

Children or adults? Age assessment practices

Minors first, foreigners second

The situation of foreign minors in Spain has been a source of particular concern practically ever since I first came to the Ombudsman's Institution. Throughout the years when I was the First Deputy Ombudsman, I devoted many an effort to keeping watch over the activity of the different Administrations regarding the repatriations of unaccompanied foreign minors to their homelands. Fortunately, our work met with success and, today, those repatriations carried out without the necessary guarantees - one of the most glaring of which was the right to be heard of the minors in question- are today but a bad memory from the past.



There are few other cases in which the existing strain between the decisiveness of the authority which the Government places in the hands of the immigration and alien affairs department officials and the great degree of responsibility which Spain has taken upon itself as a signer of the Children's Rights Convention comes so patently to fore as with regard to this matter of unaccompanied foreign minors. If the realm of immigration is always fertile ground for the fight between the principle of advantageousness and the respect for the full efficacy of the fundamental rights and freedoms, the experience of foreign minors is one of those issues in which the coherence of our legal system is at stake.

This report is for the purpose, first of all, of providing a catalogue of the shortcomings detected in the procedure set out for determining the age of those foreign nationals who are doubted to actually be under age. Our aim has been to approach the issues involved systematically and to incorporate into this debate the necessary plurality of opinions coming from all of the spheres to which an answer must be provided.

This report takes the form of a number of contributions, combined with the study conducted by the services proper of this Institution, based on the investigations carried out over the past few years. The result of all this effort is summarized into a number of conclusions affording the possibility of recommending to the different government agencies involved in this matter what changes must be made in the measures taken thereby in order to improve the procedures which have been employed to date and even to contribute toward setting out the organization of a more suitable system.

Conducting medical tests for determining age poses numerous problems of both a technical as well as an ethical order, it therefore being necessary for this report to focus special attention on this aspect. For this purpose, we have had the invaluable collaboration of experts in legal medicine and in other disciplines, to whom I must express my appreciation for their generous response. Their extremely interesting debates and thoughts shed a great deal of light on this subject for all of this work as a whole and provided us with a number of conclusions and good practices of utmost interest. I would especially like to express my appreciation for the work done by Dr. Rafael Bañón González, the chief of the Legal Medicine Institute of Murcia, who coordinated the technical meetings held for the forensic medicine experts and who then presented the scientific conclusions to those attending the second meetings, the members of the different Government agencies who have authority over this matter and members of the association.

I would also like to thank UNICEF for the permission granted to include a copy of an annotated bibliography as an appendix to this report. I would also like to make special mention of the commendable work done by the different associations who have contacted this Institution and provided first-hand knowledge of the actual situation as it stands, which has been indispensable for preparing this report. I am especially proud of the participation of the foreign minors themselves in the preparation of this report, who have contacted the Ombudsman by means of e-mail messages or by phone, by sharing their personal experiences with the staff of this Institution on the occasion of the visits made thereby or, alternatively, by coming in to the headquarters of this Institution themselves, in person.

I must also acknowledge the complete willingness of the different Government agencies who have authority over this matter, who have collaborated not only in the meetings held at the headquarters of our Institution but have also fulfilled the requests placed with them for information.

I would not wish to end this presentation without expressing my appreciation to the staff members of this Institution, who have taken upon themselves the drafting and publishing of this report, without which this endeavor would not have been accomplished.

With this report, we are making something similar to an inventory of efforts. Many are the investigations which have been made and the problems examined over the course of these years. However, despite the fact that some issues have progressively been overcome and others may be overcome – which is the eager hope prompting our work - as a basis for our conclusions and recommendations, we cannot lay these concerns to rest for good herein, since the Ombudsman must continue giving them top-priority attention as whenever we are dealing with individuals or groups in a situation of vulnerability. This is our obligation and also our passion.

María Luisa Cava de Llano y Carrió
Acting Ombudsman

6. Conclusions

6.1 Concerning general aspects

1. The high rate worldwide at which births are not being recorded at the point in time at which they take place results in the possibility of later registration perhaps entailing some major margins of error. In fact, the importance which the immediate, accurate registration of births has for the recognition of basic rights, beginning with the right to an identity, has been given extremely widespread recognition on the theoretical plane but is however still as yet facing practical difficulties of far-reaching importance in many parts of the world. The attempt to combat this situation by assigning an exact date of birth by means of the use of a scientific procedure is not feasible in the current state of the art.
2. In view of cases of doubt as to age, the first measure to be taken for meeting the needs of protection of unaccompanied minors separated from their family is precisely that of determining their age. The Children's Rights Committee (2005) has pointed out that the measures for determining age must not only take into account the physical appearance of an individual, but also the psychological maturity thereof. The age determination procedure must be carried out with scientific criteria, safety and impartiality, must be in the interest of the minor in question and, with regard to gender-related aspects, prevent any risk of violation of the physical integrity thereof, duly respecting their human dignity and, in the event of doubt, granting the individual in question the benefit of the doubt. In any case, the individuals in question must have access to an effective recourse for taking exception to whatever decision is made concerning their age.
3. Assuming the individual is under age in the event of doubt takes on special importance in those cases in which there are indications as to needs for international protection, given that the minors in such a situation normally have major problems as regards leaving their countries, as a result of which they may find themselves forced to use false documentation or to resort to human trafficking networks.

In particular, it must be taken into account that, in the cases that indications exist as to trafficking in human beings, Article 10.3 of the Council of Europe Convention on Action Against Trafficking in Human Beings (Warsaw, 2005) sets forth that, in the event that no certainty exists as to the age of the victim and whenever there are reasons to believe that the individual in question is a minor, said individuals shall be considered as such and shall be granted specific means of protection until their age can be definitely assured.

4. A consensus is found to exist among the scientific community with regard to warning of the major margins of error entailed in the techniques for estimating age by means of measuring bone maturity and dental mineralization. Similarly, the experts also call attention to the improper use of certain techniques, which entails overexposure to X-rays or radiation of sensitive areas for non-therapeutic uses, such as the case in point. At the international level, a growing interest has been found to exist regarding

identifying alternative means of proof other than conducting X-rays testing, although the debate is open and the results differ remarkably depending on the examining country.

5. The scientific community stresses the need- when conducting any study for estimating age -of taking into account the influence which specific disease-related, nutritional, health and hygiene and physical activity-related factors may have on the chronology of the sequences of morphological changes. However, the relevance of the ethnic factors still as yet continues to be an issue under debate.
6. The margins of error of the aforementioned medical techniques have given rise to the suggestion of moving toward a method referred to as holistic. However, there is no consensus as to the aspects which must be encompassed within this holistic method, although it is noted that the medical examinations should take second place to psychosocial examinations.

6.2 Concerning the situation in Spain

7. The fact of the Unaccompanied Minors Registry - a fundamental aspect for assuring the identify of these minors in Spain – not functioning seriously compromises the control of the age determination procedures carried out, the individualization of the individuals in question, the monitoring of the situation and of the mobility thereof, as well as the adopting of the coordinating measures which are indispensable, in view of the many different agencies which all have authorities over this realm. In addition thereto, this situation prevents there from being any reliable statistics on the unaccompanied foreign minors in Spain, which conditions the decision-making process.
8. The generality of the terms with which Article 35.3 of Organic Act 4/2000 governing the rights and freedoms of foreigners in Spain and the social integration thereof makes reference to the collaboration of the fitting health institutions and to the conducting of the tests necessary with a view to determining age has given rise to a wide variety of practices throughout the country. The Public Prosecutor's Office has focused attention on this matter by way of different documents, although the situation cannot be considered to have been overcome, as highly important issues still as yet remain to be resolved which it would fall to the Public Prosecutor's Office to take upon itself, given the special leading role played thereby in these procedures. The necessary coordination of all the institutions and administrations involved, which the Regulations further expanding upon Organic Act 4/2000 passed by Royal Decree 557/2011 defers to a framework protocol, neither replaces nor conditions the leading role of the Public Prosecutor's Office within this scope.
9. The law sets forth that "in those cases in which the Law Enforcement Forces and Agencies located an undocumented alien whose status of being under age cannot be established in all certainty shall be given the immediate attention needed thereby by the competent juvenile protection services.. immediately notifying this fact to the Public Prosecutor's Office, who shall order the age thereof to be determined...". In legal terms,

the providing of the immediate care must be parallel to setting the age determination procedure in motion, which implies presumed status as being underage.

The current situation, with a relatively small number of undocumented foreigners whose age is doubtful must favor the analysis of the cumulative experience gained, of the shortcoming of the system such as to make it possible to set out a protocol respectful with the volition of lawmakers which does not subject the providing of assistance to first having determined status as being underage. This issue has one important practical consequence, given that it makes to possible to lessen the degree to which the conducting of tests and the evaluation thereof is pressing, which facilitates the adopting of some more complete and stringent medical examination criteria than those currently being observed in most cases.

10. The necessary expeditiousness which must prevail in this age determination procedure cannot obviate the right of all individuals, in this case the presumed minor, to be heard regarding any matter which has a bearing thereon. The investigations conducted reveal that the interested parties are not informed by the police services as to the procedure being gotten under way, the scope thereof or the nature of the tests which they are going to undergo. Nor has it been found that the consent of the interested parties is being rendered for conducting these tests at this point in time.

There being no legal counsel during the age determination procedure seriously compromises the respect for the right to be heard with all due guarantees.

11. A large number of cases have been detected in which the prosecuting attorney refers the interested party directly to a health care center for specific medical tests to be conducted. The type and sequence of the tests to be conducted are not legal issues, but rather that they must be conducted under adequate, sufficient medical indication in scientific terms. Lastly, the overall evaluation of the results of the age-estimating tests conducted must be coordinated by a medical examiner or by a physician who is a specialist in legal and forensic medicine possessing specific training in the integral interpretation of the recommended supplementary study methods.
12. There being no intervention on the part of experts in legal medicine in the interpretation of the diagnostic tests for estimating the age of the person in question makes it possible for age determination decrees to be issued based on the interpretation of single tests (i.e. exclusively X-ray tests) therefore lacking the necessary scientific rigor. This report includes, as an appendix hereto, a number of recommendations made by the physicians attending the meetings which include the sets of tests they deem necessary for carrying out technically correct age determination processes. In particular, these recommendations indicate that the estimating process must be the result of the collaboration of different medical specialists.
13. In several investigations, tests have been found to be conducted at the request of the police authority or of the juvenile protection services without the prior authorization from

the prosecuting attorney. Cases have even been found in which a medical test for treatment-related purposes is used for voiding the statement of underage status agreed in a prior procedure. These practices are unaware of what authority over this matter is attributed exclusively to the Public Prosecutor's Office.

14. The expert report must specify that the forensic estimates of the age based on medical criteria are subject to more than a considerable risk of error. The vast majority of the medical reports examined have been found not to include any remark as to this circumstance or the precautions which must be taken when extracting legal consequences from the reports per se. Medical reports have also been examined which made no references to the margins of error which must be considered when interpreting the results of these tests.
15. The previously mentioned problems regarding the Unaccompanied Foreign Minors Registry, in conjunction with other circumstances, have given rise to the frequent repetition of medical tests on the same individuals. Given the margins of error of these tests, their being repeated does not provide any greater degree of certainty, but rather increases the uncertainty, especially in individuals near 18 years of age, where it is quite common for the results to make it possible to uphold conflicting interpretations.
16. The prosecuting attorney's decree determining the age, of a presumptive nature, marks the end of a procedure in which no provision has been made for holding a hearing for the interested party prior to the resolution being adopted. This hearing has solely been provided for in those cases in which the interested party refuses to undergo the medical tests. It seems necessary that this hearing be held in any case.
17. Following the entry into effect of the Penal Code reform in December 2010 made by way of Organic Act 5/2010 of June 22nd, the interception of a foreign national holding a passport or other identifying document on which status as a minor is stated, the authenticity or ownership of which is questioned cannot be put through the administrative procedure for which provision is made under Article 35 of Organic Act 4/2000, given that indications exist as to the commission of a criminal offense. In these cases, it shall be the judicial authority, within the framework of the criminal proceedings, who is to order the necessary tests to be conducted for determining whether or not the individual allegedly having committed the offense is under age or of legal age and whether the same has committed any offense.

8. Recommendations

8.1 To the Ministry of Justice ; to the Autonomous Community of Andalusian Government Council of Government and Justice; to the Autonomous Community of Aragon Government Department of the Presidency and Justice; to the Autonomous Community of the Principality of Asturias Department of Finance and Public Sector; to the Autonomous Community of the Canary Islands Government Department of the Presidency, Justice and Equality; to the Autonomous Community of Cantabria Government Department of the Presidency and Justice; to the Autonomous Community of Catalonia Government Department of Justice; to the Autonomous Community of Valencia Department of Justice and Welfare; to the Autonomous Community of Galicia Government Department of the Presidency, Public Administration and Justice; to the Autonomous Community of Madrid Government Department of the Presidency and Justice; to the Autonomous Community of Navarre Government Department of the Presidency and Public Administrations; to the Autonomous Community of the Basque Country Government Department of Justice and Interior and Public Administration and to the Autonomous Community of Rioja Government Department of the Presidency and Justice

1. That, within the scope of the authorities thereof, a specialized service be established for estimating age, which is to be in the position to conduct the tests and examinations necessary in an expeditious, centralized manner on the basis of common protocols.
2. That the formalization of an inter-institutional protocol be promoted which will make possible the sharing of forensic reports and tests conducted for age determination by any institute of legal medicine or forensic medicine service anywhere nationwide for the purpose of facilitating the necessary background information which might exist regarding the person on whom it is planned for an age determination study to be conducted.

8.2 To the Ministry of Labor and Immigration

That Organic Act 4/2000 governing the rights and freedoms of foreigners in Spain and the social integration thereof be amended for the purpose of assuring the right to free legal counsel on the part of undocumented foreigners whose status as being underage cannot be determined in all certainty during the age determination procedure.

8.3 To the Public Prosecutor's Office

1. That an instruction be issued concerning the action of the Public Prosecutor's Office in the age determination procedures for which provision is made under Article 35 of Organic Act 4/2000, which sets forth aspects including the following:
 - a) That in those cases in which the police forces notify the Public Prosecutor's Office as to the existence of an undocumented foreigner whose status as being underage is doubtful, that the decision be made to inform the competent forensic medical service or

the specialist in legal medicine so that he/she may evaluate whether it is fitting to conduct medical tests for estimating the biological age thereof and that the diagnostic methods to be employed in each case be stated.

- b) That the forensic medicine service or the specialist in legal medicine appointed for conducting the age estimate study be furnished with the information and the results of the tests available through the police records in conjunction with the justification of the need of proceeding to conduct further tests.
 - c) That the medical professionals be instructed as to the obligation of informing the interested parties concerning the scope and consequences of the tests to be conducted such that they will find the same comprehensible and as to the need of their rendering their consent for the same to be conducted.
 - d) That on the request for a report from the forensic medicine service or from the specialist in legal medicine, the object of the expert opinion be extended to examining the existence of indications of any form of violence or abuse.
 - e) That once the forensic medical report has been obtained, prior to issuing the decree by way of which the age is established, an appearance be held with the interested party with the due aid and in presence of an interpreter, should one be necessary, in which the results of said report will be stated thereto, with an indication as to the tests used, so that they may put forth any allegations deemed fitting.
 - f) That, save judicial intervention, it be assured that any medical test aimed at determining age can solely be conducted as a result of the Public Prosecutor's Office having so agreed.
 - g) That the needs for immediate protection suited to each case be established and that instructions be given to the police forces taking action so that, whilst the age determination process is taking place, they will coordinate their actions with the competent protection services.
 - h) That, in the work of coordinating the Unaccompanied Foreign Minor Registry which falls to the Public Prosecutor's Office, measures be promoted for guaranteeing access to the registry of all the noteworthy data and circumstances independently of the police force or the juvenile protection institution which has been attributed with the responsibility for the interested party.
2. That the indications made in Consultation 1/2009 concerning some aspects related to the proceedings for age determination of unaccompanied foreign minors be reviewed in light of the new wording given to Article 392 of the Penal Code following the amendment introduced by Organic Law 5/2010.

8.4 To the Autonomous Community of the Canary Islands Government Department of Economy, Finance and Security ; to the Autonomous Community of Catalonia Government Department of the Interior; to the Autonomous Community of Navarre Government Department of the Presidency, Public Administrations and Interior and to the Autonomous Community of the Basque Country Government Department of Interior

That operative criteria be set out for coordination with the Directorate General of the Police and Civil Guard so that when the Autonomous Community police has at their disposal an undocumented foreigner whose status as a minor is doubtful, this fact be notified immediately to the Unaccompanied Minors Registry, attaching or facilitating access to the data and annotations making the fitting comparison of records possible and, if necessary, that the data available be furnished for the registration thereof in said registry.

8.5 To the Autonomous Community of Andalusia Government Department of Equality and Welfare; to the Autonomous Community of Aragon Government Department of Health, Welfare and Family; to the Autonomous Community Government of the Principality of Asturias Government Department of Welfare and Equality; to the Autonomous Community of the Balearic Islands Government Department of Health, Family and Welfare; to the Autonomous Community of the Canary Islands Government Department of Culture, Sports, Social Policy and Housing; to the Autonomous Community of Cantabria Government Department of Health and Social Services; to the Autonomous Community of Castile-La Mancha Government Department of Health and Social Affairs; to the Autonomous Community of Castile and Leon Government Department of Family and Equal Opportunities; to the Autonomous Community of Catalonia Government Department of Welfare and Family; to the Autonomous Community of Valencia Government Department of Justice and Welfare; to the Autonomous Community of Extremadura Government Department of Health and Social Policy; to the Autonomous Community of Galicia Government Department of Labor and Welfare; to the Autonomous Community of Madrid Government Department of Social Affairs; to the Autonomous Government of the Region of Murcia Government Department of Health and Social Policy; to the Autonomous Community of Navarre Government Department of Social Policy, Equality, Sports and Youth; to the Autonomous Community of Rioja Government Department of Health and Social Services; to the Autonomous City of Ceuta Government Department of Social Affairs; to the Autonomous City of Melilla Government Department of Welfare and Health and to the Government Delegations of Alava/Araba, Bizkaia and Gipuzkoa

1. That, for the purpose of rendering full compliance with that for which provision is made under Article 35.3 of Organic Act 4/2000 governing the rights and freedoms of foreigners in Spain and the social integration thereof, resources be allocated for providing an appropriate sheltering of the interested party while the age determination proceedings are under way.
2. That instructions be issued to the juvenile protection resources and centers for the purpose of the Public Prosecutor's Office and the National Police Force being immediately notified as to the entry of any foreigner whose status as a minor is not established by way of documents or which has not been determined by decree on the part of the public prosecutor.

8.6 To the Secretary of Immigration and Emigration

That for the adoption of the framework protocol for unaccompanied foreign minors which this agency is to promote, the conclusions of the workshop on forensic age determination of unaccompanied foreign minors as well as the consensus document on good practices among the Institutes of Legal Medicine of Spain which are included in the appendix to this report all be taken into account.

8.7 To the Directorate General of the Police and Civil Guard

1. That when the existence of an undocumented foreigner whose status of being a minor cannot be determined in all certainty comes to the knowledge of the police services, they immediately proceed to verify by means of checking the ten-print fingerprint card to see what past records may exist in the Unaccompanied Foreign Minor Registry and, in the event that none were to be found, that the interested parties then be registered in said Registry, as well as recording the tests conducted and the resolutions adopted whenever applicable.
2. That, in accordance with that for which provision is made under Article 213.1.w) of the Regulations approved by virtue of Royal Decree 557/2011, a note be made in the Central Alien Registry of the decrees of the prosecuting attorney which have determined that an undocumented foreigner is of full age, making mention of the tests conducted and the health agencies having carried out the tests. That the fitting technical measures be adopted so that this data may be exploited in searches run on the Unaccompanied Foreign Minors Registry.
3. That the hearing formality at the start of the proceedings by way of which the conducting of the tests necessary for determining age is agreed be guaranteed. In this initial formality, the interested party must be informed as to the purpose of the procedure and of the rights which are his/hers, especially concerning the possibility of putting forth allegations and the possibility of appealing the resolution issued by the prosecuting attorney by way of which the age thereof is determined.
4. That the protocols necessary for coordinating with the Autonomous Community police be set out for the purpose of facilitating the immediate consultation and registration, wherever applicable, in the Undocumented Foreign Minors Registry, independently of the police force which has taken responsibility at first for the undocumented foreigner whose status as a minor is doubtful.

8.8 To the Official Medical Organization

1. That the licensed members thereof be reminded that the diagnostic testing without any treatment-related indication with a view to estimate a person's age can be conducted solely when ordered by the judicial authority or the Public Prosecutor's Office.
2. That the licensed members thereof be reminded that when medical examinations or tests are conducted for treatment-related purposes, no reports or opinions must be issued concerning a person's probable age.