

**AT/ PHILIP ALSTON**

**UN SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS**

**From Associació Noves Vies**

**Barcelona**

**ACTS:**

Unaccompanied child migrants<sup>1</sup>, in the custody or care of the child protection services, are beneficiaries of a residence permit, but they can not process a residence and work permit.

However, the purpose of the national legal system is to protect and provide personal autonomy to manage their own life, what is difficult to do without a work permit.

European and spanish regulations state that unaccompanied child migrants will be granted a residence permit, but nothing is said about the work permit.

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<sup>1</sup> In the Spanish State they are called MENA (*Menor Extranjero No Acompañado*, foreign unaccompanied minors).

- A. THE RESIDENCE PERMIT MUST BE INTERPRETED AS A RESIDENCE AND WORK PERMIT FOR THE EFFECTIVE INTEGRATION AND DEVELOPMENT OF THE MINOR IN SOCIETY WHEN THEY REACH LEGAL AGE.**
- i) **Ultimate purpose of the protection system for homeless minors: social integration.**

The article 39.4 of the Spanish Constitution states:

*Children shall enjoy the protection provided for in the international agreements which safeguard their rights.*

Although the Constitution does not contain specific references to the MENA situation, *Convention on the Rights of the Child* is integrated into the Spanish system by virtue of the articles 13 and 10.2 of Spanish Constitution (the rights of foreigners are regulated by national legislation and international treaties). Therefore, Spain, as a State party, must guarantee the non-violation of *Convention on the Rights of the Child* rights.

According to the Committee on the Rights of the Child, the priority objective is to find a solution that meet all their needs, keep in mind their opinions to take action to resolve the situation, considering the UN Committee on the Rights of the Child (CRC), General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, paragraph 79:

*79. The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever*

*possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analysing the possibility of family reunification.*

The child protection regulation (obviously, includes unaccompanied child migrants) is based on the best interest of the child principle.

In that way, we can find different rules:

- 1) 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, entry into force 2 September 1990:

*Article 3.*

*1. 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.*

*2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

*3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

*Article 6.*

*1. States Parties recognize that every child has the inherent right to life.*

*2. States Parties shall ensure to the maximum extent possible the survival and development of the child.*

Article 27.

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

[...]

Article 29.

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

[...]

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

2) GENERAL COMMENT No. 6 (2005). Treatment of unaccompanied and separated children outside their country of origin:

c) Best interests of the child as a primary consideration in the search for short and long-term solutions (art. 3)

19. Article 3 (1) states that “[i]n 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". In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.*

From this regulation, it is emphasized that public service must supply anything for a effective integration in society. This is the purpose of the child protection system. Finally, in this paragraph it should be emphasized that the best interest of the child has to be deeply connected with the principle of no-discrimination because this is one of the fundamental values in the European Union, according to article 2 of the Treaty on the Functioning of the European Union (TFEU). According to the principle of equality all minors must have the same opportunities, without making any discrimination about their nationality, sex, race or other criteria. The equality principle means that there must be no discrimination with regard to the recognition and application of rules of the Convention of the Right of the Child, for all children who are in the territory of the States that have ratified the Convention, whatever their nationality is. For the MENAS, also implies the prohibition of discrimination based on their condition of unaccompanied minors, refugees, asylum seeker or irregular migrants. So, it's necessary that minors receive from host countries the same treatment of national children and that their status of minors need to be taken into account before their status of immigrants.

The General Comment No. 6 states that the principle of no-discrimination in all of its forms must be applied to all of the aspects of the treatment of MENA. The Committee refers to the variety of protection needs of these minors, strictly linked to the age or gender. Moreover the Committee clarifies that police actions related to public order issues, are eligible only when covered by the laws and when they are applied individually and proportionally.

*18. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it*

*prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.*

**ii) Different acts of EU institutions establish this purpose with regard to the residence permit without specifying if this kind of authorization includes also a work permit:**

Being the most important aim of any laws regarding helpless child protection clarified, in this paragraph we make a list of different EU acts in which the possibility to obtain a work permit is unclear.

**1) Council Resolution 97/C 221/03 of 26 June 1997 on unaccompanied minors who are nationals of third countries, Official Journal C 221, 19/07/1997 P. 0023 – 0027:**

*Article 1 Scope and purpose*

*3. The purpose of this Resolution is to **establish guidelines for the treatment for unaccompanied minors**, with regard to matters such as the conditions for their reception, stay and return and, in the case of asylum seekers, the handling of applicable procedures.*

*4. This Resolution shall be without prejudice to more favourable provisions of national law.*

*Article 3 Minimum guarantees for all unaccompanied minors*

5. Where a **guardian** is appointed for an unaccompanied minor, the guardian **should ensure, in accordance with national law, that the minor's needs** (for example, legal, social, medical or psychological) are duly met.

*Article 6 Final provisions*

1. Member States should take account of these guidelines in the case of all proposals for changes to their national legislations. In addition, Member States should strive to bring their national legislations into line with these guidelines before 1 January 1999.

2. **Member States shall remain free to allow for more favourable conditions for unaccompanied minors.**

2) CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION:

*Article 24. The rights of the child*

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. **In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.**

- 3) Recommendation CM/Rec (2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors (Adopted by the Committee of Ministers on 12 July 2007 at the 1002nd meeting of the Ministers' Deputies):

*Recommends that the governments of member states:*

- a. *take steps to implement in their policy, law and practice the principles and measures set out in the appendix to this recommendation; [...].*

*Appendix to Recommendation CM/Rec (2007)9*

*I. Concepts*

*Life projects*

**1. Life projects aim to develop the capacities of minors allowing them to acquire and strengthen the skills necessary to become independent, responsible and active in society.** *In order to achieve this, life projects, fully in accord with the best interests of the child, as defined in the Convention on the Rights of the Child, pursue **objectives relating to the social integration** of minors, personal development, cultural development, housing, health, education and vocational training, and **employment**.*

**2. Life projects are individual tools, based on a joint undertaking between the unaccompanied migrant minor and the competent authorities for a limited duration. They define the minor's future prospects,** *promote the best interests of the child **without discrimination** and provide a long-term response to the needs of both the minor and the parties concerned.*

**3. Life projects are a lasting solution for both member states and the minors themselves, meeting the challenges arising out of the migration of unaccompanied minors.** *They shall therefore be an integrated policy tool available to member states in order to meet the needs*



*of such minors and to tackle the many difficulties arising out of this migration.*

*[...]*

## *Life projects in the host country*

*25. For as long as the life project is implemented in the host country, the member state should guarantee access for the unaccompanied migrant minor to classes in the language of the host country, to education and/or to appropriate vocational training on an equal footing with nationals. The minor should also have the possibility of entering the labour market.*

*26. Where a minor involved in the implementation of his or her life project attains the age of majority and where he or she shows a serious commitment to their educational or vocational career and a determination to integrate in the host country, he or **should be issued with a temporary residence permit in order to complete the life project and for the time necessary to do so.***

#### 4) COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. Action Plan on Unaccompanied Minors (2010 – 2014) – SEC (2010)534

##### *5. Finding durable solutions*

*Durable solutions should be based on the individual assessment of the best interests of the child and shall consist of either:*

- return and reintegration in the country of origin;*
- granting of international protection status or other legal status allowing minors to **successfully integrate in the Member State of residence;***
- resettlement.*
- A decision on the future of each unaccompanied minor should be taken by the competent authorities within the shortest possible period (if possible maximum six months) taking into account the obligation*

*to try to trace the family, explore other possibilities for reintegration in their home society and assess which solution is in the best interests of the child.*

[...]

*5.2. International protection status, other legal status and integration of unaccompanied minors*

***Unaccompanied minors could be granted refugee or subsidiary protection status under the conditions set out in EU legislation. Given their particularly vulnerable situation, measures to support their integration into the host society are essential. The European Refugee Fund (ERF) could finance relevant activities.***

***EU legislation and policies do not address the situation of minors who cannot be returned, leaving the granting of residence permits for compassionate, humanitarian or other reasons to national legislation. In cases where return is not possible or integration in the country of residence is considered in the best interests of the child, a legal status should be granted to unaccompanied minors entitling them to at least the same rights and protection as beforehand, and suitable accommodation should be found. The minors should be supported in their path toward successful integration in the host society.***

All the previously mentioned acts together give a clear idea of what integration of unaccompanied child in the host countries is. The integration must be widely interpreted according to the real cases of social inclusion and job placement and guaranteeing the same rights for everyone.

**PROPOSALS:**

- i. Minors with valid passport shall be considered documented migrants and must receive a residence and work permit.**

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Albert Parés Casanova

President Associació Noves Vies