Team Department for Children, Schools and Families 2010) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/296368/uncrc\\_how\\_legislation\\_underpins\\_implementation\\_in\\_england\\_march\\_2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/296368/uncrc_how_legislation_underpins_implementation_in_england_march_2010.pdf)> accessed 5 June 2020



these reservations were eventually retracted. The Joint Committee on Human Rights Report outlined UK's reservation with regards to Article 22 of the CRC.<sup>68</sup>

173. Article 22 of the Convention on the Rights of the Child (CRC) guarantees the protection of children seeking refugee status. More generally, the rights protected by the Convention apply to all children within the jurisdiction, irrespective of nationality. On ratifying the Convention in 1991, the UK entered a general reservation as regards the entry, stay in and departure from the UK, of those children subject to immigration control, and the acquisition and possession of citizenship.<sup>69</sup>

Further to this, there was a suggestion for the removal of the mentioned reservation:

175. The reservation has been widely criticised by both the Committee on the Rights of the Child, the international monitoring body for the CRC, and parliamentary committees.<sup>70</sup>

The removal of the reservations, especially that of Article 22, meant that the principles in the CRC is applicable to all children regardless of their nationality or status. This would help further solidify the protection for UMs.

France ratified the Conventions on the Rights of the Child (CRC) on 6 September 1990, and the applicability of the CRC in the national legislation is governed by the *Conseil d'État*. The comprehensive analysis of Article 3(1) is dependent on the administrative court judges, who use the rights stipulated in the CRC categorically in the national legislation for the UMs. Sometimes it is used directly in cases of the determination of guardianship of the child, accommodation, and access to healthcare. This gives a clear indication that the CRC is invoked

<sup>68</sup>'Joint Committee On Human Rights Tenth Report' (House of Lords Publications on the internet 2007) <<https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>> accessed 5 June 2020.

<sup>69</sup>HL 81-II/HC 60-II deb 22 March 2007

<sup>70</sup> n(69)

by the French administration when employing immigration law. Certain provisions under the CRC that are important for determining the rights and status of the unaccompanied child are carefully implemented by the French administration. Guidelines under Article 12 of the CRC have unequivocal ramification in French law. Per Article 12:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.<sup>71</sup>

The Courts are not necessarily bound by this in expressly taking into account the unaccompanied child's wishes. However, they do consider this when deciding the case in the child's favour. Of course, this would not apply if the Court's decision for the child aligns with the best interests of the child and the child might want otherwise. The French application of the CRC in general is increasingly well done and relevant. There is a direct application in some areas, and in others, it is still used as a reference.

### **2.3. Existence of best interests of the child and best interest determination procedure in the UK and France**

In France, the BIC principle does not have a specific definition. It evolves according to the circumstances and the policies of the government. However, as a general rule, it is a principle that the French authorities abide by when making rulings and decisions regarding the child. There are specific laws, strategies, or policies, stipulated for the best interests of the child.

There is an analogous process followed in the UK in terms of the absence of a specific definition for the BIC principle. The best interest determination follows the course of the

<sup>71</sup> Article 12 (1) CRC

national legislation, incorporated with the CRC for nationals. The unaccompanied child is granted a leave to remain in the UK<sup>72</sup> after age assessments are conducted.

### *Chapter Summary*

The examination presented in this chapter is quite necessary for situating the unaccompanied child in both states. It establishes the context in which the child is perceived and the differences and similarities when assessing the legislation of the two case study states. The functional equivalent in these two states, therefore, is the national procedure of assessing minors seeking asylum. There is no formal structure to the determination of the best interests of the child. Both the states rely on their stringent asylum policies to assess UMs.

The preliminary understanding of the legislation implicating the unaccompanied children forms a basis in understanding the assessments conducted by the states for these children, which is discussed in the next chapter.

<sup>72</sup> Till the age of the are 17 ½

‘Limited Leave As An Unaccompanied Asylum-Seeking Child (UASC Leave)’ (*Coram*, 2020)  
<<https://www.childrenslegalcentre.com/resources/uasc-leave/>> accessed 5 June 2020.

## Chapter 3

### ASSESSING ASYLUM PROCEDURES AND TREATMENT OF UNACCOMPANIED MINORS

This chapter answers the question of the relevance of comparing the two case study states, and if these states have practices that are compatible with the BIC principle, as stipulated in the CRC and EU law. This chapter analyses the application of the BIC in the two states by assessing them based on the procedural safeguards they have implemented during the assessment procedures.

#### 3.1. De facto good practices in the UK and France

The good practices in both states are a reflection of their adherence to the best interests of the child and the best interest of the child determination. This section discusses the laws and policies regarding unaccompanied children, and the approach taken by the two states in conducting their assessments and assigning adequate benefits to them.

Civil society institutions in France are well equipped in providing adequate facilities to unaccompanied children, including accommodation, healthcare services, psychological support, and access to legal aid, if necessary. There are authorized institutions that help unaccompanied children who are devoid of any sort of safety and care.<sup>73</sup> Institutions like *Hors la rue 5* offer such protection to the UMs, while institutions like *Accompagnement et Défense des Jeunes Isolés Étrangers (Adjie)*, and *Medecins du Monde (MDM)* offer legal and health services to the UMs that have been abandoned by the child welfare services. *Education Sans*

<sup>73</sup> Sedmak n (59) 16

*Frontieres (ESF)* offers education to UMs.<sup>74,75,76</sup> The physical health of these minors is important because of the hazardous and tiring journeys they often have undertaken, and these NGOs play a vital role in taking care of them. For example, since some children could be travelling from some countries where tuberculosis and human immunodeficiency virus are quite prevalent, these NGOs help screen them and provide adequate medical attention for their needs.

In the UK, there are insufficient non-governmental organisations (NGOs) assist UMs as compared to the active civil societies in France. Organisations like the Refugee Council assist minors in their application process. There are also some organisations that are focussed solely on the UK's application of the CRC. As examined in the Chapter 2, the UK did have a reservations concerning the CRC. Organisations like the Refugee Children's Consortium led the campaign against the UK's reservations of the CRC and strove for its abjuration.<sup>77</sup> Some NGOs in Scotland assist UMs with legal aid and advice, and provide lawyers who advocate for the best interests of the child.<sup>78</sup> The Immigration Law Practitioners' Association trains lawyers to assist unaccompanied children seeking asylum.<sup>79</sup> Although certain CRC reservations were revoked by the UK, the state's right to control its borders against asylum seekers, including UMs, takes precedence over the best interests of the child.<sup>80</sup>

<sup>74</sup>'Textes De Référence - Hors La Rue' (*Hors La Rue*, 2020) <<https://horslarue.org/textes-de-reference/>> accessed 5 June 2020.

<sup>75</sup>Bailluel n(20) 136

<sup>76</sup>'Réseau Education Sans Frontières' ([Educationsansfrontieres.org](http://www.educationsansfrontieres.org), 2020) <<http://www.educationsansfrontieres.org/>> accessed 5 June 2020.

<sup>77</sup> HC deb 12 February 2014, 196 2013-14, cm. 8778

<sup>78</sup> Blanka Hancilova, Bernadette Knauder and Patricia Sutter, 'Unaccompanied Minor Asylum-Seekers: Overview Of Protection, Assistance And Promising Practices' (International Organization for Migration 2011) 34

<sup>79</sup> Hancilova n (77)

<sup>80</sup> Dembour n(21) 157

### **3.2.Overview of Age Assessment Procedures in the UK and France**

States are bound by the BIC to protect the rights of the child and give primary importance to the interests of the child. France and the UK are both bound by the CRC and therefore obliged to abide by the provisions in General Comments 6 and 14. As mentioned earlier in the introductory part of the study, General Comment 14 provides guidance for states on the implementation of the best interests of the child principle and General Comment 6 specifically focuses on the implementation of Article 3 for the unaccompanied or separated children outside their state of origin. Almost all of the unaccompanied children who find themselves at the EU borders are confronted with the age assessment procedures. Some of them have lost their documents while fleeing difficult situations in their country of origin; others have escaped conflict and could not bring their birth certificates along. Even for those who have some sort of proof of age, authorities in most cases are sceptical to accept these documents, especially if they feel that the document provided is forged. In cases where there are no existing documents, authorities may assess that the young migrants are in fact not minors, based on their behaviour, posture, or physique. All of this is quite subjective, but sheds light on the unfair, biased, and often discriminatory age assessments of minors in Europe. Based on such unbalanced assessments, uninformed decisions about the minors' future are often conducted.

#### *3.2.1. France*

In France, the assessment models for minors is considerably different from other EU states. Here, minors are not considered as migrants that are to be avoided and therefore unwanted by the state. Instead, they are considered children at risk and therefore the Social Action and Family Code applies to them under prevailing circumstances. They are not treated as regular asylum seekers like in other states, but are documented as unaccompanied vulnerable children in need of care and protection. Unaccompanied children are taken in by the child welfare

services, and treated at par with the other French children with regards to having access to education, healthcare, and housing. As compared to the UK, from the immigration policy perspective the system is less discriminatory, and the civil code under Article 221-1 of the Social Action and Family Code has specific provisions for when a child is at risk, as in the case of the UMs, and how the state could offer protection to the minors at risk.<sup>81</sup> The assessment prescribed by the civil code to determine the child's best interests is certainly effective, but has a huge margin of error, which could lead to the child's application being dismissed. In this case, upon being interviewed by the authorities to provide accurate dates of departure and information on transit points, the credibility of the child's narrative relies on the coherence of the information provided, which, if full of discrepancies, could potentially harm the child's assessment.

In France, the age assessment process is done at a primary stage, prior to establishing the status of the minor. For a minor to be recognised as an unaccompanied minor, the border and judicial authorities, as well as child welfare services, conduct the age assessment of the child concerned. The state authorities must conduct the assessment based on these ground rules within the first five days on the child's arrival.<sup>82</sup> The assessment contains various stages, which are well divided into assessing the child medically and socially, and establishing the identity via the documents provided by the child. In the first stage, the history of the applicant is recorded. This means the authorities, along with child welfare services, trace the steps of the child to establish identity, country of origin, and transit points crossed. The important takeaway from this process as conducted by the French authorities is that it is markedly different from the treatment of the child by the authorities in the UK. In this stage, the child is given an opportunity to give his or

<sup>81</sup>Bailluel n(20) 137

<sup>82</sup> In 2013, Interministerial Circular concerning the minors that are unaccompanied was established, It deal with the reception conditions for them, and included the assessment procedure that should be carried out to establish their status

her side of the story, and the reasons for migrating, if the child was separated from the guardian, or if he had to flee a place of conflict. This not only helps the authorities with identification, but also helps in establishing any psychological support that might be needed at a later stage. The verification of the child's document occurs in the second stage. In this stage, the authorities examine the documents based on the premise that they are authentic and provide a valid link to the child's identity.<sup>83</sup> The medical assessment constitutes the final stage of the assessment. The methods employed are widely repudiated by various scholars and local medical professionals due to their inaccuracy in determining the age of the minor.<sup>84</sup> The French authorities use x-rays to determine the ontogenesis of the oral cavity and the bone structure maturity.<sup>85</sup> This is of concern because incorrect age assessment of the minor can potentially deprive him or her of their rights and the access to education, housing, and healthcare to which they may be entitled to.

### 3.2.2 *United Kingdom*

As mentioned earlier, the UK had made certain unique reservations to the CRC. This would have allowed for no interference in their immigration-related decisions. The UK ratified the CRC in 1991, and the ratification came into force into 1992.<sup>86</sup> In 2008, the UK withdrew its remaining reservations against refugee and asylum-seeking children.<sup>87</sup> 'In the UK, the identification of the unaccompanied refugee child involves a referral not only to the local social services but also to the Children's Panel at the Refugee Council. The Children's Panel acts as

<sup>83</sup> French civil code Article 47. Klaus Berger, 'French Civil Code 2016 Trans-Lex.Org' (Trans-lex.org, 2020) <<https://www.trans-lex.org/601101>> accessed 5 June 2020

<sup>84</sup> Haut conseil de sante publique 2014 ; Academie nationale de medicine 2007 Bailluel n(20)139-141

<sup>85</sup> *ibid.*139

<sup>86</sup> Assets.publishing.service.gov.uk, 2020 <<https://assets.publishing.service.gov.uk/government.pdf>> accessed 5 June 2020.

<sup>87</sup> 'Children's Rights - Human Rights Joint Committee' (*Publications.parliament.uk*, 2020) <<https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157we18.htm>> accessed 5 June 2020.



a liaison for the child in the first stages of the determination procedure'.<sup>88</sup> Age assessment in the UK is undertaken by the Home Office, with the involvement of social services, only if there are doubts about the age of the child and detailed investigation needs to be carried out. This is executed through interviews and no medical tests are required to determine the age of the unaccompanied child<sup>89</sup>. Age assessments in the UK are often conducted in conditions that might seem intimidating and traumatising to a child, for instance, at a police station. Interviews are conducted by people with no formal training, and who report mostly based on the physical appearance of the child, disregarding the fact that the child comes from a completely different racial and cultural background and that his or her appearance is not a definitive indicator of age. Even if a child tries to give a narrative of his or her experience, he or she is not given the benefit of the doubt, but instead, it is the word of the person conducting the assessments against the views of the child.<sup>90</sup>

The use of capricious methods of age assessments like dental or clavicle x-rays are inaccurate and present a major flaw in the age assessment system for children. Methods like these override the need to first protect the child, and the provisions stipulated in the CRC, which aim the right of the child's opinions.<sup>91</sup>

The views of the child are disregarded in both states, which means there is a significant risk of detention for a child, simply because he or she did not meet the standardised assessments of the states. EU member states employ such capricious methods of age assessments to keep the number of migrants moving to the EU low. There is less regard for compliance with the CRC, and more emphasis on preservation of the state's sovereignty. The UMs are essentially devoid

<sup>88</sup> Eugenia Markova, 'The Situation Of The Unaccompanied Minors Migrants In The UK', Regional Conference on Migration of UMs: acting in the best interests of the child (Council of Europe 2005).

<sup>89</sup> 'Consent To Medical Tests For Age Assessment' (European Union Agency for Fundamental Rights, 2020) <<https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/consent-age-assessment>> accessed 5 June 2020.

<sup>90</sup> Dembour n(21)157

<sup>91</sup> CRC/C/GC/12 General Comment No. 12 (2009) The right of the child to be heard Committee on the Rights of the child. Fifty-first session Geneva, 25 May-12 June 2009

of any autonomy, and are treated as adult migrants. The state gets to infer the best interests of the child, drawn from the CRC and the EU acquis, that abide by the national interest of the state. In such instances, there is no single legislation that is binding on states and essential for the protection of unaccompanied children. These documents can only provide guidance for the state on how to produce a child-friendly environment, putting the best interests of the child as the primary consideration during interview, or any other assessments. It is eventually up to the state to uphold these considerations. Even though the best interests of the child should be given primary consideration, the existent principle conflict between the primary obligation of the rights of the child and the state's policy to curb migration prevents that from happening.

### *Chapter Summary*

After the asylum assessment is conducted in both these states. The children that are recognised as UMs are further granted accommodation based on their status, the nature of their application, and the state's practice. Unaccompanied minors are provided with accommodation, education, and access to child welfare. This shall be explained in detail in the next chapter.

## **Chapter 4**

### **OBSERVATION OF BIC WHILE ASSESSING RECEPTION CONDITIONS**

This chapter analyses the BIC specifically during the reception arrangements for the UMs – the institutions in which they are placed in the UK and France. Based on the analysis of the assessment practices conducted in the previous chapter, it is easier to delve into the reception condition based on those elements.

The treatment of unaccompanied children varies across states. They are provided sufficient care and reception conditions in some and are merely allowed to stay in others. There is no generalized practice. Child welfare protection laws in most states aim at protecting children that are vulnerable within the state's boundaries and not at migrant children. The protection offered to UMs ranges from basic support, to letting them seek asylum without providing any systemic care. This chapter identifies the practices in France and the UK, accordingly, ranging from acceptable to bare minimum practices. This would mean comparing state practices and comparing reception conditions, specifically accommodation.

Suitable conditions for accommodation of UMs seeking asylum are stated in the reception conditions directive and the qualification directive, and under General Comment No.6 of the CRC . <sup>92</sup>, <sup>93</sup>, <sup>94</sup>

<sup>92</sup>Committee on the Rights of the Child (2005): General Comment no 6 on the treatment of unaccompanied and separated children outside their country of origin, paragraph 19

<sup>93</sup> Ibid.Paras 30

<sup>94</sup> Ibid. Para 40

#### 4.1. Accommodation

Across EU Member States, the accommodation facilities for UMs granted asylum, after their assessment is based on the status they receive. They could be given basic welfare support, full child welfare, or be entitled to housing in a family group home.<sup>95</sup> The kind of accommodation UMs are assigned could also be categorised based on the age group of the children, foster homes, and need-based homes for children who require assistance for special needs, such as mental or physical health issues, differently-abled children, or pregnant teens.

##### 4.1.1. France

Article L. 221-1 of the *Code de l'action sociale et des familles* (CASF) states that one of the roles of the child welfare services is to 'provide material, educational and psychological support' to minors in danger, as well as to adults under the age of 21 years who are facing difficulties.<sup>96</sup>

France, apart from providing facilities for the UMs in terms of accommodation, prioritises that the children are well integrated into the French way of life.<sup>97</sup> There are markedly different accommodations based on the needs of the minor, ranging from social children's homes (*Maison d'Enfance à Caractère Social*, MECS), the *Maison d'Accueil et Accompagnement vers l'Autonomie pour Mineurs Isolés*, and various foster family arrangements.<sup>98</sup> There are also separate facilities provided for young adults once they turn 18 years of age. These provisions are stipulated in Article L. 222-5-1 of the Code on Social Action and Families, for children

<sup>95</sup> In case of Finland, family group home

<sup>96</sup> Amiel n (73) 42

<sup>97</sup> The department council provides for temporary accommodation till the assessment of the child is completed, and thereafter a much permanent one after the status of the minor is confirmed, per Article L.222-5 of the CASF

<sup>98</sup> Amiel n(73) 32

when they turn 18 years in order to assure a smooth transition from being a child under the welfare system to as a young adult with access to proper employment and accommodation.<sup>99</sup> However, there have been subsequent reports that the accommodation facilities provided for the minors are not supervised or well regulated.<sup>100</sup> The remaining of the UMs are devoid of any accommodation, and may have to resort to living on the streets. According to a report provided by *Medecins Sans Frontieres*, children who were not recognised as UMs had taken to streets and public places to find shelter. Even those recognised by the authorities as unaccompanied migrants were not assigned a place and had to survive in makeshift facilities.<sup>101</sup>

#### 4.1.2. United Kingdom

The UK mostly grants temporary protection to children who claim asylum. In this scenario, the accommodation offered, therefore, differs markedly than accommodation conditions in France. Based on the level of protection that a child needs, he or she is provided with accommodation accordingly. This is stipulated under section 22 C of the Children Act 1989.<sup>102</sup> In the UK, the accommodation facilities are of three kinds: private accommodation in municipalities, foster care, and shared accommodation.<sup>103</sup> This means that, based on the need of the child, specialised accommodation is provided for. A report from the Department for Education statutory provides guidance on the care of unaccompanied migrant children and child victims of modern slavery and provides guidelines for the appropriate accommodation arrangement needs for such unaccompanied children.<sup>104</sup> After careful assessments are made, specific guidelines are

<sup>99</sup> Bailluel n(20) 141

<sup>100</sup> Hancilova n(74) 58

<sup>101</sup> 'MSF Provides Emergency Winter Shelter For Teenage Migrants In France | MSF' (*Médecins Sans Frontières (MSF) International*, 2020) <<https://www.msf.org/msf-provides-emergency-winter-shelter-teenage-migrants-france>> accessed 5 June 2020.

<sup>102</sup> 'Local Authorities' Duties In Relation To Looked After Children' (*Childlawadvice.org.uk*, 2020) <<https://childlawadvice.org.uk/information-pages/local-authority-duties-to-looked-after-children>> accessed 5 June 2020.

<sup>103</sup> Kanics n(15) 34

<sup>104</sup> Local.gov.uk, 2020 <<https://www.local.gov.uk/sites/default/files/documents/Final.pdf>> accessed 5 June 2020.

provided for the accommodation, based on the needs of a child. It also takes into consideration the post- traumatic stress disorder (PTSD) that the child might suffer from due to the arduous journey, and makes notes of the same when making assessments if the child is suffering from any other mental health conditions, so as to provide a suitable accommodation accordingly.

### *Conclusion*

This chapter delineated the differences in the kinds of accommodation in the two states are indicative of varying models and practices in reception conditions. The comparison between the accommodation systems in France and the UK is conclusive of the fact that these facilities align with the state's policy on migrants. In France, unaccompanied children are provided accommodation in the general facilities along with other French children. This eliminates differential treatment or alienation that the unaccompanied child may have gone through during the asylum assessment process. This in line with the French value system, which asserts that the unaccompanied children should integrate with the French children, as this helps them cope better and adjust to their new life. This is significantly different in the case of the UK, where unaccompanied children are put in different facilities than British children. This might hint at specialised care for their needs, but in fact is an indicator of the temporary nature of the status that unaccompanied children have in the UK.

## CONCLUSION

The thesis has reached certain conclusions regarding the application of the best interests of the child principle in France and the UK. This is based on the application of the CRC and EU directives regarding the best interests of the child, in their national legislation, and in their assessment and treatment of UMs. When it comes to assessing the preliminary treatment of UMs, France does not follow a fixed pathway UMs are either treated as unlawful migrants, during their age assessment or should they pass the age assessment, they are treated as any other vulnerable minor in France and do not require a residence permit.<sup>105</sup> They are in fact covered by the French child welfare system directly. They have the additional option to apply for a residence permit when they attain the age of 18 years. Although France is not a model state and needs to improve the age assessment procedures, and respect the views of the child claiming to be a minor, this indicates that there is no disparity in the treatment of citizens and non-citizens. In the UK, only temporary residence permits are awarded to the UMs and changing political scenarios, including Brexit, has worsened the anti-migrants rhetoric. The conclusive theories in the study point to the negligent attitude of the UK in obliteration of the Dubs amendment. This is further going to risk the lives of children trying to cross borders in less formal ways. Based on these assessments, and taking scholarly opinions into consideration, the UK's practices regarding unaccompanied children have been unsatisfactory. Both the states need to show better compliance with the CRC and take views of the child into consideration

<sup>105</sup> Marie Hélène Amiel and others, 'Approaches In France To Unaccompanied Minors Following Status Determination' (Le réseau européen des migrations (REM) 2018) <<https://www.immigration.interieur.gouv.fr/Europe-et-International/Le-reseau-europeen-des-migrations-REM3>> accessed 5 June 2020.

during age determination process. The best interests of the child should favour the child interest's and not cater to the State's interests in downgrading the number of refugees.



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