



FENIX
HUMANITARIAN LEGAL AID

A Child's Best Interests?

Rights Violations in the Absence of Presumption of Minority



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INTRODUCTION

In recent years there has been an increase in children migrating, both accompanied and unaccompanied, and the United Nations High Commissioner for Refugees (UNHCR) estimate that in 2021, 41% of people forcibly displaced worldwide were under 18 years of age.¹ In Greece, the Ministry of Migration and Asylum report that over 8,000 children lodged an application for international protection the same year, representing close to one-third of all applications.² At the end of 2021, there were 2,217 unaccompanied children registered in Greece,³ though the true number of children arriving unaccompanied is difficult to ascertain given that many are wrongfully registered as adults on arrival. This is not a new phenomenon, nor is Greece the only country where children experience this.⁴ The UN Convention on the Rights of the Child (CRC) and international refugee law offer complementary forms of protection for asylum-seeking children, and the Council of Europe has underscored that children must be treated “as children first”.⁵ However, the 1951 Geneva Convention and the national asylum systems applying it do not always adequately account for the particularities of child applicants in practice.⁶

In recognition of their particular vulnerability, unaccompanied minors are given special protection under European and Greek asylum law; however, many asylum-seeking children arriving on Lesvos have been wrongfully registered as adults and forced to navigate the asylum system as unrecognised minors. In response, Fenix has focused on those cases where a presumption of minority has not been applied and children remained registered as adults for months or even years. From daily living conditions and barriers to accessing education, to procedural roadblocks and delayed family reunification, the knock-on effects of wrongful registration inevitably touch almost every aspect of a child's life, infringing on their fundamental rights as children and as asylum seekers. Age assessment procedures on Lesvos have also been plagued by a number of issues, suggesting that they were not designed with consideration for the best interests of the

¹ See UNHCR statistics at <https://www.unhcr.org/refugee-statistics/>.

² Statistics published by the Greek government indicate that 8,445 children applied for international protection in 2021 out of 28,320 total applications, representing 30%. Available at <https://rb.gy/of11lb> (Table 19, p. 12).

³ EKKA National Center for Social Solidarity, 2021. *Situation Update: Unaccompanied Children (UAC) in Greece*. Available at: https://ekka.org.gr/images/STATISTIKA/EN_EKKA_Dashboard_20211215.pdf.

⁴ Examples include the *Darboe and Camara v. Italy* case (<https://hudoc.echr.coe.int/eng?i=001-218424>), the UK Refugee Council's Age Dispute Project (<https://refugeecouncil.org.uk/projects/age-disputes-project/>), and Dr. Ulrike Bialas' forthcoming publication on unaccompanied minors in Germany and “the daily struggles of living with a contested identity” (<https://www.mmg.mpg.de/848895/forever-seventeen>). It is worth noting that the terminology varies across disciplines and geographies, such as “age-disputed” and “alleged”, “contested”, or “unrecognised” minor.

⁵ Council of Europe, 2019. *Age Assessment for Children in Migration: A human rights-based approach*, p. 9. Available at <https://rm.coe.int/ageassessmentchildrenmigration/168099529f>.

⁶ Jason M. Pobjoy, 2017. *The Child in International Refugee Law*, Cambridge University Press, pp. 1-5.

child. Ultimately, children have been denied their rights as minors and respective procedural guarantees, presenting perhaps one of the most significant protection issues in Greece.

This report aims to highlight some specific problems with the recognition and reception of unrecognised unaccompanied minors that Fenix has witnessed over the course of our work on Lesbos between 2019 and 2022. We will profile sample stories from four past clients throughout on an anonymous basis, whose asylum cases spanned several years during this period. In addition, we will highlight responses received to complaints submitted by Fenix to the Ombudsman, the Assistant Ombudsman for Children's Rights, the Ombudsman for Human Rights, and to Frontex European Border and Coast Guard Agency (Frontex) on behalf of unrecognised unaccompanied minors. Finally, we offer our recommendations to improve current policy in this area, such that unaccompanied minors can realise their fundamental rights as children.

1. KEY PRINCIPLES

Best interests of the child

The 'best interests of the child' (BIC) is considered a right, a principle, and a rule of procedure.⁷ Enshrined in Article 3(1) of the CRC, it is applied by national and international courts alike as the guiding standard when making a decision affecting a child.⁸ The broad definition requires that, for all decisions concerning a person under 18, whether carried out by private institutions, governments or courts, the best interests of the child is the primary consideration. The European Court of Human Rights (ECtHR) has repeatedly affirmed the application of the BIC principle to asylum-seeking children, and in 2019 noted that "respect for the double vulnerability of child asylum seekers must be a primary consideration, and not just an equal consideration to other factors (such as their irregular status)".⁹ Similarly, the European Union Asylum Agency (EUAA) has noted that the BIC principle must be given "high priority and not just be one of several considerations," and that asylum authorities are responsible for giving primary consideration to the best interests of the child at all stages of the asylum procedure.¹⁰ Inherent in fulfilling this principle is the necessity of conducting a best interests assessment for child applicants.

Presumption of Minority

The presumption of minority principle is contained in both Greek and EU law, and serves as a procedural safeguard for asylum-seeking children whose age is contested. Law 4939/2022 and Joint Ministerial Decision 9889/2020 (JMD) state that as long as a doubt about the applicant's minority persists they shall be treated as a minor.¹¹ The ECtHR recently found the presumption of minority to be "an inherent element of the protection

⁷ EASO (now EUAA), 2019. *Practical guide on the best interests of the child in asylum procedures*, p. 13. Available at <https://euaa.europa.eu/publications/practical-guide-best-interests-child>.

⁸ United Nations (UN) General Assembly, 1989. *Convention on the Rights of the Child*. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

⁹ International Law Blog, 2019. *The European Court of Human Rights and the Best Interests of Unaccompanied Migrant Minors: a Step Towards a More Substantive and Individualized Approach?*. Available at <https://rb.gy/5wuegi>, with reference to cases *H.A. and Others v. Greece*, Application no. 19951/16, 28 February 2019 and *Khan v. France*, Application no. 12267/16, 28 February 2019.

¹⁰ See note 7 at pp. 13-15.

¹¹ See (in Greek) Article 1, paragraph 11 of Joint Ministerial Decision 9889/2020 and Article 41(f) of Law 4939/2022, Official Gazette 111/A/10-6-2022 (Codified), Ratification of a Code of Legislation on the reception, international protection of third country citizens and stateless persons and temporary protection in the event of a mass influx of displaced foreigners, available at <https://migration.gov.gr/wp-content/uploads/2021/04/9889.pdf> and <https://www.e-nomothesia.gr/kat-allodapoi/nomos-4939-2022-phek-111a-10-6-2022.html> respectively.

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of the right to respect for private life” of unaccompanied minors.¹² Given the possible delays that may occur between registration and the appointment of a guardian, allocation of housing, or an age assessment procedure, it is essential that this principle is applied by the authorities when registering an applicant.¹³

¹² See *Darboe and Camara v. Italy*, Application no. 5797/17, para. 153. Available at <https://hudoc.echr.coe.int/eng/?i=001-218424>. Para. 67(g) of the same judgment, quoting Parliamentary Assembly: Resolution no. 2449(2022) on Protection and alternative care for unaccompanied and separated migrant and refugee children, June 22, 2022, notes the Council of Europe's emphasis on adopting a common Europe-wide model for age assessments, based on the presumption that the applicant is a minor.

¹³ UNHCR has noted the importance of the presumption of minority, “[r]ecognizing that it may not be possible to carry out some actions on arrival, such as conducting age assessments or appointing a guardian.” Inter-Parliamentary Union and the UNHCR, 2017. *A guide to international refugee protection and building state asylum systems, Handbook for Parliamentarians No 27*, p. 91. Available at <https://rb.gy/iipm5r>.

2. DETERMINING THE AGE OF AN UNACCOMPANIED MINOR

A. Incorrect registration

Similar to personal details such as name and nationality, a person's age makes up a part of their identity.¹⁴ In the context of seeking asylum, being under 18 years of age triggers a variety of entitlements and corresponding obligations on the State, particularly in the case of those who are unaccompanied. Unaccompanied minors are guaranteed special protections, including with respect to housing and legal representation as well as the appointment of a guardian, who works to ensure certain safeguards are respected throughout the process. Under EU Directive 2013/32 (Asylum Procedures Directive), Member States are required to appoint a guardian who has the necessary expertise to act in the best interests of the child as soon as possible.¹⁵

The registration of personal information is a key part of the asylum process and includes the identification of children, who are considered vulnerable under Article 21 of EU Directive 2013/33 (Reception Conditions Directive).¹⁶ In violation of the established procedure, Fenix has observed instances where applicants of international protection stated before the competent Greek authorities and/or Frontex¹⁷ that they were minors but were nevertheless registered as adults. The reasons for this have varied, from rejection of an identity document¹⁸ to a subjective and unqualified determination based on a person's physical appearance. An individual health screening by the National Public Health Organisation (EODY) on arrival has proven to be another missed opportunity for

¹⁴ EASO (now EUAA), 2018. *Practical Guide on age assessment*, Second Edition, p. 18 ('Right to identity'). Available at <https://euaa.europa.eu/publications/practical-guide-age-assessment>. See also note 12 at para. 124 of *Darboe and Camara v. Italy*, where the ECtHR noted "the age of a person is a means of personal identification."

¹⁵ Article 25 (1)(a) and (b) of EU Directive 2013/32, available at <https://eur-lex.europa.eu/eli/dir/2013/32>. For example, a key responsibility is to ensure the minor is prepared for their personal interview and that a legal representative is present. The requirement to appoint a guardian has been transposed into Greek Law 4939/2022 at Article 65(2).

¹⁶ EU Directive 2013/33, available at <https://eur-lex.europa.eu/eli/dir/2013/33>. The registration of personal data - stage three is also outlined in the reception and identification procedures under Greek Law 4939/2022 at Article 41(a) and (b), but Covid-19 quarantine protocols resulted in delays to 'full' registration and access for legal service providers was at times limited (see the Greek Council for Refugees' entry *Registration of the Asylum Application*, last updated May 30, 2022. Available in the Asylum Information Database (AIDA) at <https://rb.gy/5rmzpn>). See also a joint response to the European Commission's proposed Screening Regulation concerning procedural violations in Greek reception and identification procedures (<https://www.fenixaid.org/articles/the-workings-of-the-screening-regulation>).

¹⁷ Registration and identification of asylum seekers are functions that Frontex may carry out through its mandate to support Member States under Articles 3, 10, 37(4) and 40(4) of the European Border and Coast Guard Regulation (EU) 2019/1896, available at <https://eur-lex.europa.eu/eli/reg/2019/1896/oj>. Since 2006, Frontex has been deployed along the Greek sea borders with Turkey under Operation Poseidon (<https://frontex.europa.eu/we-support/main-operations/operation-poseidon-greece/>).

¹⁸ For example, Fenix has observed that Afghanistan's *tazkira* has been routinely rejected on Lesbos.

the authorities to identify applicants who are children. When a person's information is not documented accurately on arrival, as time goes on it becomes increasingly complicated to remedy, and taxing on the individual.

Regardless, a presumption of minority is guaranteed by law and must always apply where there are doubts about a person's age.¹⁹ This ensures no child is subjected to harm or rights violations until a decision can be formally reached, such as through an age assessment procedure.²⁰ Nevertheless, the practice of the Greek authorities involved in the registration and identification of asylum seekers on Lesbos has been to consistently disregard the presumption of minority principle. At the same time, many applicants claiming to be minors have been registered as adults and not referred for an age assessment until a lawyer becomes involved, contrary to international and European standards.

In the case of a minor wrongfully registered as an adult, the presumption of minority and BIC principles should combine to ensure that the child's rights are upheld while any age assessment process is ongoing. In December 2020, Fenix submitted a complaint to the Fundamental Rights Officer at Frontex (FRO) on behalf of three unaccompanied minors who had been registered as adults but were later found to be children. After an investigation, the FRO responded in October 2022, confirming that the principle of minority must be applied to all applicants claiming to be minors, in compliance with international standards, stating that when "a person claims to be a minor, even without presenting supporting documents, the officers shall consider that person as a minor." Additionally, during any age assessment, it is "paramount that throughout this process the officers ensure respect of the presumption of being a minor of persons claiming to be minors, by treating them as such."²¹

However, in submitting complaints to the Greek Ombudsman, the Assistant Ombudsman for Children's Rights, and the Ombudsman for Human Rights, Fenix has learned that there is a misinterpretation and misapplication of the presumption of minority principle at an institutional level on Lesbos. In February and April 2021, Fenix filed complaints to the Ombudsman and the Assistant Ombudsman for Children's Rights on behalf of six

¹⁹ Article 41(f) of Greek Law 4939/2022; Articles 13 and 25(5) of the EU Directive 2013/32; UN Committee on the Rights of the Child Joint general comment 3/22 (2017) states that governments should ensure "anyone claiming to be a child is treated as such, promptly referred to child protection authorities and other relevant services, and appointed a guardian, if unaccompanied or separated," para. 32(h). Available at <https://digitallibrary.un.org/record/1323014?ln=en>.

²⁰ See note 13 at p. 91.

²¹ Final Report by Frontex Fundamental Rights Officer for Complaint CMP-2020-00024 submitted by Fenix, received October 12, 2022.

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unrecognised children, whose minority was later acknowledged, in some cases two years after their arrival. These clients had been denied the protection of a presumption of minority and, despite stating their age, were registered as adults. Many of these clients were also not referred for an age assessment at registration. In each case, there were severe consequences for their living conditions, including a lack of any support following the Moria fires in September 2020. The basis of these complaints was that the presumption of minority contained in Greek law had not been applied, according to which applicants "shall be considered a minor and shall be treated accordingly," until a finding of age is determined.²²

As a result, the Assistant Ombudsman for Children's Rights, agreeing that the principle should apply to any applicant whose age is contested, sought further information as to why the presumption had not been applied. Responding to the requests, the Commander of Lesvos Reception and Identification Centre (RIC Lesvos) and the Mytilene Public Prosecutor both affirmed a different interpretation of the principle. The Commander noted specifically that, "where a third country national or stateless person has been registered as an adult and subsequently claims to be a minor, even if, for lack of any other more appropriate procedure, he or she has been referred to an age assessment procedure...no presumption of minority is created and consequently cannot be considered, before the completion of the procedure, as an unaccompanied minor," and confirmed that only those registered as minors on arrival would be treated as such.²³ This interpretation, clearly at odds with both Greek law²⁴ and international standards, has had a profound impact for unrecognised minors, particularly when the authorities do not refer the applicant for an age assessment.

Client A arrived on Lesvos in March 2021. The client stated they were 16 years old to the authorities at registration and provided a copy of their identity document. Despite this, the authorities registered the client as 18 years old and indicated they would correct the client's age once an original identity document was provided. However, no presumption of minority was applied and no age assessment was ordered at registration.

²² As translated from original Greek version of Law 4939/2022, at Article 41(f).

²³ Translated from the Greek version of a letter sent on April 26, 2021 from RIC Lesvos' former Commander to the Ombudsman (document 4893/26-04-2021). The Mytilene Prosecutor's Office also confirmed they shared the same interpretation, and that such interpretation was contained in a document by the Special Secretariat for the Protection of Unaccompanied Minors (Protocol Number 394/1-4-2021).

²⁴ For example, Article 80(3) of Greek Law 4939/2022 requires that a guardian be appointed in advance of any age assessment procedure, who will protect the rights and best interests of the applicant throughout the age determination procedure. However, for those wrongly registered, a guardian cannot be appointed without the presumption of minority being applied.

Client B arrived on Lesbos in December 2019. During registration, the applicant stated their age as 16 years old. The interpreter assisting with registration did not believe them and the client was registered as 22 years old. Despite the client's attempts to correct the age on record, no age assessment was ordered. They did not undergo an age assessment procedure until 10 months after arriving on Lesbos, and only after the intervention of a legal representative at Fenix.

Client D arrived on Lesbos in December 2019. Despite informing the translator during registration that they were 16 years old, the client was registered as an adult. No age assessment was ordered until Fenix became involved with the case, and their first age assessment occurred in October 2020, 10 months after arriving.

B. Age Assessments

When should a referral to an age assessment occur?

In the case of doubt as to the minority of an asylum seeker, age assessments may be conducted by Member States pursuant to the Asylum Procedures Directive.²⁵ Since August 2020, age assessments in Greece have been provided for under the JMD.²⁶ This sets out the process for referring an individual for an age assessment from the moment the doubt as to the age of the individual arises, to the successive steps of the examinations itself, through to notifying the decision and potential subsequent appeal.²⁷

Age assessments should not be treated as standard procedure, and should only be referred in circumstances where it would be in the best interests of the applicant.²⁸ Further, an age assessment should only be carried out if there are "serious", "reasonable", and "well-founded" doubts concerning whether the individual is a child.²⁹ The JMD defines "doubt" as arising when the authorities' initial assessment is inconsistent with the

²⁵ Article 25 of EU Directive 2013/32.

²⁶ This JMD came to substitute the previous Joint Ministerial Decision 1982/15.2.2016, which was legislating the procedure from February 2016 until August 2020.

²⁷ JMD 9889/2020 also sets out the various bodies and institutions responsible for different stages of the process. As an example, should the doubt arise in the interview, the Director of the Asylum Service is responsible for the referral.

²⁸ See note 14 at pp. 11 and 21-31. The guidance additionally notes that if it "is not deemed necessary and useful...it should not be undertaken," p. 21.

²⁹ See note 7 at p. 20; See also Parliamentary Assembly of the Council of Europe, Resolution no. 2195 (2017), Child-friendly age assessment for unaccompanied migrant children, para. 6.1. Available at <https://pace.coe.int/en/files/24273/html>.

self-declared age of the applicant.³⁰ The EUAA provides further guidance on this issue, and distinguishes “simple doubts” from the required “substantiated doubts”. Substantiated doubts occur when “documentation is missing and the claimed age is not supported or is contradicted by several elements of evidence gathered by the authorities”.³¹ When identity documents are presented by minors that support their claimed age, in theory there should be little cause for doubt.³² In those cases where they are necessary and in the best interests of the child, they should occur “without undue delay”.³³

On Lesbos, the practice of the Greek authorities of referring applicants for an age determination procedure has been marred by inconsistency and a misapplication of the concept of “substantiated doubt”. Fenix has observed unqualified and subjective decisions by the authorities to register an applicant with an incorrect age, when there appears to be little cause for doubting the applicant’s statements. Further, a significant issue on Lesbos in recent years has been the authorities’ refusal to refer an individual for an age assessment after they have stated they are a minor, while registering them as adults. This has led to unrecognised minors on Lesbos being unable to even access an age assessment procedure, and left to navigate the asylum procedure undetected.

In this context, access to an age assessment represents an applicant’s only chance to correct the record and secure their rights as a child, as was the case for many of the unrecognised minors Fenix has represented. In a number of cases, an age determination procedure was only provided after intervention by Fenix, in many cases close to a year after the minor had arrived on Lesbos. In these cases, the authorities consistently misapplied the concept of “doubt”, asking the applicant or their lawyer to show why an age assessment should be ordered. Instead, the onus should be on the authorities to correctly apply the “substantiated doubt” safeguard at the registration stage, so that age assessments are ordered only when necessary and appropriate. Even for those who

³⁰ See note 11. Article 1 of JMD 9889/2020, para. 3, states “[d]oubt about a person’s minority arises when the initial assessment of the [competent] persons or authorities or bodies...is inconsistent with the claims of the third-country national or stateless person about his minority, in particular during the recounting of the personal history of the person about important chronological events of his life or place of origin or previous residence,” as translated from original Greek.

³¹ See note 14 at p. 23.

³² In practice, the authorities frequently do not take the Afghan Tazkira document into account, see Joint NGO Briefing “The Workings of the Screening Procedure”, at page 12, <https://tinyurl.com/RSAScreen>. UN guidance affirms that “[d]ocuments that are available should be considered genuine unless there is proof to the contrary.” *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return, CMW/C/GC/4-CRC/C/GC/23*. Available at <https://digitallibrary.un.org/record/1323015?ln=en>, p. 2.

³³ See note 14 at p. 42.; See also note 32 at p. 2.

are referred by the authorities for an age determination procedure, the presumption of minority has consistently not been applied while an age assessment is pending, contrary to international and European standards, leaving children without access to their fundamental rights for lengthy periods of time.³⁴

Procedural Requirements of Age Assessments

Given the practice of the Greek authorities of registering applicants claiming to be minors as adults, a referral to an age assessment procedure often takes on vital importance. Age assessments are often essential to ameliorate the impacts of incorrect registration, providing applicants their only pathway to a fair asylum procedure. As recently noted by the ECtHR, “the procedure to assess the age of an individual alleging to be a minor, including its procedural safeguards, is essential in order to guarantee to him or her all the rights deriving from his or her minor status”.³⁵ However, even for those applicants who gain access to an age assessment procedure, the consistent poor quality of the assessment process on Lesbos has served to further violate minors’ rights.

Under international standards as well as Greek law, age assessments must follow a set procedure.³⁶ There are three potential successive stages to the examination itself, with each stage to be exhausted before proceeding to the next, and the application of the next stage to be sufficiently justified.³⁷ The successive format of the procedure attempts to decide upon the individual’s age by the least invasive means possible, and avoids exposing minors to radiation unnecessarily. Each stage must be conducted by an appropriately qualified professional, such as a medical professional or child psychologist.

The first stage is the least invasive and consists of a physical examination, considering characteristics such as height, weight, voice, and hair growth. In the case of a “justified impossibility” to determine the age from this stage, the next stage is a psychosocial assessment, wherein a psychologist and a social worker examine the cognitive, behavioural, and psychological development of the individual. At this point, the first two tests may be examined together. If it is still not possible to determine the age, the assessment moves to the third and final stage, which is the most invasive and the only

³⁴ The presumption of minority requirement is found in the JMD 9889/2020, para. 11, and Article 41(f) of Greek Law 4939/2022.; See also Council of Europe, 2017. *Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration*, para. 47. Available at <https://rm.coe.int/age-assessment-council-of-europe-member-states-policies-procedures-and/168074b723>.

³⁵ See note 12 at para. 124.

³⁶ Additionally, international guidance encourages that non-medical techniques should be exhausted prior to moving to any of the permitted medical methods. See note 14 at p. 43.

³⁷ JMD 9889/2020, para. 5.

stage permitted to rely on radiation. This stage provides for methods such as an X-ray of the wrist bone, dental examination or dental X-ray, or other similar internationally recognised examination.

Importantly, to combat the recognised unreliability and imprecision of any method of assessing age, it has been established that the benefit of the doubt must be applied in favour of the applicant.³⁸ Accordingly, a range should be established with the result reflecting the lower end of the scale. Additionally, should a doubt persist following the assessment, it must be assumed that the applicant is a minor.³⁹

European and Greek law provide guiding principles on how the applicant should be treated during the age assessment process. The JMD requires that each applicant has a right to be informed of the details of the age assessment procedure in a language they understand, including each of the methods involved and the possible consequences of the result.⁴⁰ On a basic level, the provision of information serves to enhance the applicant's agency, ensure their dignity, and assist with decreasing the anxiety that may be associated with not knowing the consequences of a procedure one is facing. Additionally, each age assessment procedure should be customised to the applicant, conducted in a child-friendly manner, adapted according to cultural and gender considerations, individualised, and sensitive to any specific vulnerabilities.⁴¹

Violations in Practice

Over the years, Fenix has represented many unaccompanied minors who have undergone an age assessment process in violation of the required standards. Violations ranged from using invasive methods as the first stage of the examination, not exhausting one stage prior to moving to the next, a lack of qualified and appropriate personnel, a lack of justification for adopting a more invasive measure, failure to explain the procedure, a lack of providing reasoning such that an appeal could be properly argued, a lack of proper notification of the outcome, and applicants not being informed of their right to appeal.⁴² In a sample of 11 cases from 2020, none of the age assessments had lasted

³⁸ See note 14 at p. 22.

³⁹ Article 25(5) of EU Directive 2013/32.

⁴⁰ This requirement is also contained in Article 25(5)(a) of EU Directive 2013/32. The possibility of refusing to undergo the assessment and the consequences of such a refusal must also be explained to applicants.

⁴¹ See, for example, Parliamentary Assembly of the Council of Europe, Resolution no. 2195 (2017), Child-friendly age assessment for unaccompanied migrant children, para. 6.6. Available at <https://pace.coe.int/en/files/24273/html>.

⁴² According to Article 9 of the JMD, applicants have 15 days from notification of the decision to submit an appeal. The presumption of minority should continue to apply until the appeal period has been exhausted. Fenix has witnessed several violations with respect to the right to appeal including improper notification, decisions containing wrong

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more than 10 minutes, and sometimes this timeframe encompassed more than one stage of the procedure.⁴³ One applicant informed Fenix his assessment had lasted two minutes, and another informed Fenix his assessment had lasted one minute. These short timeframes suggest insufficient time for an adequate examination, including the ability to inform the applicant of the details of the procedure. Another typical violation is the immediate referral of the individual for an X-ray, without justification and without having conducted the first two stages of the procedure sequentially.⁴⁴ Finally, it is worth highlighting that in 2021 age assessments were suspended for a period of six months on Lesbos, pending personnel training by a team from Athens. This resulted in severe delays for applicants.

Client C arrived on Lesbos in September 2019 and faced multiple procedural violations in their attempts to have their correct age on arrival, 15, recognised. This client underwent a total of three age assessments, the first one taking place 10 months after arrival on Lesbos following an intervention by Fenix and the Special Secretariat for the Protection of Unaccompanied Minors. This assessment took place in October 2020 and lasted two minutes, in which one person asked questions, one wrote the client's answers, and one translated. It was unclear who each of these individuals were as they did not introduce themselves. There was no physical examination, and the client underwent an X-ray the same day. There was no guardian present and they were not issued any result from this assessment. After their asylum interview in November 2020, which proceeded despite the client pointing out that their date of birth was recorded incorrectly, a second age assessment took place. This time, the examination lasted two minutes in which a doctor simply asked the client to remove their mask. Fenix assisted in appealing the negative result of this second age assessment. The appeal was accepted and a third age assessment ordered, which took place in June 2021 and included both a physical and psychosocial examination. Finally, nearly two years after this person's arrival to Lesbos, they were recognised as a minor.

deadlines for appeal, and improperly drafted decisions. Additionally, in practice the appeal process is very difficult to access without legal representation, and a lawyer appointed by the Greek state is not provided for in these cases.

⁴³ Fenix interviewed these 11 clients between August and October 2020 as part of a complaint submitted to Frontex Fundamental Rights Officer in December 2020.

⁴⁴ In particular, Fenix observed this trend with a number of clients in 2019 and 2020.

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Client A arrived on Lesbos in March 2021 when they were 16 years old. After being incorrectly registered as an adult, their first instance interview took place in April 2021. Only during the interview was the client referred for an age assessment, which eventually took place in June 2021. However, the client did not understand that what took place was in fact an age assessment as no one informed them this was the case or explained what would be involved in the procedure. The assessment lasted 5-10 minutes and did not follow the required successive procedure, and the individuals conducting it did not introduce themselves. The client was found to be an adult. On appeal, the second age assessment did not respect the three-step procedure required by law, and irrelevant questions about the client's journey to Lesbos were included. This assessment also concluded that Client A was an adult. It is worth noting that Client A has since been recognised as a minor in another Member State.

Client D arrived on Lesbos in December 2019. Despite declaring they were a minor at registration, the client did not receive an age assessment until October 2020 after intervention by Fenix and the Special Secretariat for the Protection of Unaccompanied Minors. The first session lasted two minutes, in which there were three other people present, with one asking questions, one translating, and one writing, and these individuals did not introduce themselves. The client was told to attend an X-ray appointment the next day, and that a result would be provided the same day. The X-ray session lasted ten minutes, and no result was given.

3. CONSEQUENCES OF A FAILURE TO RECOGNISE MINORITY

A. Reception Conditions

Of the various facets of daily life that can be negatively impacted when a child is treated as an adult, housing and education are some of the most critical. The Reception Conditions Directive outlines particular requirements for children, including attendance at school and accommodation in a safe environment and with family members where possible. Delaying or denying children access to education, including opportunities to learn a local language, can have future impacts and exacerbate existing barriers, such as access to the job market.⁴⁵ When children go unrecognised and the presumption of minority is not respected, they are also generally housed alongside unfamiliar adults and unable to access designated housing or other safe spaces for unaccompanied minors. This is of particular concern as the camps on Lesvos have received significant and repeated criticism for substandard conditions, from poor sanitation and environmental concerns to the use of tents that do not offer adequate shelter from the elements.

Inappropriate housing leads to further risks, such as violence and exploitation, and the presumption of minority seeks to reduce the risk of harm to unrecognised unaccompanied children by removing them from camp settings. Early identification and separation of children from the general adult population in reception and identification centres decreases the risk that children will be targeted by traffickers or exploited in other ways. Regrettably, some children represented by Fenix have been subjected to incidents of violence in camp.

In response to a collective complaint filed in 2018 with the European Committee of Social Rights (ECSR), Greece was ordered to take “immediate measures” on a number of issues until a formal decision could be issued regarding potential violations of children’s rights. This included provision of adequate housing, access to education and healthcare, and appointing an effective guardian. In 2021, the ECSR determined that the Greek government had in fact violated numerous rights of children under the European Social Charter, acknowledging inadequate accommodation and education on the islands, and

⁴⁵ See the Greek Council for Refugees’ entry *Employment and Education*, last updated May 30, 2022. Available in AIDA at <https://rb.gy/st6lvw>.

“the lack of an effective guardianship system for unaccompanied and separated migrant children.”⁴⁶

Appropriate guardianship is essential for children in meeting their day-to-day needs and accessing key services such as legal counsel, but gaps can exacerbate the risks to life and health. This was evident following the Moria fire in September 2020, as Fenix staff worked around the clock to locate clients displaced by the fire, including children, who were left to sleep on the streets in the aftermath without access to food, water, and shelter. Many children and other vulnerable people were transferred in the aftermath of the fire,⁴⁷ but there was a stark contrast in the authorities' treatment of unrecognised minors as they neglected to offer any support.

B. Impact on Family Reunification

Family unity is a fundamental principle under international law and EU asylum law. It is explicitly recognised by EU Directive 2011/95 (Qualification Directive) and the Dublin III Regulation, in recognition of the importance of keeping families together. Greek Law 4939/2022 at Article 22 dictates that the competent authorities take “all necessary measures” to ensure family unity is maintained,⁴⁸ while Article 23 of the Reception Conditions Directive requires Member States to take “due account” of family reunification possibilities when assessing the best interests of child applicants.⁴⁹ UNHCR have noted that family reunification should generally be regarded as being in the best interests of the child.⁵⁰

⁴⁶ ECSR, 2021. *Decision on the merits: International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Complaint No. 173/2018*, Conclusion. Available at <https://hudoc.esc.coe.int/eng/?i=cc-173-2018-dmerits-en>.

⁴⁷ UNICEF, 11 September 2020. *UNICEF statement on children affected by the Moria camp fire on Lesbos Island, Greece*. Available at <https://rb.gy/go3zos>.

⁴⁸ See note 11, including Section 60(3)(b), which requires the authorities to assist unaccompanied minors with locating their family members.

⁴⁹ EU Directive 2013/33. This is also required by the Dublin III Regulation, available at <https://eur-lex.europa.eu/eli/reg/2013/604/oj>, in which Article 6(3) specifically requires Member States to give “due consideration” to family reunification possibilities.; It should be noted that the issue of family unity also affects minors who arrived on Lesbos accompanied by an adult sibling. Fenix has represented clients who are registered as single adults, when in reality they are minors whose applications have been separated from their older sibling in the asylum system, in breach of the principle of family unity.

⁵⁰ UNHCR, 2021. *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, p. 50. Available at <https://www.refworld.org/docid/5c18d7254.html>.

Article 8 of the Dublin III Regulation allows for unaccompanied minor applicants to be reunited with family members present in other Member States.⁵¹ Once the necessary criteria are met, Article 8 submissions typically carry a high acceptance rate. Any transfer must be in the best interests of the child, meaning a separate best interests assessment must be carried out. Article 8 applications must be submitted within three months of registration of the individual.⁵² Should any criteria of Article 8 not be met, Article 17 of the Regulation allows for Member States to accept applicants under humanitarian reasons on a discretionary basis who do not otherwise fit into the specific family scenarios envisioned by the rest of the Regulation, or where the required deadline for submission has passed. However, an applicant's chance of success is lower with Article 17, with some Member States virtually never accepting applications under this Article.⁵³

As a consequence of incorrect registrations, delayed age assessments, incorrect age assessment procedures, and a lack of application of the presumption of minority, Fenix has witnessed children miss out on reunification opportunities with their family members when they are not recognised as being minors within the required three month timeline. These violations occur even in cases where the child mentions at registration that they have a family member in the EU, and converge to impede the possibility of relying on Article 8 of the Regulation. For these individuals, their application must be made under the less secure option of Article 17. This pattern serves to deny children their basic rights, with severe knock-on impacts including delays, inappropriate living conditions, and being unable to spend the last years of their childhood with their family.

C. Impact on Asylum Procedure

As well as experiencing gaps in reception conditions and their standard of living, without the presumption of minority applied applicants are denied procedural entitlements with respect to the asylum process. According to Greek law, unaccompanied minors are recognised as a vulnerable group entitled to various accommodations. As one example,

⁵¹ Dublin III Regulation.

⁵² If the family member whom the applicant is seeking to be reunited with lives in Germany, France, Italy, Belgium, or Croatia, applications must be submitted within three months of *arrival* on Lesbos.

⁵³ Fenix, 2021. *Keeping Families Apart: The Dublin III Regulation in Practice*, p. 6. Available at <https://www.fenixaid.org/articles/the-dublin-iii-regulation-in-practice>. Over the course of our work, Fenix has observed a very low acceptance rate amongst our applicants for family reunification under Article 17 of the Dublin III Regulation for certain countries. For example, Germany almost never accepts applicants under this Article. See also Refugee Support Aegean, 2019. *Refugee Families Torn Apart: The systematic rejections of family reunification requests from Greece by Germany and their detrimental impact upon the right to family life and the best interest of the child*. Available at <https://rsaagean.org/en/refugee-families-torn-apart/>.

the personal interview should be modified to be child-friendly.⁵⁴ Recognition of minority can also lead to further procedural exemptions, and a finding that special procedural guarantees are needed due to age can lead to additional entitlements. One example is that exemption from the border procedures may be granted, with the asylum claim instead being processed under the regular procedure.⁵⁵

In cases where an applicant is found to be a minor months or years after they arrived on Lesbos, it goes without saying that the finding of minority does not ameliorate the violations experienced without the presumption of minority applied, nor restore the applicant to the position they would have been in had they been treated as a minor throughout the process. Additionally, in many cases where an age assessment is pending, often the asylum procedure is not suspended. Asylum interviews have proceeded despite the child and/or the lawyer present alerting the caseworker to their circumstances and requesting a deferral due to a pending age assessment. In many cases, only the notification of the decision itself is suspended.⁵⁶ In these cases, it is unclear whether the asylum service has an opportunity to adequately consider the applicant's minority as part of their asylum claim. This gap is particularly damaging in cases where the fact that the applicant is a child forms a central part of their asylum claim and their reason for seeking safety, for example in the case of child soldiers, child labour, sexual violence, and other forms of child exploitation.⁵⁷

Client B had their asylum interview in November 2020, a month after their first age assessment was conducted. At the beginning of the interview, their lawyer pointed out that an age assessment result was pending, and that a request to postpone the interview until the age assessment decision was issued had been submitted. Nevertheless, the caseworker proceeded with the interview.

Client D had their asylum interview in December 2020, having not yet received a result from an age assessment that took place in October 2020. Their lawyer requested postponement of the interview until the age assessment process had been completed, pointing out that it would otherwise be impossible to meet the best interests of the child principle. Regardless, the caseworker proceeded with the interview.

⁵⁴ Article 15(3)(e) of EU Directive 2013/32. This requirement is also contained in Article 80(2) of Greek Law 4939/2022. See also Article 72(2).

⁵⁵ Article 72(3) of Greek Law 4939/2022 covers applicants in need of special procedural guarantees due to particular vulnerabilities, which may include age.

⁵⁶ Fenix has also represented two clients whose decisions were actually issued prior to the results of the age assessment procedure being notified.

⁵⁷ See note 14 at p. 24.

CONCLUSION

The presumption of minority seeks to ensure that, while awaiting an age assessment, the asylum process for an applicant whose age is disputed mirrors that of an unaccompanied minor per Greek and European law. The presumption bridges the gap between registration of a minor and subsequent actions such as appointment of a guardian, transfer to appropriate housing, and referral for an age determination procedure. The principle ensures procedural safeguards are met while the age assessment decision is pending, and that applicants who later receive positive age assessment decisions have not been denied protection throughout the process. In tandem, the BIC principle ensures that all actions taken by authorities throughout the process are in a child's best interests and uphold their dignity.

In recent years, Fenix has observed the authorities' failure to apply the presumption of minority safeguard, while taking actions that are clearly not in a child's best interests. This failure has led to unaccompanied minors falling through the cracks, navigating the asylum system undetected. Exacerbating this failure are the lengthy delays that plague the asylum process for unaccompanied minors. Fenix clients have experienced delays in the recognition of their minority of up to 21 months and, in some instances, delays were so long that a child could turn 18 before the age assessment process was completed. Fenix has witnessed cases where the minor applicant goes through the entire asylum process treated as an adult by the authorities. In other cases, there is such a long delay for an age assessment that an unaccompanied child spends months or years housed amongst the adult population before being proven to be a minor and transferred to child-appropriate housing.⁵⁸

In addition to violating the standards required by Greek, European, and international law, the treatment of unrecognised and unaccompanied minors by the Greek authorities falls far short of respecting an individual's dignity. Respect for the dignity of an applicant whose minority is disputed is specifically called for under the JMD and Asylum Procedures Directive, and aligns with the CRC entitlement that children have a right to be heard.⁵⁹ Requirements such as keeping an applicant informed of each stage of an age assessment they are facing, and conducting the age assessment and personal interview

⁵⁸ In *Darboe and Camara vs Italy*, the ECtHR concluded that a delay of four months in moving an unrecognised unaccompanied minor to appropriate housing breached the applicant's procedural guarantees as he had been housed in an overcrowded adult reception centre during this time. See note 12 at para. 150.

⁵⁹ See note 8 at Article 12 requiring that contracting States allow children capable of forming opinions to express their views.

in a child-friendly manner, support this principle and imply respect and dignity for each person.⁶⁰ In addition to non-compliance with Greek and international legal standards, disregarding an applicant's statements at registration, not providing information on the process, and not applying the presumption of minority are among the ways that actions by the Greek authorities serve to deny an individual their dignity.

In many ways, the presumption of minority and BIC principles seek to empower and protect the minor applicant in the context of a dynamic that is inherently imbalanced. These principles support the legal entitlements of unaccompanied minors to ensure that unqualified border authorities cannot make arbitrary decisions about age unchecked. Unfortunately, Fenix has witnessed the authorities register applicants as adults despite their declaration of minority, and not refer them for age assessments, as if that were the end of the matter. It does not escape observation that such practices result in less effort and resources required on the part of the Greek authorities with respect to registration and identification procedures, reception conditions, and the asylum procedure. Regardless, such practices and arbitrary decision making must be abandoned, such that legal standards can be met and the fundamental rights of minor applicants respected. Additionally, these cases highlight the importance of legal representation for unrecognised unaccompanied minors, who otherwise may not have access to an age determination procedure or other procedural entitlements.

Unfortunately, despite the dramatic decrease in population currently in RIC Lesvos compared with the peak population of Moria in 2020, many of the same violations outlined in this report continue to occur. We therefore urge the authorities to implement the recommendations below on an urgent basis, to ensure children will no longer be denied access to the asylum process and reception conditions they are entitled to.

⁶⁰ See, for example, the requirements contained in Article 70(2) and (3) of Greek Law 4939/2022.

RECOMMENDATIONS

1. We urgently request that all authorities involved in the reception and identification of asylum seekers on Lesbos apply the presumption of minority principle as required by Greek law and international standards, to any applicant declaring to be a minor at registration, even those who may be initially registered as adults. Proper application of this principle should include the prompt appointment of a guardian, referral to appropriate housing, and referral to the education system, amongst other measures, while an age assessment procedure is pending.
2. A best interests assessment for every minor must be standard practice, including for those who declare to be minors at registration but are nonetheless registered as adults.
3. All decisions affecting minor applicants should be undertaken as quickly as reasonably possible, to avoid delays with realising fundamental rights, knock-on health impacts, and the possibility of "aging out" of their entitlements as children.
4. We urgently request that the authorities involved in the reception and identification of asylum seekers comply with Greek law and with international standards regarding when it is appropriate to refer applicants for age assessments.
5. We urgently request that age assessment procedures are conducted according to the required legal standard. This includes respecting the sequential approach that sets down three subsequent stages of examination, justified reasons for proceeding to each subsequent stage, the presence of a representative facilitated at every stage, informing applicants in an appropriate manner of the details and potential outcome of the examination, proper notification of the decision, and proper respect of the appeal process, amongst other requirements. The benefit of the doubt must also be afforded to applicants with respect to the decision.
6. All staff involved in the processing of children's asylum claims and in the care of minors must be adequately trained in how to respect a child's procedural entitlements. For certain roles, such as guardians, personnel conducting the age assessment, and interviewers, specific qualifications and/or expertise to act in the best interests of the child are required.

A Child's Best Interests?

7. Safe and child-friendly reception conditions should be guaranteed, including housing and education, while an age assessment is pending.
8. All authorities involved in the registration of asylum seekers must enquire as to whether the applicant has family members in other EU Member States as soon as possible. This is particularly important when the applicant is unaccompanied and stating that they are under 18. If yes, the presumption of minority should be applied and swift steps to initiate a family reunification case should be undertaken.
9. The asylum procedure, including the personal interview, must be deferred for an applicant who has been referred for an age assessment or who has an age assessment result pending, until the age assessment process has been completed (including any appeal period of the decision).
10. To the extent that Frontex continues to be involved in the registration and identification of asylum seekers on Lesbos, we urge Frontex to comply with its Operational Plan Manual, Joint Operation Poseidon 2019 requiring compliance with the presumption of minority principle, in recognition of EU and international standards.