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# The Legal Protection of Unaccompanied Foreign Minors in Italy. Law 47/2017 two years on

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*"Nothing like the legislation on foreigners tells us so deeply who we are"*[1]

## 1. THE ITALIAN REALITY OF UNACCOMPANIED FOREIGN MINORS

Analysing the problems and legal issues with which we deal in our daily life, what are the issues that deserve particular attention and which we should focus on? We hear talking about immigration very often and we actually see it with our own eyes and deal with it at any time, much more than we can even imagine. On our territory it is very difficult to identify the themes that have to be treated as a priority compared to others. However, if facing the migratory phenomenon, now structural to our century and to our planet, means "*putting the head and our heart to help the more desperate and in need humanity"*[2], we cannot ignore the fate of unaccompanied foreign minors, considered more vulnerable and in need of particular protection: first of all because they're minors, and so they must be protected more deeply, and they're also foreigners, and therefore object of those rejection policies established for *"others*", in this case immigrants, identified as enemies and as a danger for the national security.

The topic of unaccompanied foreign minors is very sensitive to emotional influences, and the system of law, established for unaccompanied minors, which until now has been recognized between two very different kind of standards, the ones established for minors and the other ones established for foreigners, are particularly significant of *"who we are"*.

The Italian legal framework concerning unaccompanied foreign minors, is not so different from the International provisions recognized for them, and even there we find this very strong contraposition when trying to identify the most favourable legal protection. Unaccompanied foreign minors, are not just foreign minors but they're situation is more and more complex: they're not accompanied by parental figures and forced to project their possible future into a land of which they do not even know the language, in this specific case, they try to entry Italy, but it's not so easy for them to receive the appropriate

[1] Luigi di Liegro, in Lorenzo Miazzi "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag 7

[2] ACCORINTI M. "Politiche e pratiche sociali per l'accoglienza dei minori non accompagnati in Italia", CNR Edizioni, Roma, 2014, prefazione

protection they're entitled to receive according to their situation, specifically considering human rights.

The exodus of people who migrate "alone" and of the entire groups of humans along the Mediterranean is a phenomenon that is characterizing this historical phase and therefore we cannot fail to mention, regarding migrants in Italy, the thousands of people who have performed and are performing in these hours, these days and months, their journey, hoping to find better life conditions. [3]

Today writing about the topic of immigration and the hospitality system that has been established for foreigners in Italy, is quite a difficult operation, due to the fact that it is also politically very sensitive. [4]

Italy has been at the centre of the operation of the refugee crisis for many years now. A large number of people, seeking peace and a dignified life, runaway from Syria; many others, coming from sub-Saharan Africa, undertake increasingly dangerous journeys, crossing the desert and reaching Libya, where, very often, they are victims of abuse and unspeakable violence. [5]

The migratory paths and the reasons that drive Unaccompanied Foreign Minors to undertake the journeys to reach Italy are among the most complex aspects of the migration phenomenon in the country, since the last ten years. The number of UAMs has been increasing with incoming flows, especially of asylum seekers, according to a very high growth rate.

The years 2014-15 mark the emergence of two critical issues that are no longer removable: on one hand, the *"normalization"* of tragedies at sea, and the acceptance of the fact that one becomes tacitly aware that there is a physiological number of migrants and also minor migrants which risk, and decide to undertake these journeys hoping to find these better life conditions, and in the end instead they find death in the sea. On the other hand, the unveiling of the "bad management" of the reception system itself.[6]

From the juridical point of view, as we have already said, the position of foreign minors is in between two very different kind of standards since they're considered both minors and foreigners and their double juridical condition makes the treatment foreseen for them extremely fragmented and unorganized.

[3] "Immigrazione e contesti locali", Annuario Cirmib 2015, pag. 9
[4] Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag. 7
[5] "Rapporto sulla protezione internazionale in Italia 2017", UNHCR
[6] "Immigrazione e contesti locali", Annuario Cirmib 2015, pag. 9

The disciplines are opposite between them, the one on minors identified as a "favourable" legislation, based on principles of protection and support of the minors, and on the other hand, the one established for foreigners recognized as a negative legislation, the "unfavourable" one, mostly based on principles of control and defence of national security.

This "unfavourable" legislation has its legal basis on the single text of public security, the only law that up to the 90s regulated the condition of foreigners, recognized as subjects that had to be controlled, in order not to cause a specific danger to the society.

The minor is therefore a subject to whom recognize faculties and freedoms, but to which it must be considered forbidden to enjoy those rights, when it is not allowed.[7] The legal protection provided for them is not the only fragmented scene within unaccompanied minors topic, since the comparison of data referring to migrant children in the world is affected by the difficulties that the different countries encounter in implementing different shared statistical systems, that allow to have information on different groups of children to be integrated, and more generally on migrants.[8] The actual presence of unaccompanied minors in the area is difficult to define, since it concerns subjects who are for the most part not in order with the rules on the stay and with a strong mobility on the territory. [9] The reality of unaccompanied foreign minors is becoming more and more tangible in our country, especially in the local realities already affected by the arrival of migrants and the institutions find themselves in front of administrative and operational challenges, that are not easy to win.

In Italy there are different ways of collecting data on foreign minors and this can produce very differentiated statistical results, and the systematization of these data has not yet been initiated, although as it is shown by the data in the Statistical Appendix, in the last six years the number of unaccompanied minors has remained at an annual average of about 7,000 / 8,000 minors, with a peak in 2013, the year in which 8,461 foreign minors were recorded and that has been largely overcame at the end of 2014.[10]

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[7] Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag. 8

[8] "I minori stranieri in Italia, identificazione, accoglienza e prospettive per il futuro – l'esperienza e le raccomandazioni di Save the Children", pag. 12

[9] Marco Accorinti, "Politiche e pratiche sociali per l'accoglienza dei minori non accompagnati in Italia" Introduzione, pag. 9

[10] Marco Accorinti, "Politiche e pratiche sociali per l'accoglienza dei minori non accompagnati in Italia", pag. 10

The progressive growth of foreign girls and boys, in Italy, as well as in other European countries, is characterized in different ways:

• Minors born in Italy from legally resident immigrant parents;

• Minors who regularly enter Italy to be reunited with their parents;

• Minors who arrive irregularly, after having travelled through foreign countries, without any reference adult;

• Minors who arrive irregularly with their parents;

• Minors who travel irregularly through Italy to other European countries;

• Minors who arrive irregularly to be reunited with their parents or others relatives;

• Child victims of trafficking.[11]

Foreign minors can come into contact with Italian institutions in different ways and different paths open up, trying to allow the appropriate social integration of the child. The Italian law imposes on public officials, public service appointees and institutions that predominantly carry out health or assistance activities, which are in any case aware of the entry or presence on the territory of the State of an unaccompanied minor, to immediately inform the institutional structure that deals with coordination and interventions in favour of unaccompanied foreign minors.[12]

The information and data collected on UAMs in Italy, although significant, cannot be considered exhaustive, since not all the competent Authorities in the State territory systematically report the presence of minors without a reference adult figure, as well as not all foreign minors who arrive in Italy come into contact with institutions or are intercepted by law enforcement agencies, and some of them also remain in hiding. [13]

Certainly, given their dual nature and the risk of being considered as enemies because they are foreigners, the fundamental thing that must be guaranteed is a reception system that is able to allow an adequate protection for minors, even if it often happens that the host community and the legislator itself end up managing the emergencies rather than governing the phenomenon and discretionary attitudes develop. How are unaccompanied minors protected by

[11] "I minori stranieri in Italia, identificazione, accoglienza e prospettive per il futuro – l'esperienza e le raccomandazioni di Save the Children", pag. 12

[12] Marco Accorinti "Politiche e pratiche sociali per l'accoglienza dei minori non accompagnati in Italia", Introduzione pag. 9

[13] Maria Giovannetti "Storie minori, percorsi di accoglienza e di esclusione dei minori stranieri non accompagnati", in Cesvot, pag.6

the Italian legal framework? And is the Italian legal system able to guarantee their appropriate protection?

It certainly does not help that, as with all immigration regulations, the set of laws and the associated literature often appear contradictory and very difficult to apply.

The system today established in Italy, guarantees the protection of foreign minors in the territory, without legal representation; this means that they cannot be expelled or dismissed (except for reasons relating to public order and national security), and actually the host community should take care of the minor, providing registration and, for non-EU citizens, the possibility of requesting and obtaining a residence permit.[14]

From a qualitative point of view, it is possible to provide precise information on foreign minors, but the quantitative measurement of this category of people, nowadays, still remains quite a complex operation, and the results often underestimate the actual number of minors on the territory.

Despite the critical areas illustrated, it is necessary to recognize that the available statistics allow us to estimate and highlight the dynamics, characteristics and trends of the migration flows: could this help to improve the reception system and provide the appropriate measures in a more precise and specific way?

The consolidation of the Italian reception system, put to the test by the constant pressure of arrivals of the migrants, by the closing attitude undertaken by other European Union countries in sharing the burden of reception (starting from rescues at sea), from non-compliance with relocation agreements and political exploitation and hostility in public opinion towards immigration, visibly struggles to continue in the direction of a "widespread acceptance", able to favour an effective dislocation of migrants throughout the territory.

As in the international legal framework on unaccompanied minors, even in the Italian legislative context, the laws that protect unaccompanied foreign minors are in between two special legislations, the "favourable" one established for minors because of their particular vulnerability, and the "unfavourable" one, which identifies them as strangers and as enemies from which the public system and the host community must be protected.

[14] "Rapporto sulla protezione internazionale in Italia 2017", UNHCR

The legislator takes care of the matter in an extremely fragmented way by making, among other things, frequent changes. However, what really characterizes this discipline is the lack of a nucleus of shared principles that in case of uncertainty of the systems, manages to orient the interpreter in the choice of which it is placed before two incompatible systems, when there are uncertain situations.[15]

Furthermore, faced with legislative framework which is lacking, contradictory and sometimes even incompatible with the provisions of the Constitution, the protection of children's rights has often been forgotten in the context of a legislation that perhaps can be considered stronger, such as the one that has been typically recognized for foreigners.

The introduction of a specific legislation on unaccompanied minors in the Italian scene, is an absolute novelty for Europe, ant it only occurred in 2017.

Law 7 April 2017 n. 47, specifically dedicated to unaccompanied foreign minors, allowed a series of interventions on the minors when they are on the Italian territory and recognized that they are vulnerable people entitled to receive specific rights.

The main question within the topic of the legal protection and legal framework recognized for unaccompanied foreign minors, should be, also considering the Zampa law, as the main novelty: is the Italian legal system able to guarantee adequate protection to unaccompanied foreign minors?

We will analyse the system dedicated to minors by the Zampa law in 2017, after reviewing the most important rules dedicated to the discipline and protection of unaccompanied foreign minors, within the legal protection granted to them by the national system.

## 2. THE REGULATORY REFERENCE FRAMEWORK

If we can say that the enactment of the rules relating to immigration in general is a recent phenomenon, until a few years ago specific rules on foreign minors were completely lacking and the only few existing ones and the provisions established for unaccompanied foreign minors, were not adaptable to the immigration phenomenon, according to the characteristics that it presents today.

[15] Lorenzo Miazzi, "La tutela dei minori stranieri nel quadro normativo e costituzionale", in Minori Giustizia 2006, n. 4, pag. 155

In fact, until 1989, there was no organic law on the subject and the fundamental principles of the discipline, were dictated by Article 10 of the Constitution; the entry of the foreigner was recognized as a matter of police and public security, and consequently governed by Title V of the public security text.

While in 1986 a law concerning the permanence and rights of resident for foreigners was introduced, and it was mainly focused on the subject of work and workers' rights.[16]

Which are the principles regarding unaccompanied foreign minors that can be derived from the normative sources, before the establishment of the first law, specifically dedicated to unaccompanied foreign minors?

We can certainly start by paying attention to the regulatory framework of reference dictated at the constitutional level, first of all by article 10 of the Constitution, as it establishes *"The Italian legal system conforms to the generally recognised rules of international law"* and goes on saying that *"The legal status of foreigners is regulated by law in conformity with the international provisions and treaties."*[17]

Again, within our Constitutional Charter there are other principles recognized which have a fundamental importance, and we can even say that in the Italian legislation, the rights of the child are based on the interpretation of article 2 of the Constitution[18] which generally consider the "formation of the personality": to whom can the disposition be referred to, if not to minors, who find themselves at the time of full development of one's personality?

Art. 2 Constitutional Charter "*The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed."*[19]

With the ratification of the UN Convention on the Rights of the Child by Italy, its rules have become an integral part of the Italian legal system, relying on the programmatic principle dictated by Article 3[20] which has become a

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[16] Lorenzo Miazzi, "La tutela dei minori stranieri nel quadro normativo e costituzionale", in Minori Giustizia 2006 n 4, footnote n. 1
Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag. 9

[17] Article 10 Italian Constitution, paragraphs 1 and 2

[18] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza, ostilità", a cura di Giovanna Campani, Zoran Lapov e Francesco Carchedi, in Franco Angeli 2008, pag. 37

[19] Article 2 Italian Constitution

[20] See Chapter 2, principle of the "best interest" of the child, established by article 3 of the Convention on the Rights of the Child.

fundamental interpretative criterion of the single norms, above all, where it is necessary to overcome ambiguities. [21]

However, the superior interest of the child also in this normative context, should not be examined in an abstract way but its content will have to be substantiated in relation to the single concrete case, since the needs of the child may change, considering the relevance of the minor as a *"subject in formation"*.

Surely at the base of the Italian legislative context, we can start our analysis from the combination of article 3 and article 29 of the UN Convention with the norms of the Italian Constitution and first of all from article 2, since they explain the presuppositions on the basis of which for the minors it is possible to achieve *"the development of his faculties and mental and physical attitudes in all their potential "*, and according to article 29 of the Convention on the Rights of the Child "*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;"*

The minor, in order to start this implementation path to which the States have committed themselves through the ratification of the treaty, should benefit of the rights enunciated and recognized by it, but for the implementation of these rights, it would be necessary to delegate to reference adult figures and to be associated with the natural family, since it is considered as the natural environment able to guarantee the growth and well-being of the members and in particular of children.

Therefore, with respect to emotional ties, without any doubt, the primary reference for the child is the natural family: for the purpose of the harmonious development of his personality, the child must grow up in a family environment and in an atmosphere of happiness, love and understanding.[22]

We can therefore say that depending on the substantive situations, the legal system provides different legal procedures suitable to guarantee the child specific forms of representation and protection for the implementation of his rights, especially whenever the family itself is not in a position able to provide

[21] Joseph Moyerson "L'evoluzione della normativa sui minori stranieri non accompagnati", in Cittadini in Crescita, pag. 11

[22] Joseph Moyerson "L'evoluzione della normativa sui minori stranieri non accompagnati", in Cittadini in Crescita, pag. 11

it[23], in fact where the parents or other persons are not able to do so, the State must identify appropriate measures: *"For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children".* [24]

The Italian legislation in fact, conforming to the international legislation, assigns to the family the fundamental task of providing protection and guidance, according to the *"natural inclinations"* of the child as established by the articles:

- Art. 147 of the Civil Code: *"Marriage imposes on both spouses the obligation to maintain, educate and morally assist children, respecting their abilities, natural inclinations and aspirations, in accordance with article 315-bis."*
- Art. 30 Constitutional Charter: "*It is duty and right of parents to support, raise and educate their children, even if born out of wedlock. In the case of incapacity of the parents, the law provides for the fulfilment of their duties."*
- Art. 1 L. 184/83: *"The child has the right to be educated within his family."*

Obviously, there aren't any kind of problems when the child is in a family context and has a natural family aware of responsibilities and suitable to protect and guarantee an adequate training path, in this way it is possible to combine the right of the minor to grow within his own family, with the right to receive an adequate development of his personality. [25]

Therefore, the natural family is the first place to guarantee the growth of the minor, in alternative, he will find place in another family and finally, the child will be allowed to live in a family community, or in a public or private assistance institution, preferably near the place in which the original family unit of the child resides: *"the minor who is temporarily deprived of a suitable family environment can be entrusted to another family, possibly with minor children, or to a single person, or to a family-type community, in order to ensure his maintenance and education.*

*Where it is not possible to have a convenient family custody, the minor's admission to a public or private care institution is allowed and should be carried out preferably within the minor's residence region".*[26]

[23] Joseph Moyerson "L'evoluzione della normativa sui minori stranieri non accompagnati", in Cittadini in Crescita, pag. 12
[24] Art. 18 second paragraph, Convention on the Rights of the Child, 1989
[25] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza ed ostilità", Franco Angeli 2008, pag. 38
[26] Art. 2 Paragraphs 1 and 2, L. 184/83

From what has been said so far, what clearly emerges is the identification of the specific right of the minor to the growth and harmonious development of his personality, however, such development could be prevented when the child comes to find himself temporarily or definitively without a natural family. What should happen then to the unaccompanied foreign minor who inevitably finds himself without the possibility of developing his own personality in the place and in the situation most suitable for his development, such as the protection of the natural family?

When the child is in a situation of abandonment, or is deprived of moral and material assistance from the parents, required to provide it, as established by Article 8 of Law 184/83, the Juvenile Court competent for the area, must declare the child's adoptability status, *"they are also declared ex officio by the Juvenile Court of the district in which they are located, minors who are abandoned because they do not have moral and material assistance from the parents or relatives required to provide it, as long as the lack of assistance is not due to force majeure of transitory nature."*

On the other hand, the hypothesis that the difficulty of the natural family to provide the appropriate assistance definitively is different, since in this case it will be necessary to guarantee the minor a stable representation protection, in accordance with article 343 of the civil code: *"If both parents are dead or due to other causes they cannot exercise their parental rights, the guardianship is opened in the district court where the principal place of business for the minor's interest is",* and article 371 which establishes that *"once the inventory has been completed, the tutelary judge, at the suggestion of the guardian and having heard the protector, deliberates:*

*(1) On the place where the child is to be raised and on his / her start-up to the studies or the exercise of an art, profession or profession, he / she has ordered the listening of the same child who has completed his ten years and also of inferior age where capable of discernment and when appropriate, the notice of close relatives is required;"*

This rule, according to what has been established by part of the doctrine, could be applied to unaccompanied foreign minors, so to assign the judge the evaluation of the interest of the minor either to remain in Italy or to be repatriated.[27]

Article 37bis of Law 184/83, which states that the Italian law on adoption and custody and of those measures to be taken in urgent cases, is applicable to foreign minor in a state of abandonment in Italy, also has a fundamental importance:

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[27] Lorenzo Miazzi "La tutela dei minori stranieri nel quadro normativo e costituzionale", in Minori Giustizia 2006, n. 4, pag. 157 footnote n. 5

- Art. 37bis L.184/83: "*Italian law concerning adoption, custody and necessary measures in case of urgency applies to foreign minors who are in state of neglect.*"

In conclusion, therefore, the Italian legislator has provided, through different forms of support by the State or through the custody institutions, protection and adoption, legal mechanisms through which the minor can still be guaranteed by forms of representation and protection, able to ensure the implementation of his rights.[28]

## 2.1 FROM THE MARTELLI LAW TO THE SINGLE TEXT ON IMMIGRATION

After analysing which tools the Italian legislator prepared for the best care of the minor's interest, in accordance with the international reference legislation, we will deal in the same perspective with the specific topic of the discipline applicable to unaccompanied foreign minor who is on the Italian territory.

In the first immigration laws, there were no specific rules on foreign minors, in fact the 1986 law was mainly focused on labour issues and on the rights and burdens established for foreign workers.

The first relevant legislative intervention, the 1989 Martelli Law (law 39/1990) only contained two rules dedicated to foreign minors[29], quite marginal in the economy of law.

The two rules provided by law n. 39/90 recognized the right to education and the obligation to report to the Juvenile Court every information about those minors who requested the refugee "status". For the first time the expression "unaccompanied minor" was used, although this law did not contain provisions specifically dedicated to this category of minors.

Precisely from the first half of the 1990s numerous decree laws characterized this phase, with few provisions, however, capable of adequately designing the legal status of foreign minors.

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[28] Giulia Martini, "Il minore straniero nelle fonti normative internazionali e nazionali" 2007, pag. 7

[29] Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag. 9
Lorenzo Miazzi, "La tutela dei minori stranieri nel quadro normativo e costituzionale", in Minori Giustizia 2006, n. 4, pag. 156

It was only around 1990 that the problem of the arrival of unaccompanied foreign minors began to arise[30]: those adolescents who arrived in Italy without their families and therefore without a legal representative. In this sense, the Martelli law[31] still had not regulated the matter[32], leaving the powers of determination in this regard to the judicial authorities.

This historical moment began with the arrival of unaccompanied minors, at first from Morocco, then the mass arrivals began, mainly in 1991 the Albanians and then the continuous flows of young foreigners coming from the Eastern Europe countries and from North Africa.

However, the presence of foreign minors to such an important extent was immediately considered inconvenient, so much so that police and social service operators did not find timely responses, neither on the legislative nor the judicial level. The judges were late and not ready to understand and "catch" the diversity and scope of the migration phenomenon and responded with contradictory and heterogeneous guidelines.

Indeed, the juvenile jurisprudence turned out to be strongly unprepared and incapable of understanding, managing and framing these new forms of arrival, from the juridical point of view.

Only in a second moment, from the first arrivals of unaccompanied foreign minors, the most adequate legal instrument to guarantee the minor's appropriate protection was "rediscovered". Initially, when the social services or the police directly signalised the presence of autonomous foreign children without families, some Courts opened the procedure for determining the adoptability state, while others had more or less typical assignments and others, still declined all their competences.

However, the problem encountered in the absence of judicial indications and certain laws, which governed the matter, was that by downloading the management of the minor to police stations and local services, a "*do-it-yourself*

[30] Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag. 9

[31] The law 39/1990 still hadn't regulated the matter, with the consequence of leaving to the police authority the powers of determination. The intervention of the judicial authority that could be identified in the Court or in the tutelary judge, was requested by the operators, sometimes invoking the New York Convention on the rights of the child and sometimes the general principles concerning the minor's protection.

[32] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza, ostilità", a cura di Giovanna Campani, Zoran Lapov, Francesco Carchedi, in FrancoAngeli 2008, pag. 45

*system'*[33] was created from an administrative and judicial point of view, creating diversified practices from city to city.

During the validity period of the "Martelli Law", the matter was regulated by the general legislation and by some ministerial circulars that tried to standardize the treatment provided for unaccompanied foreign minors in Italy, clarifying the need to provide an adult figure by appointing a guardian[34].

The procedures in force at that time were considered to comply with the principle of non-discrimination, as they were able to make the integration of the "foreigner" in Italy possible, without making any distinction between foreigners and citizens.

In the validity period of this law, from 1990 to 1998, the matter was regulated by attempting to standardize the treatment of unaccompanied minors in Italy and these procedures made the concrete integration of the foreigner who entered Italy, alone and under age, possible, without making any kind of distinction in relation to the protection and the foreseen guarantees.

Law 40/1998, called by the name of the signatories "Turco-Napolitano law" was the first organic law on foreigners that subsequently converged into the Legislative Decree 286/1998, recognized as the "single text in the matter of immigration" and which served as a basis also for the subsequent amending laws.

Law 40/1998 has therefore a considerable importance, given primarily by the fact that it doesn't only regulate the legal status of foreigners, but it also specifically regulates the issue of unaccompanied minors, dictating specific rules on the subject.[35]

Decree Law 286/98 dedicated Title IV to the *"Right to Family Unity and Protection of Minors"* (Articles 28-33), which has repeated what had already been established within our legal system with the ratification law of the Convention on the rights of the child n. 176/9: *"In all administrative and jurisdictional proceedings aimed at implementing the right to family unity and concerning minors, the superior interest*

[33] Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010 n. 2, pag. 9
[34] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza, ostilità", a cura di Giovanna Campani, Zoran Lapov e Francesco Carchedi, Franco Angeli 2008, pag. 45
[35] Giulia Martini, "Il minore straniero nelle fonti normative internazionali e nazionali" 2007
Lorenzo Miazzi, "Minori o stranieri: leggi e istituzioni a confronto con una presenza scomoda", in Minori Giustizia 2010, N 2 pag. 10
Lorenzo Miazzi, "La tutela dei minori stranieri nel quadro normativo e costituzionale", in Minori Giustizia 2006, n. 4, pag. 157

*of the child must be considered with priority, in accordance with the provisions of Article 3, paragraph 1 , of the Convention on the Rights of the Child of November 20, 1989, ratified and enforced pursuant to the law of May 27, 1991, n. 176."*[36]

This evaluation criterion requires the public authority to consider, in relation to each individual case, which of the possible solutions is the more favourable for the child and consequently to adopt it in preference over any other.

Certainly, from a technical point of view this rule did not seem necessary, since the principle of the best interest of the child had already been stated in the 1989 Convention, today in force in our system. In relation to minors, what the law wanted and proposed to achieve was the overcoming of the logic of expulsions, trying to introduce an alternative logic that included appropriate reception and integration systems.

Integration and reception systems that could somehow recall the attempt made by the legislator only two years ago when, introducing law 47/2017, the legislator wanted to establish a reception system that could take into account the specific situation of unaccompanied foreign minors, despite the fact that the Italian policies on migration, nowadays seem increasingly oriented to discourage migrants from reaching the Italian territory, even if this means using tools that contravene international law and human rights standards.[37]

Precisely for this reason, consistent with the objective of integration, the "single text on immigration" introduced extremely important principles such as:

1) The inclusion among the prohibitions of expulsion of minors under the age of eighteen years.

*"Expulsion is not permitted, except in the cases provided for in Article 13, paragraph 1, with respect to:*

*a) Foreigners under the age of eighteen, except for the right to follow the expelled parent or custodian;"*[38]

[36] Art. 28, paragraph 3, Single Text on Immigration. See also Joelle Long, "Il ruolo del principio del superiore interesse del minore nella disciplina dell'immigrazione", in Minori Giustizia 2006. N.3, pag. 254

[37] Amnesty International, "Invisibili, i diritti umani dei minori migranti e richiedenti asilo detenuti all'arrivo della frontiera marittima italiana", pag. 2

[38] Art. 19 paragraph 2 (a), Testo unico in materia di immigrazione dlgs 286/1998

2) The attribution of the remaining possibilities of expulsion to the juvenile court.

*"If the expulsion of a foreign child is required pursuant to this consolidated law, the provision is adopted, at the request of the commissioner, by the juvenile court."*[39]

Therefore, the legislator strictly states that the jurisdiction regarding the expulsion of the minor belongs to the juvenile court. This is linked to the ban on administrative expulsion of minors, dictated by article 19 of the Single Text on immigration, since the minor will have the right to follow the expelled parents only if this decision is considered to be in his best interest[40], because the child may have a different interest compared to the family, and his interest will be paramount and of course the best one for himself. The expulsion of the minor can only be arranged for reasons related to public order and national security, and it shouldn't in any case be ordered where the protection of the minor's interest is considered prevalent.

3) And the aforementioned right to family unity and prevalence of the best interest of the child established by the third paragraph of article 28 of the single text.[41]

The same article 31 on the subject of minors states that "*The Juvenile Court, for serious reasons connected with the psychophysical development and taking into account the age and health conditions of the minor who is on the Italian territory, can authorize the entry or permanence of the family member, for a fixed period of time, also in derogation from other provisions of this law, the authorization is revoked when the serious reasons justifying their release or incompatible family activities cease to exist with the needs of the child or with the stay in Italy.* "[42]

This rule has a particular relevance, considering that it allows to protect the needs of the child and obtain better living conditions in Italy, not only

[39] Art. 31 paragraph 4, Testo unico in materia di immigrazione dlgs 286/1998

[40] Lorenzo Miazzi, "Il minore è straniero ma il suo interesse non cambia", in Minori Giustizia 2011 n. 3. pag. 110; Lorenzo Miazzi, "La tutela dei minori stranieri nel quadro normativo e costituzionale", in Minori Giustizia 2006 n. 4, pag. 161; Giulia Martini, "Il minore straniero nelle fonti normative internazionali e nazionali"

[41] Art. 28 paragraph 3 "*In all administrative and jurisdictional proceedings aimed at implementing the right to family unity and concerning minors, the superior interest of the child must be considered with priority, in accordance with the provisions of Article 3, paragraph 1 of the Convention on the Rights of the Child of November 20, 1989, ratified and enforced pursuant to the law of May 27, 1991, n. 176.*"

[42] Art. 31 paragraph 3, Testo unico in materia di immigrazione dlgs 286/1998

considering his social and cultural growth, but also allowing him to maintain “emotional ties”, with his natural family.

With regard to this article, however, a wide debate has developed in the doctrine and in the jurisprudence for the precise identification of the "serious reasons" which then the authorization is given, since part of the jurisprudence has interpreted these "serious reasons" in a reductive way.

While a different reading that has been adopted by the courts is carried out on the basis of the complex legal status of the minor and therefore, an evaluation parameter and a specific interpretative key would be the "best interest of the child".[43]

The discipline on foreign minors established by the Consolidated Law on immigration 286/1998, contains numerous and important provisions on minors and still, the most important principle therein established, in order to guarantee the child’s well- being, requires to considering particularly the rights of the family. Subsequently, the legislator intervened several times on the law, with modifications that aimed however mostly to restrict than to guarantee the protection of minor’s rights, transferring specific competences relating the minors to other administrative organs, such as the Committee for foreign minors.[44]

## 2.2 THE COMMITTEE FOR FOREIGN MINORS

Precisely within the single text on immigration, the legislator pursuant to article 33 has introduced the establishment of a Committee for foreign minors *"with the specific task of supervising the residence procedures of temporarily admitted foreign minors on the territory of the State and to coordinate the activities of the administrations concerned, a Committee is set up without further burdens on the State budget by the Presidency of the Council of Ministers composed of representatives of the Ministries of Foreign Affairs, of the Interior and of Grace and justice, from the Department for Social Affairs of the Presidency of the Council of Ministers, as well as from two representatives of the National Association of Italian Municipalities (ANCI), a representative of the Union of Italian Provinces (UPI) and two representatives from most representative organizations operating in the field of family problems. "*

[43] Joelle Long, “Il ruolo del principio del superiore interesse del minore nella disciplina dell’immigrazione”, in Minori Giustizia 2006, n. 1, pag. 255; Lorenzo Miazzi, “Il minore è straniero ma il suo interesse non cambia”, in Minori Giustizia 2011 n. 3, pag. 109

[44] Art. 33 Testo unico in materia di immigrazione, dlgs 286/1998

The institute operates in the field of unaccompanied foreign minors, whether they are "temporarily admitted on the territory of the State" or in any case "present in the State territory".

From the legislative framework that has been so far presented, it is evident that there has been a great complexity of the division and an overlapping of competences between the various bodies and institutions operating in the unaccompanied minor sector.

Precisely, to respond to this extremely complex picture, the government of the time expanded the competences of the Committee for the Protection of Minors, which was at first established in 1994, and of the Presidency of the Council of Ministers in the Department for Social Affairs.

The Committee for Foreign Minors, initially established at the Presidency of the Council of Ministers and now operating at the Ministry of Labour and Social Policies, is composed of nine representatives:

4) One from the Ministry of Labour and Social Policies;
5) One from the Ministry of Foreign Affairs;
6) One from the Ministry of Justice;
7) Two from the National Association of Italian Municipalities (A.N.C.I.);
8) One of the Union of Italian Provinces (U.P.I.);
9) Two of the most representative organizations operating in the field of family problems and unaccompanied minors.[45]

The tasks, outlined by the institution's regulation[46], identify the Committee as a supervisory body for minors, decides the residence arrangements and guarantees the cooperation with the concerned administrations, the assessment of unaccompanied minor status, the research of the minor's family members in their countries of origin or in third countries and the organization of assisted repatriation of the minors.

Since 1998, the competences of the Committee for foreign minors have been extended:

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[45] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza e ostilità", a cura di Giovanna Campani, Zoran Lapov, Francesco Carchedi, Franco Angeli 2008, pag. 59

[46] Decree of the Presidency of the Council of Ministers No. 535 of 1999

*"This regulation, pursuant to article 33 of the consolidated text of the provisions concerning immigration regulations and rules on the status of foreigners, approved by legislative decree 25 July 1998, n. 286, as amended by Article 5 of Legislative Decree 13 April 1999, n. 113, and without further charges to the State budget, regulates the tasks of the Committee for foreign minors and the matters indicated in the aforementioned article 33, paragraph 2, letters a) and b)."*

- Monitors the residence procedures of minors;
- Cooperates with the administrations concerned;
- It deliberates, according to well-defined criteria regarding minors, entries accepted within the framework of temporary reception, solidarity projects and provides the establishment and maintenance of the list of minors accepted in such programs.
- Assesses the unaccompanied minor status.
- It carries out impulse and research tasks to promote the identification of the families of unaccompanied minors also in their countries of origin or in third countries. [47]

*"The Committee has the priority objective of protecting the rights of unaccompanied minors and of children received, in accordance with the provisions of the Convention on the Rights of the Child, made in New York on November 20, 1989, ratified and enforced by law May 27, 1991, n. 176."*[48]

The main object of the Committee for unaccompanied minors is surely to guarantee the respect of the provisions contained in the 1989 Convention on the Rights of the Child, and carry out the other tasks pertaining to it, according to the discipline dictated by the Presidential Decree Council Ministers December 9 1999, n. 535.

The main activities pertaining to the Committee are all expressly stated within the Presidential Decree Council Ministers December 9, 1999, n. 535, starting from the census of unaccompanied minors, to being able to prepare the measures relating to their stay.

According to its own regulation, however, the Committee will not have to directly manage the reception, but formulate guidelines to carry out its implementation. Also considering the assisted repatriation, but in that case not being able to exempt himself from the debate on assisted repatriation, the Committee planned a specific pilot project in this regard.

According to the directives dictated by the Committee in this sense, repatriation should not be implemented where it is contrary to the following Conventions:

- To the Convention relating the refugee status;

[47] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza e ostilità", a cura di Giovanna Campani, Zoran Lapov, Francesco Carchedi, Franco Angeli 2008, pag. 61
[48] Art. 2, Decree of the Presidency of the Council of Ministers No. 535 of 1999

- To the European Convention for the Protection of Human Rights and fundamental Freedoms;
- To the Convention against torture and other cruel and inhuman punishment or treatment;
- At the New York Convention on the Rights of the Child;

But the real repatriation, according to what the Committee believes, should be the one that establishes to follow the child for a certain period even after his return to the country of origin, in order to be able to favour his positive reintegration.[49]

The Committee, therefore, doesn't only have the right to assess the interests of the unaccompanied foreign minor, but it may also decide on their possible repatriation as it is also underlined in the Guidelines issued in the Committee Note of October 14, 2002. The last one in particular has a fundamental importance and it establishes in which case *"the Committee issues a provision of non-place to provide for repatriation in which it is indicated to the juvenile judicial authority to entrust the child under the law 184/83.* "[50]

The circular regulates in particular the question of the permit of stay for minor, introduced by law n. 40/98, which however did not clarify its concrete operation. The aforementioned circular specifies that the residence permit for minor age, should only be granted residually, in all those cases where there are no conditions for issuing a different residence permit.

*"Repatriation must take place in such conditions as to constantly ensure respect for the rights guaranteed to the child by the international conventions, by law and by judicial authority, and such as to ensure the respect and integrity of the child's psychological conditions, until re-entrustment to the family or to the responsible authorities. A specific statement to be sent to the Committee is issued on the reappointment".* [51]

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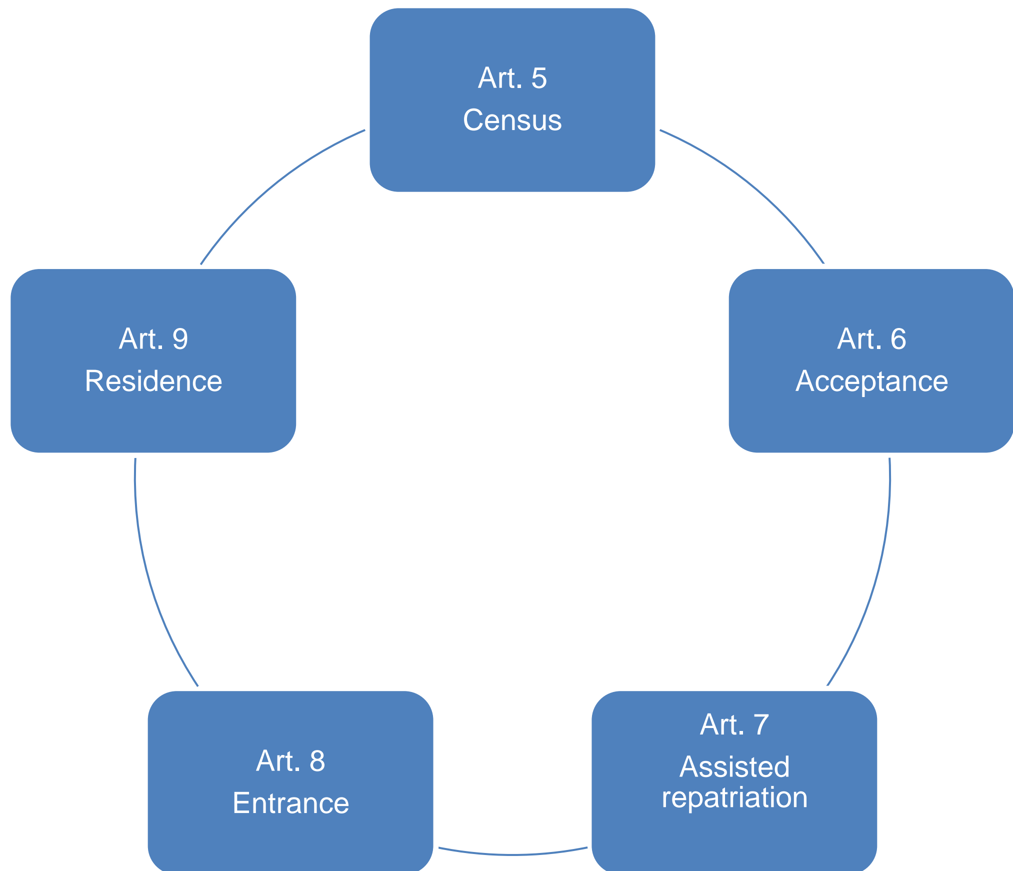
[49] "Le esperienze ignorate, giovani migranti tra accoglienza, indifferenza, ostilità", a cura di Giovanna Campani, Zoran Lapov e Francesco Carchedi, in Franco Angeli 2008, pag. 63
[50] Joseph Moyerson, Giovanni Tarzia "L'evoluzione della normativa sui minori stranieri non accompagnati", in Cittadini in crescita, pag. 16
[51] Art. 7, Decree of the Presidency of the Council of Ministers No. 535 of 1999




**Chapter III, Decree of the Presidency of the Council of Ministers No. 535 of 1999 CENSUS AND RECEPTION OF UNACCOMPANIED MINORS**

Who are the norms, contained in the Decree of the President of the Council of Ministers 535 of 1999, specifically referred to?

## 2.3. DEFINITION OF UNACCOMPANIED FOREIGN MINORS FOR THE COMMITTEE

The first definition of unaccompanied foreign minor in the Italian legal system appeared in the legislative text that attributed specific duties to the Committee for Foreign Minors.

"*For unaccompanied foreign minor in the State territory, hereinafter referred to as "unaccompanied minor" it means "the minor who does not have Italian or other EU citizenship who, not having applied for asylum, finds himself for any reason in the territory of the*

*State without assistance and representation from the parents or other adults legally responsible for him in based on the laws in force in the Italian legal system".* [52]

The area outlined by this definition comprehends all those foreigners under the age of 18 *"who are in Italy without assistance and representation from their parents or other adults legally responsible for them"*, according to the provisions of the Italian law.

The outlined category, therefore, should include minors who are in Italy without any person accompanying them or are accompanied by other adults but not from their parents, such as relatives, friends, acquaintances, but without a formal provision with which the minor is entrusted by law to their responsibility.

According to the opinion expressed by the Committee for Foreign Minors, in the *"unaccompanied foreign minor"* category, the children under 18 entrusted to relatives by the fourth degree, are also comprehended. [53]

This normative interpretation creates a first difference between the general legislation applicable to minors and the specific legislation on foreign minors, since the Italian law on custody and adoption establishes that the child entrusted to a relative by the fourth degree, even in the absence of a custody provision, cannot be considered in state of abandonment, and so without any assistance or representation.

The interpretation provided by the Committee leaves doubts on the correct interpretation of the rules applicable to foreign minors. For these reasons, some non-governmental organizations have been asking for clarification on the subject for several years through a specific legislative intervention.

What is the last notion of "unaccompanied foreign minor" recognized in the context of the Italian legislation concerning this category of minors?

And is the role of the Committee for Foreign Minors still so strong or have the subsequent regulatory changes, almost completely modified the legal framework that has been presented up to now?

The competences that with the decree 535/99 had been attributed to the Committee for Minors, from L. 135/12 were transferred to the General Directorate of Immigration and integration policies at the Ministry of Labour.[54]

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[52] Art. 1, Decree of the Presidency of the Council of Ministers No. 535 of 1999

[53] Guidelines of the Committee for Foreign Minors, 2003

[54] Brevi riflessioni in merito alla legge n. 47/2017 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati), in "Diritto, immigrazione e cittadinanza n. 2/2017, nota numero 15, pag. 7

## 3. LAW 47/2017: THE MAIN NOVELTIES OF THE LAW

We know that within the notion of unaccompanied foreign minors we can recognize and define that link between *"otherness and relatedness"*[55], defining claims and protecting interests, codifying the identity of a group, the community of the society and distinguishing it, at the same time, from that group of strangers who do not have those "indicators of belonging" to the society.

We can say that the normative device outlines the border between what belongs and what is instead considered excluded from the society, and so most of the time identified as something just too different to be accepted and especially protected in the same way as citizens are. The system of norms aims at organizing specific frameworks that allow the stabilization and that can guarantee the identity of "us" (such as the social community), against those modifications brought about by relations with the foreigner.

It would be very nice and right to think and maybe even imagine, since it sometimes seems impossible, that in every social context foreigners were not identified as enemies and as a danger for social security, but unfortunately just the fact that initially the first rules referring to unaccompanied foreign minors were part of the single public safety text, makes it extremely difficult to identify a regulatory complex that can adequately protect them and consider them as minors, entitled to receive special protection.

Law 7 April 2017 n. 47, which is specifically dedicated to foreign unaccompanied minors, has allowed a series of systematic interventions on these minors when they are on the Italian territory, recognizing their vulnerability[56] and their specific rights.

Law 47/2017 has completed, within our legal framework, the protection system provided for unaccompanied foreign minors.

As it has been immediately pointed out, we can say that law, specifically the one dedicated to unaccompanied foreign minors, pursues the specific intent to reorganize the various interventions so far fragmentarily arranged with

[55] Alessandra Cordiano, "Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1299
[56] The concept of vulnerability, has been now considered explicitly by Zampa law, Article 1, defining its scope of application and it takes up the concept that had already been mentioned by article 17 of legislative decree 142/15.

different measures that followed one another over time, but which until that moment had been too general and just couldn't provide a system able to recognize first of all their vulnerability and to protect them, after having realized which was their quite "weak" position.

In fact, the juridical framework of the foreigner's discipline shows a colourful and changeable picture of the whole history of law, which demonstrates a strong basic ambivalence: the identity hostility towards the idea of foreigner, that results in legal parameters that legitimize extremely differentiated treatments between citizens and foreigners.

On the other hand, opposite to the hostility towards foreigners, we can identify the proclamation of a core of incompressible fundamental rights by virtue of the principle of substantial equality, of which the ownership is never limited. [57]

The matter was in fact until that time regulated by different provisions, mainly referring to articles 32 and 33 of the single text on immigration (Legislative Decree 286/1998), and in the Decree of the Presidency of the Council of Ministers 535 of 1999.

Specific provisions concerning unaccompanied foreign minors are provided for in Article 19 of Legislative Decree 25/2008[58] and Article 28 of Legislative Decree 251/2007[59] and within the Ministry of the Interior Directive of 7 December 2006[60].

The proposed Zampa law, introduced some modifications to the current legislation on unaccompanied foreign minors with the specific objective of establishing a unitary organic discipline on unaccompanied foreign minors, able

[57] Alessandra Cordiano, "Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1300

[58] *Art. 19 paragraph 1, Legislative Decree 25/2008 "To the unaccompanied minor who has expressed the will to ask for international protection the necessary assistance is provided, in submitting the application. At the same time the assistance of a guardian is guaranteed at every stage of the procedure for the examination of the application, according to the provisions of article 26, paragraph 5."*

[59] *Art. 28 paragraph 1, Legislative Decree 251/2007 "When the presence on the national territory of unaccompanied minors requesting international protection, is identified,*
*articles 343 and following of the civil code should be applied. In the blackberries*
*of the adoption of the consequent measures, the minor who has expressed the will to request international protection can also benefit from the services provided by the local authority in the Fund for policies and asylum services, referred to in Article 1-septies of the aforementioned decree-law n. 416 of December 30, 1989."field of the protection system for asylum seekers and refugees referred to article 1-sexies of the* decree-law of 30 December *1989, n. 416, converted, with amendments, by the law of 28 February 1990, n. 39"*

[60] Directive on the subject of unaccompanied foreign minors seeking asylum

to strengthen the protection instruments guaranteed by law and to ensure greater homogeneity application of the provisions on the national territory.[61]

Before 2017 an organic discipline on unaccompanied foreign minors was completely missing, despite the Zampa initiative proposal, n. 1658 had already been presented to the Chamber of Deputies in October 2013. The bill was based on critical elements, including the lack of an organic discipline on the subject, in front of a very complex regulatory framework which until that moment was considered ambiguous and presented a system of highly articulated jurisdictional, administrative and public security bodies that made the enunciation of the rights recognized to minors possible, but it was anyway quite difficult to realize the enjoyment of those rights for unaccompanied foreign minors.

The new regulation, n. 47/2017, certainly offers the possibility to proceed in a positive way, also highlighting the invaluable intention of the legislator, and it is indeed the result of a hard work between different political parties, even if the result that has been achieved, somehow left some margin of uncertainty.

On that basis Law No. 47 provides first and foremost that unaccompanied foreign minors should enjoy "equal treatment" with Italian minors, without prejudice to the application of special protection on account of their "greater vulnerability", and also confirms the trend adopted by the legal system of treating unaccompanied foreign minors uniformly, irrespective of whether or not they are asylum seekers. [62]

Given its innovative character, which can its value be considered? And can it be considered as a model for other European Countries?

The UNICEF's position is very positive about the new law established for unaccompanied foreign minors, in fact after the approval, Afshan Khan, UNICEF Regional Director and Special Coordinator for the Refugee and Migrant Crisis in Europe, said that it is fully aligned with the UNICEF recommendations on the topic of unaccompanied foreign minors.

The same also stated *"While across Europe we have seen fences going up, children detained and pledges unmet, the Italian parliamentarians have shown their compassion and duty to young refugees and migrants."*[63]

[61] Misure di protezione di minori stranieri non accompagnati A.C. 1658, Camera dei Deputati, Documentazione per l'esame di progetti di legge, Dossier N. 172

[62] ISMU, *Twenty-third Italian Report on Migrations 2017*pag. 33

[63] UN Children's Fund, *UNICEF hails new Italian law to protect unaccompanied refugee and*

UNICEF responding to the needs of children who are on the move, or are seeking asylum in Europe, asked the States to improve the conditions of children, particularly unaccompanied minors, presenting "six policy asks for unprotected children": [64]

- Protect child refugees and migrants, particularly unaccompanied children, from exploitation and violence.
- End the detention of children seeking refugee status or migrating by introducing a range of practical alternatives.
- Keep families together as the best way to protect children and give them legal status.
- Keep all refugee and migrant children learning and give them access to health and other quality services.
- Press for action on the underlying causes of large-scale movements of refugees and migrants.
- Promote measures to combat xenophobia, discrimination and marginalization in countries of transit and destination.

*"At least 10,000 unaccompanied child refugees have disappeared after arriving in Europe, according to the EU's criminal intelligence agency. Many are feared to have fallen into the hands of organised trafficking syndicates."*[65]

Brian Donald, Europol Chief of Staff, declared that since the refugee crisis started, at least 5,000 unaccompanied minors already disappeared in Italy and he also pointed out that the number of missing children in Europe doubled in the past two years.

We have to remember that a big number of children, once arrived in Italy, voluntarily escape from the official procedure in order to reach other European countries and the main reason may be given by the awareness that the Italian bureaucracy is extremely slow and complex, and this also highlighted the necessity of a legislation able to control and protect unaccompanied minors.

The Italian government felt the necessity to develop a specific system for unaccompanied minors, both to protect them and to have more control on its own territory.

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*migrant children as model for Europe*, March 2017 https://www.unicef.org/media/media_95485.html

[64] UNICEF report "Child Alert: A Deadly Journey for Children", pag. 60

[65] Mark Townsend, *10,000 refugee children are missing, says Europol*, The Guardian, 2016 https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees

All European countries and every single member of the community should always remember these words, that the UNICEF Regional Director and Special Coordinator for the Refugee and Migrant Crisis in Europe, said:

*"50 million children are on the move, some fleeing violence, war, poverty and climate change. They shouldn't be forced to put their lives in the hands of smugglers or be left vulnerable to traffickers. We need to address globally the drivers of migration and as importantly put in place stronger measures to protect children on the move through a system of safe passage for all refugee and migrant children. If these were our children, alone and frightened, we would act."*[66]

As shown, the path followed by Italy has faced several obstacles, but it managed somehow to produce a valuable legislation. For this reason, and especially to guarantee the wealth of every child, it is duty of every European country to take into account the Zampa law and use it as a model, in order to formulate a coherent and safe legal system for unaccompanied minors.

The introduction of this new legislation has to be considered, above all, an essential turning point in the Italian scene, because, for the first time, a suited and specific procedure for foreign unaccompanied minors has been developed, recognizing, in this way, their particular vulnerability condition.

The Zampa law has introduced significant and essential novelties to the Italian system, which we will analyse in detail.

The law begins by regulating in accordance with article 1, the scope of its application, referring to *"unaccompanied foreign minors, recognized as holders of all rights regarding the protection of minors, with equal treatment, Italian citizenship minors or of the European Union. "*

The principle of equality and equal treatment is therefore recalled, whose fundamental importance we have already recognized, by virtue of the application of Article 2 of the 1989 Convention on the Rights of the Child.

This rule, in defining the scope of application of the law, continues in the second paragraph stating that these provisions *"apply to unaccompanied foreign minors, due to their condition of greater vulnerability"*.

Here, therefore, the first fundamental reference occurs not only to the concept of vulnerability of the child but also to the legislative decree 142/15[67],

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[66] UNICEF report "Child Alert: A Deadly Journey for Children", Afshan Khan, UNICEF Regional Director and Special Coordinator for the Refugee and Migrant Crisis in Europe

[67] Within this legislative decree, articles 17, 18, 19 are specifically dedicated to foreign minors, accompanied and unaccompanied.

which implementing the Directive 2013/33/EU, containing rules concerning the reception of applicants for international protection, as well as the directive 2013/32/EU, concerning common procedures for the recognition and revocation of international protection status, considers in Article 17 *"the condition of persons with special needs"*, among which explicit reference is made to unaccompanied minors : *"The reception measures provided for in this decree hold account of the specific situation of vulnerable people, such as minors, unaccompanied minors, the disabled, the elderly, pregnant women, single parents with minor children, victims of human trafficking, people suffering from serious diseases or mental disorders, the people that suffered torture, rape or other serious forms of psychological, physical or sexual violence or orientation-related violence sexual or gender identity, the victims of mutilation of genitals."*

The first information of fundamental importance that therefore emerges from the law is not only the need to recognize equality between unaccompanied foreign minors and Italian or EU minors for the applicable protections, but also the clear choice of priority field of guaranteeing protection of the more vulnerable minor, compared to the protection of national borders[68], which is very important within the discipline of unaccompanied foreign minors, since we always have to remember that it is very difficult to identify the discipline applicable to them, because they're considered both minors and foreigners.

Article 2 of Law 47/2017 then continues by providing the definition of unaccompanied foreign minor: *"a minor who does not have Italian or European Union citizenship who for any reason is in the territory of the State or who is otherwise under Italian jurisdiction, without assistance and representation on the part of parents or other adults legally responsible for him, according to the laws in force within Italian law "*.

In this case, article 2 takes up the previous definitions with similar content that already gave the definition of unaccompanied foreign minors:

- The first one, adopted at EU level, contained in article 1 in the first paragraph of the EU Council resolution of 26 June 1997, on unaccompanied minor citizens of third countries. [69]

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[68] Ciro Cascone, "brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 2

[69] Art. 2, paragraph 1 and 2: "*This Resolution concerns third-country nationals below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively in care of such a person.*
*This Resolution can also be applied to minors who are nationals of third countries and who are left unaccompanied after they have entered the territory of the Member States".*

- Article 1 of the regulation concerning the duties of the Committee for foreign minors, pursuant to Article 33 of Legislative Decree 286/1998.[70]
- The ultimate definition contained in the Zampa law, also takes up the last definition of unaccompanied foreign minor that has been given by the legislative decree 142/2015, according to article 2 of the Decree of the Minister of the Interior in 2016, in implementation of legislative decree 142/2015, according to which *"For the purposes of this decree we mean: Unaccompanied minor: a foreigner under the age of eighteen, which is, for whatever reason, on the national territory, without legal assistance and representation;"*

With reference to the status of "foreigner", the legislator has abandoned the generic definition that has been used in the past, which only required the absence of Italian citizenship, and instead limited the applicative parameter only to the foreigners who were not belonging to the European Union countries.

### 3.1 PROHIBITION OF REFOULEMENT AND THE ASSISTED REPATRATION

The Zampa law, after having specifically outlined the notion of unaccompanied foreign minor and the scope of application of the law, continues, pursuant to article 3, to place the specific prohibition of rejection of the foreign minor.

*"To the consolidated text of the provisions concerning the discipline of immigration and rules on the status of foreigners, referred to in legislative decree 25 July 1998, n. 286, hereinafter referred to as "Single text", the following modifications have been made:*

*a) The following is inserted after paragraph 1 of article 19:*

*"1-bis. The refusal of entry of unaccompanied foreign minors at the frontier cannot be arranged in any case";*

*b) In paragraph 4 of article 31, after the words: "the provision is adopted", the following words have been included: "provided, however, that the provision itself does not entail a risk of serious damage to the minor" and the following period is added at the end:" The Court for minors decides promptly and in anyway, it can never decide after thirty days".*

[70] Article 1 of the regulation concerning the duties of the Committee for foreign minors pursuant to Article 33 of Legislative Decree 286/1998, "or *"unaccompanied foreign minor present on the territory of the State, "hereinafter referred to as" minor present not accompanied "means a minor without Italian citizenship or other EU state that, not having asylum application is filed for any reason in the State territory without assistance and representation by of parents or other adults legally responsible for him in based on the laws in force in the Italian legal system. "*

*2. Paragraph 1 of Article 33 of the Law of 4 May 1983, n. 184, and the other modifications, have been replaced by the following:*

*'1. To minors who do not have an entry visa, issued pursuant to article 32 of this law and which are not accompanied by at least one parent or relatives by the fourth degree, the provisions of article 19, paragraph 1-bis of the single text are applied according to the legislative decree 25 July 1998, n. 286".*

According to the second paragraph of article 19 of the Single Text on immigration, a general prohibition of expulsion of the foreign minor had already been established, and it could only have been derogated in exceptional circumstances, such as reasons related to security and public order and only following the provision of the Juvenile Court. [71]

However, the rejection at the border differs from the expulsion, because it doesn't last as long as the expulsion, and because the expulsion provision is issued only when the minor crosses the border, or immediately afterwards.[72]

Article 19 of the single text provides, however, some hypotheses in which it is absolutely impossible to reject the foreigner: *"the expulsion or refoulement cannot be made in any case by the State where the foreigner can be subjected to persecution for reasons of race, sex, language, citizenship, religion, political opinions, personal or social conditions, or may risk being sent back to another State in which he is not protected by persecution. "*

However, also article 33 of law 184/83, in the matter of adoption, foresees a hypothesis in which it is not possible to operate the rejection of the foreign minor, *"Without prejudice to the ordinary provisions relating the entry into the State for family, tourist, study and treatment purposes, minors who do not have an entry visa issued pursuant to Article 32 or are not accompanied by at least one parent or relatives by the fourth degree."*

This rule in particular, was considered particularly controversial because paragraph 2bis of article 19 of the Single Text, included among the vulnerable subjects for whom the *refoulement* had to be implemented in a manner that is considered to be compatible with their specific personal conditions.[73]

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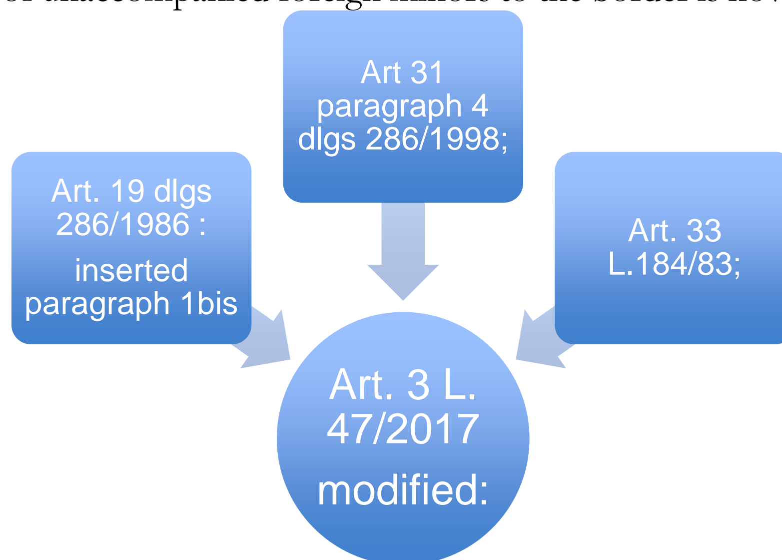
[71] Art. 19 paragraph 2 dlgs. 286/1998 *"Expulsion is not permitted, except in the cases provided for in Article 13, paragraph 1, with respect to:*
*a) Foreigners under the age of eighteen, except for the right to follow the expelled parent or custodian;"*

[72] Alessandra Cordiano, "Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1304

[73] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 8

This rule of the Zampa law has instead exceeded any doubt by inserting paragraph 1bis to article 19 of the single text and established that the re-foulement of unaccompanied foreign minors to the border is now forbidden in




every case.

Finally, this rule also modified article 31 of the Single Law Text and provided that the expulsion of the minor can only be ordered, where there are the appropriate conditions, and in any case only under a provision of the Juvenile Court, to be issued within 30 days after the request of the police commissioner. However, a concrete evaluation is necessary to prove that this expulsion does not entail a risk of serious harm to the child.

Once again here, the needs of the minor's protection prevail over internal security reasons.

The assisted repatriation differs instead from the expulsion because it can only be adopted after an investigation, carried out in the minor's country of origin and after an assessment of his specific situation, regarding his best interest, in order to realize the right to family unity.

According to Article 8 of the law, the assisted and voluntary repatriation is mentioned, and the appropriate competence is now entrusted to the juvenile court, after hearing the minor and the guardian, and after verifying the actual existence of the natural family in the country of origin, *"The provision of assisted and voluntary repatriation of an unaccompanied foreign minor is adopted, where the reunification with the family members in the country of origin or in a third country corresponds to the best interest of the child, from the competent juvenile court, after hearing the minor and the guardian and considering the family investigations results realized in the country of origin or*

*in a third country and the report of the competent social services about the situation of the child in Italy".*[74]

Article 8 also introduced amendments to Article 33 of Legislative Decree 286/1998, so far the responsibility for assisted repatriation was entrusted to an administrative body, first to the Committee for Foreign Minors and then to the General Directorate for Immigration and integration policies of the Ministry of Labour[75], *"To Article 33 of the Consolidated Law the following amendments have been applied:*

*a) In paragraph 2-bis, in the first sentence, the words: "by the Committee referred to in paragraph 1" shall be replaced by the following: "by the court for the competent minors" and the second period has been cancelled;*

*b) Paragraph 3 is replaced by the following:*

*'3. It is provided to guarantee the implementation of the provisions contained in the present article within the limits of human, financial and instrumental resources available under the current legislation and in any case without new ones or greater public finance charges ".*[76]

In order therefore to guarantee the assisted repatriation of the minor, it will be indispensable to carry out the investigations in his country of origin, verifying that the reunification of the same with the natural family corresponds to his best interest, and a specific project, able to guarantee his reintegration, from the social, emotional, scholastic and working point of view, will have to be elaborated. In this regard such investigations will also be necessary to ascertain that repatriation does not entail serious risks for the minor, because in that case there would be no progress.

This rule makes explicit reference to the minor's will, since the provision aims to realize his best interest: in an abstract way we can say that the best interest of the minor generally corresponds to the reunion with the natural family, but the minor will have the right to freely express his opinion, which must be taken into consideration.[77]

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[74] Article 8, paragraph 1, Law 47/2017

[75] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 24
Alessandra Cordiano, "Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1306

[76] Article 8, paragraph 2, Law 47/2017

[77] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 25

## 3.2 THE SUITABLE RECEPTION SYSTEM

The second element that has been modified and improved by the law n. 47/17 is the reception system: pursuant to Article 4, Article 19 of Legislative Decree 142/2015 has now been partially amended.

According to article 4 *"To article 19, paragraph 1, first sentence, of the legislative decree 18 August 2015, n. 142, the following modifications have been made:*

*a) After the words: "of first reception" the following words have been inserted: "intended for them";*
*b) The words: "to sixty days, to identification" have been replaced by the following words: "to thirty days, to identification, which must be concluded within ten days."*

According to the Legislative Decree n.142/15176, specifically referring to article 19, no specific measure regarding the reception of unaccompanied minors had been established, making the system quite ineffective. Following the indications produced by the European Immigration Agenda, the Legislative Decree 142/2015, implementing the European directives 2013/32/EU and 2013/33/EU, continued the consolidation process of the reception discipline by tracing a system structured as follows:

1. A preliminary rescue phase, first assistance and identification, which takes place in government centres, in the places that are mostly affected by massive landings;
2. A phase of first reception ensured in government centres of first reception for asylum seekers, established by decree of the Minister of the Interior, for the time necessary to accomplish the identification operations.
3. A second reception phase in one of the structures operating within the SPRAR system, set up by the local authorities, where the foreigner remains for the entire duration of the procedure to examine the application for protection. [78]

The two main important changes within the protection of the child that article 4 managed to accomplish are:

[78]UNHCR, "Rapporto sulla protezione internazionale in Italia 2017" pag. 18

- ❖ Reduced from 60 to 30 the days set aside for stay in the first reception facilities for unaccompanied foreign minors and also established that the identification procedure will be completed within 10 days.
- ❖ Established that the minor's structures of "first reception" must be destined only to unaccompanied foreign minors and excluded the permanence in mixed structures with adults.

It is essential that the reception facilities provided for unaccompanied foreign minors take into account the fact that children often suffer more traumas, as they are sent to Italy by their families when they are still very young. The first trauma is the separation from their families, the second one is that they have to face journeys in inhuman conditions, often on barges of which we unfortunately know the story, and the third one is the "migratory trauma" itself [79].

The reception system so far outlined, shows how often the communities in which they are placed are undifferentiated, while instead their condition and their vulnerability should immediately be taken into account, especially considering the traumas they have already suffered until then. From a theoretical point of view, the new provision is appreciable but must nevertheless be confronted with the lack of an integrated, fairly structured and homogeneous reception system on the Italian territory. [80]

An example able to remind us how difficult it can be in reality to protect minors even if the law does the best, is the Taranto case, just after the enactment of the law 47/2017 on unaccompanied foreign minors:

*"Hotspot prison for 80 young people". The Taranto case ends at the EU Court*[81]*;*

The European Court for the Protection of Human Rights and Fundamental Freedoms (ECHR) has declared that the appeals presented between July and August 2017 by 14 unaccompanied foreign minors, coming from Bangladesh, Ivory Coast, Gambia, Ghana, Guinea, Mali, Senegal, for the illegitimate detention of a significant number of minors within the Taranto hotspot, are

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[79] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 10

[80] Alessandra Cordiano, "Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1304

[81] https://www.lastampa.it/2017/08/29/italia/cronache/hotspot-prigione-per-giovani-il-caso-taranto-finisce-alla-corte-ue-m1SnHaH3OD0n7U8SE71GRK/pagina.html
https://www.asgi.it/wp-content/uploads/2018/02/2018_Nota_hotspot-CEDU.pdf

admissible. The considerations reported in the context of the appeals help to shed light on the real functioning of the hotspots and the related violations that may emerge, to prove that even if the provision is appreciable, it is then very difficult to apply it properly.

Following the appeal presented by unaccompanied foreign minors, the conditions in which they lived in these reception centres were analysed: for what concerns the conditions of the structure, both minors and adults were staying in one big tent. This solution doesn't guarantee any privacy and exposes children to a promiscuous condition with adults. The conformation of the structure and the practices implemented by the governance of the hotspot outline a case of illegitimate detention.

The recurrent minors, despite having declared their minor age and, even though they've been identified as minors, they were not transferred to suitable facilities for the reception of minors but were held - some of them even for more than a month, while others only for a few days - until the Italian Government was informed of the request of provisional measures presented by the lawyers.

It should be noted that the detention of the applicants within the so-called hotspot has configured several violations of their rights:

- The applicants' personal freedom was denied during their stay in the facility, as they were detained, not even with a formal written order.
- Main violations related to the minor age: pursuant to article 19 paragraph 4 of Legislative Decree 142/2015 it is strictly forbidden to place the unaccompanied minors at the first reception centres for adults referred to in article 9. This prohibition finds evident application by analogy also with reference to the extraordinary reception centres for adults, envisaged by article 11 of the same decree and, in any case, within centres without a specific discipline, such as the Taranto hotspot.
- In addition, the minors were held in the Taranto hotspot not only illegitimately, but also in material, inhuman and degrading conditions, considering their age and the fact that they had just arrived in a foreign country following a sea crossing in obviously very difficult conditions and emotional stress. Moreover, the specific material reception conditions within the Taranto hotspot integrate the violation of the provisions of article 3 of the ECHR. Furthermore, the applicants hadn't received any form of protection due to their vulnerability, directly linked to their minor age.

The facts reported by the applicants contributed to shed a light on the real functioning of the hotspot system.

The specific violations highlighted aren't in any way circumscribable to the time and places in which they were configured, since the testimonies coming from a considerable number of foreign citizens, who passed through the hotspots, reconstructed an approach characterized by a systematic use of detention of foreign people.

The case in question can allow a fundamental recognition of the violations highlighted by the applicants and at the same time, it can also be an occasion, due to its strategic nature and the specific disputes from the Government, to reopen the debate in relation to the real nature of the hotspot approach as a whole.[82]

Closely linked to the theme of hospitality is Article 12 of law 47/2017, which includes all unaccompanied foreign minors within the SPRAR system that becomes a protection system for asylum seekers, refugees and unaccompanied foreign minors.

According to article 12 *"To article 19 of Legislative Decree 18 August 2015, n. 142, the following modifications have been made:*

a) *In paragraph 2, the first period is replaced by the following: "the unaccompanied minors are accepted under the System of protection for asylum seekers, refugees and non-foreign accompanied minors, established by article 1-sexies of the decree-law 30 December 1989, n. 416, converted, with modifications, by the law 28 February 1990, n. 39, and specifically in projects specifically destined to this category of vulnerable subjects."*

The "Sprar" system concerning the appropriate protection recognized for asylum seekers and refugees is a "second reception" network , intended for asylum seekers and holders of international protection, established pursuant to Article 32 of Law 189/2002 and by the following protocol of agreement signed in 2001 between the Minister of Interior and the UN High Commissioner for Refugees.

Article 12 continues by providing precise information about the capacity of the System: *"The capacity of the System is commensurate with the actual presence of unaccompanied minors in the national territory and is, however, established within the limits of the resources of the National Fund for asylum policies and services".*

[82] Asgi, "La Corte Europea per i diritti dell'uomo dichiara ammissibile il ricorso contro il trattenimento dei minori stranieri all'interno del cd. Hotspot di Taranto" https://www.asgi.it/wp-content/uploads/2018/02/2018_Nota_hotspot-CEDU.pdf

When deciding which place to consider, the specific characteristics of unaccompanied foreign minors should necessarily be taken into account and it should be noted that among the available places, when the minor has to be collocated, what has to be considered in first place is the personal characteristics of the minor, which these structures of reception must be able to satisfy according to the minimum required reception standards: *"2-bis. In choosing the place, among those available, in which place the child, the needs and the characteristics of the same minor must be taken into account, resulting from the interview referred to in Article 19-bis, paragraph 1, in relation to the type of services offered by the reception facility. The structures in which unaccompanied foreign minors are accepted must comply, in accordance with Article 117, second paragraph, letter m) of the Constitution, the minimum standards of services and assistance provided by residential facilities for minors and should be authorized or accredited in accordance with national legislation and the regional level. Non-compliance with the statements made to the purposes of accreditation involves the cancellation of the structure from the System".* [83]

## 3.3 IDENTIFICATION AND AGE ASSESSMENT OF UNACCOMPANIED FOREIGN MINORS

The recognition of the minor age can present numerous difficulties for the authorities and for the services in charge of their identification and assistance.

Many unaccompanied and separated minors arrive in the destination country without documents that can certify their age, and they are not always able to present them later on. The documents may have been abandoned or lost at the time of escape from their country or during the journey, confiscated by traffickers, or their parents might still have them, but they've been separated from their natural family.

"Age assessment" means the procedure used to determine the approximate age of an individual. Although there is no uniform approach in the operational modes in the national context or in the community context, the term "age assessment" is more commonly used to indicate the use of medical tests aimed at estimating chronological age of an individual through the evaluation of his biological age. [84]

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[83] Art. 12 paragraph 2bis, L. 47/2017

[84] UNHCR, "L'accertamento dell'età dei minori stranieri non accompagnati e separati in Italia", pag. 6

The presence in Italy of unaccompanied minors, mostly between the age of 16 and 17 is very frequent and the correct identification and assessment of their age has a fundamental importance in order to guarantee the effective exercise of the rights of which they are owners and to avoid the adoption of measures that can seriously damage these rights.

*"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."*[85]

The necessary initial assessment process, already established within the international legal framework, by article 8 of the Convention on the Rights of the Child, which affirmed that the identification of a child as separated or unaccompanied, should be prioritized. So almost immediately, as soon as the public authorities are informed about their presence in the country, all the necessary identification measures should be started.

Since age is an essential component of an individual's identity, the age of a child should not be questioned indiscriminately and in the absence of sound reasons. The child should therefore be considered as such until he is tried differently, as it is said by the principle of the "presumption of the minor age"[86].

Such identification measures, that must be started immediately, include age assessment, that must be conducted in a scientific, safe and fair manner, avoiding any risk of violation of the child's physical integrity; giving due respect to human dignity[87], and in uncertain cases, to "*still grant the person the benefit of the doubt, treating him as if he was a child* ".

Following the recognition of the guarantees granted to unaccompanied foreign minors, the correct identification of the minor's age certainly has a primary importance, since only when the public authority is sure about the child's age, all the recognized standards will be considered applicable to guarantee the unaccompanied minor's specific protection.

The need to assess specifically the generalities of immigrants, including minors, without documents, has a particular relevance because when the minor is mistakenly identified as an adult, serious injuries can be adopted against his

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[85] Art. 8 Convention on the Rights of the Child, 1989

[86] Tribunale di Torino, terza sezione penale, del 27.01.2014

[87] General comment No 6 (2005) "Treatment of unaccompanied and separated children outside their country of origin", pag. 11, paragraph 31

rights, such as expulsion, refoulement or detention in a temporary identification Centre.

Procedures regarding age assessment are regulated by article 4 Legislative Decree no. 24/14 and the related d.p.c.m. n. 234/16, and by article 19 Legislative Decree 25/08 and by article 8 d.p.r. n. 448/88.

These regulations, although involving minors who are victims of trafficking, asylum seekers or subjected to criminal proceedings, should be applied by analogy to all unaccompanied foreign minors, as indicated by the Ministry of the Interior in the circulars of 25 July 2014 and 9 July 2007[88].

Law 47/2017 dedicates article 5 to the identification procedures of unaccompanied foreign minors and intervenes in relation to the reporting obligations of minors in the territory that had already been established by other provisions in our system, although in a different way.

However, under Article 5 and within the identification procedures, several critical points emerge.

*"After the article 19 of the legislative decree 18 August 2015, n. 142, the following has been inserted:*

*"Art. 19-bis (Identification of unaccompanied foreign minors) - 1. When the unaccompanied foreign minor has been reported to the police authority, social services or other representatives, the local authority or the judicial authority, the staff qualified for the first reception structure, carries out, under the management of the services of the competent local authority and assisted, where possible, from organizations, or associations with proven and specific experience in the protection of minors, an interview with the minor, aimed at deepening his/her personal and family history and to bring out any other element useful to guarantee his protection, according to the procedure established by decree of the President of the Council of the Ministers to be adopted within one hundred and twenty days from the date of entry into force of this provision. To the interview, the presence of a cultural mediator is guaranteed".* [89]

This first paragraph lays down the bases of the procedure foreseen for the identification of the minor and states that when he comes into contact with police authorities and social services, the personnel qualified for the first hospitality structure, must carry out the first interview.

*"In cases of doubts regarding the age declared by the minor, the provisions of paragraph 3 and following shall be applied. In any case, while awaiting the outcome of the identification*

[88] Ministro dell'Interno Prot. n. 17272/7 "Identification of underage migrants"; http://www1.interno.gov.it/mininterno/export/sites/default/it/assets/files/14/0841_2007_07_10_circolare_dentificazione_di_migranti_minorenni.pdf
[89] Art. 5 paragraph 1, L. 47/2017

*procedures, the reception of the minor is guaranteed by the appropriate first reception facilities for minors provided for by law; the provisions of Article 4 of Legislative Decree 4 March 2014, n. 24."* [90]

The second paragraph aim is to ensure that the reception of the minor in the appropriate first reception facilities is guaranteed even when there are doubts based on the age declared by him.

When will all the anthropometric assessments take place?

Every time a child is without any document, so as to be able to attribute the minor an identification code and insert the data in an appropriate database, so that in future such investigations will not necessarily have to be repeated for him.[91]

*"The identity of an unaccompanied foreign minor is established by the public security authorities, assisted by cultural mediators, in the presence of the guardian or temporary guardian if already appointed, only after the immediate humanitarian assistance, has been guaranteed to the minor. If there is any doubt about the age declared, this is ascertained principally through a registry document, also with the collaboration of the diplomatic-consular authority. The intervention of the representation diplomatic-consular should not be requested in cases where the alleged minor has expressed the wish to seek for international protection or when a possible need for international protection emerges following the interview established in paragraph 1.*

*This intervention is not possible if dangers of persecution can derive when the child declares that he doesn't want to use the diplomatic- consular authority's intervention. The Ministry of Foreign Affairs and international cooperation and the Ministry of the Interior promote appropriate initiatives, in agreement with the States concerned, in order to accelerate the completion of the checks referred to in this paragraph."* [92]

The correct identification as minors of boys and girls, under the age of 18, who arrive in our country, is an essential prerequisite for the application of the protection and assistance measures provided for by the current legislation, such as the right to be received in a structure for minors, to have a guardian, and the right not to be expelled.

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[90] Art. 5 paragraph 2, L. 47/2017

[91] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 13

[92] Art. 5 paragraph 3, L. 47/2017

Therefore, when the minor's age is uncertain, it is necessary to resort all the assessments, however identified by the relevant legislation, to determine the minor age, using first of all the public health facilities thanks to the paediatric department. [93]

These normative innovations aim is to guarantee a better protection of the child's rights, limiting the unfortunately widespread practice of attributing to unaccompanied young people the major age, without informing those directly concerned, about the results of the exams that have been taken and so making sure they can be protected by the courts.

Article 5 continues in paragraph 4, stating that if there are any doubts regarding the age declared by the unaccompanied foreign minor, socio-health examinations can be carried out, in order to ensure the assessment of his or her age.

It will be up to the Public Prosecutor's Office at the Juvenile Court to order these socio-medical examinations.

The following paragraphs of article 5 continue regulating the methods through which all the assessments must be carried out and also sets down some principles:

- The foreigner has the right to receive all the necessary information on the type of checks that will be carried out[94] and on the consequences of these results. The presence of a cultural mediator and of a legal representative must be guaranteed. [95]

*"The foreigner is informed, with the help of a cultural mediator, in a language that can understand and conform to his degree of maturity and literacy, of the fact that his age can be determined with the help of social and health examinations, of the type of exams to which he must be subjected, of the possible expected results and the possible consequences, as well as those arising from his refusal to submit to such examinations. This information must also be provided to the person who, even temporarily, exercises tutelary powers for the minor."*

[93] Ministro dell'Interno Prot. n. 17272/7 "Identification of underage migrants"; http://www1.interno.gov.it/mininterno/export/sites/default/it/assets/files/14/0841_2007_07_10_circolare_dentificazione_di_migranti_minorenni.pdf

[94] Article 5 paragraph 5, L. 47/2017

[95] Article 5 paragraph 6, L. 47/2017

- The assessment must also be carried out in a suitable environment and with a multidisciplinary approach[96], by adequately trained professionals, with less invasive and respectful operating modes.

*"The socio-medical assessment of the age must be carried out in a suitable environment with a multidisciplinary approach from appropriately trained professionals and, where necessary, in presence of a cultural mediator, using the less invasive possible method and respectful of the presumed age, of sex and physical and mental integrity of the person. Health and social examinations that could compromise the psycho-physical person's state, should not be performed".*

- Finally, the results of the assessments must be communicated to the foreigner, the legal representative and the Public Prosecutor who has ordered the assessments.
- What when the minor age is uncertain? In this case we refer to the principle of the relative presumption of the minor age, in fact paragraph 8 of article 5 states that *"if, even after the socio-sanitary verification, there are still doubts remaining on the minor age, this is presumed for all legal purposes."*

Considering the age assessment methods from the more exquisitely scientific profile, the new legislation provides the obligation to proceed with a multidisciplinary examination, thus requiring evaluation of cases of uncertain age through a more specific examination, rather than the only wrist radiography which was traditionally used in our country to determine the age of the minor, but now for a long time has harshly been criticized, as it is considered inaccurate from a medical and scientific point of view.[97]

As it is clear, these normative innovations aim to guarantee a better protection of the rights of the child, trying to stop the unfortunately widespread practice that attributes to unaccompanied young people the major age without providing any information concerning the results of the taken exams, and thus preventing them from being able to be protected by the courts.

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[96] Article 5 paragraph 6, L.47/2017 In this case, the legislator choose to follow a multidisciplinary approach as children are often without documents and it is impossible to recover them from the Country of Origin. Such a context would not be sufficient to declare the minor age of the child. The multidisciplinary approach is considered as the only one able to really achieve results coinciding or at least close to the real chronological age of minors.

[97] New Legal, "l'accertamento dell'età nella nuova legge sui minori stranieri non accompagnati" in Diritto e Innovazione; http://newlegal.it/laccertamento-delleta-nella-nuova-legge-sui-minori-stranieri-non-accompagnati/

Law 47/2017 therefore tried to overcome two of the critical points that up to that moment could be found within the discipline of ascertaining the age of unaccompanied foreign minors: 1) age assessment methods; 2) lack of information of the radiological examination results and the consequent impossibility to contest them in court.

Both of the highlighted aspects have recently been contested by the European Court of Human Rights in *the 5797/17 "Darboe et Camara c. Italie*[98].

The Court has consistently held that children, due to their age and personal situation, are amongst the most vulnerable persons in the society.

It is the interveners' submission that the State Parties should ensure that the age assessment procedure as a whole, including procedural safeguards and the methods used to assess age, guarantees respect for the child's private life under Article 8 ECHR. Construed in light of the best interest of the child and benefit of the doubt principles, the interveners submit that age assessment procedures concerning asylum-seeking children, should not be contemplated as routine measures and should satisfy the necessity and proportionality test under Article 8 ECHR in order to achieve the legitimate aim pursued.

*"The interveners submit that the negative consequences of an incorrect age assessment can constitute inhuman and degrading treatment under Article 3 and a violation of the child's private life under Article 8. An erroneous age assessment denies children the substantive and procedural rights they are entitled to, under international and European law throughout the asylum procedure, which may adversely affect the outcome of the child's asylum claim. Amongst the most deleterious consequences is the improper accommodation of children with adults where they face a much higher risk of ill-treatment."* [99]

On that occasion, however, the Strasbourg Court was able to issue a precautionary order in which it accepted the complaints formulated by the applicants concerning the unreliability of the simple radiological examination of the wrist for the purpose of assessing age.

Where the individual circumstances of a particular case require an age assessment, a holistic, safe and dignified procedure should be carried out by

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[98]European Court of Human Rights in the 5797/17 *"Darboe et Camara c. Italie* https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Darboe%20Camara%205072017%20final%20INTERVENTION%20ONLY%20as%20sent.pdf

[99] European Court of Human Rights in the 5797/17 *"Darboe et Camara c. Italie* https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Darboe%20Camara%205072017%20final%20INTERVENTION%20ONLY%20as%20sent.pdf

qualified experts, with due respect to material and procedural safeguards under Articles 3 and 8 ECHR.

Finally, this novel seems to clarify some fundamental aspects regarding the protection of unaccompanied foreign minors arriving in Italy.

According to the concrete experience of the Organizations, however, the operating practice still doesn't appear homogeneous, although it is increasingly and gradually approaching the provisions of the law.[100]

The family investigations theme is closely linked to the theme of identifying the child and to the correct assignment to the same of his proper age.

Once the same has been identified and the provision for the attribution of the age established pursuant to Article 5, paragraph 9 has been issued, it will be possible to arrange and start family investigations, as established by Article 6 of Law 47/2017.

According to the provisions of article 6, which modifies article 19 of legislative decree 142/2015, the family investigations are regulated as follows: *"Within article 19, paragraph 7, second sentence, of the legislative decree 18 August 2015, n. 142, after the words: «The Ministry of the interior » the following are inserted: "after the Ministry of justice and the Ministry of Foreign Affairs and international cooperation".*

*2. To article 19 of the legislative decree 18 August 2015, n. 142, finally, the following paragraphs are added:*

*"7-bis. In the five days following the interview mentioned in Article 19-bis, paragraph 1, if there is no risk for the unaccompanied foreign minor or for his family members, with the prior informed consent of the same minor and exclusively in his own best interest, the exercising parental responsibility, also temporarily, sends a report to the to the partner organization, which immediately starts the investigation."* [101]

What happens when the natural family of the child is identified?

One of the fundamental principles regarding minors, and in this case unaccompanied foreign minors, consists in trying, as far as possible, to guarantee the relationship between the child and the natural family, considered as the most suitable situation able to guarantee the principle of the best interest of the child, and yet the development of his personality in an environment in which

[100] "Osservazioni e raccomandazioni del Tavolo di lavoro sui minori stranieri non accompagnati sull'attuazione della L. 47/2017 "Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", pag. 5

[101] Art. 6 paragraph 1 and 2, L. 47/2017

he can feel protected and grow, hopefully, with the respect of his person and with love.

Article 6 of the Zampa Law, in the second paragraph, continues in fact saying that "*7-quater) If any of the suitable family members are identified to take care of the foreign unaccompanied minor, this solution must be preferred compared to the placement in the community*".

The family investigation is closely linked to family custody, as stated by article 7 which established that the family custody of unaccompanied foreign minors should be encouraged, with respect to admission to a host community.

So, analysing the law we identify a specific "passage" from Article 6 in which we recognize the right to carry out family investigations for the child, in order to realize the reunion with his family, in the natural family environment, then reaching article 7 that realized some modifications of law 184/83 in matter of adoption.

Article 7 states that *"After paragraph 1 of article 2 of the law of 4 May 1983, n. 184, and subsequent amendments, the following words are inserted:*

*"1-bis. Local authorities can promote awareness and the training of carers to encourage family foster care unaccompanied foreign minors, with priority over the admission to a reception facility."*

In this provision, therefore, we legislator tried to protect the child and integrate him as much as possible, providing that instead of finding, as a welcome, arrangement in a reception facility, he may find a situation that brings him closer, as much as possible, to enjoy a status which guarantees his protection and that can make up for the lack of the natural family.

### 3.4 THE RESIDENCE PERMIT

Art. 3 of Law 47/17 states that "*the refoulement of unaccompanied minors cannot be initiated in any case*". The establishment of this principle is essential in the regulation of the residence permits regarding unaccompanied minors.

Article 10 of the 47/2017 law deals with regulating the residence permit for minors.

According to this discipline, under the term "residence permit for minors", both the minor age permit, issued even before the appointment of the guardian, and the permit for family reasons, are considered.

Before the discipline n. 47/2017, when the General Management opted for the "non-place to provide the assisted repatriation of the child", the foreign minor was granted the right to receive a residence permit for minor age, issued by the police headquarters according to article 28 paragraph 1 a), presidential decree n.394/1999. [102]

The current regulatory system, pursuant to Article 32 of the Consolidated Law, provides that upon reaching the major age, a residence permit may be issued for study reasons or to guarantee to unaccompanied foreign minors the access to work entrusted pursuant to Article 2 of law 184/83, subject to the opinion of the General Directorate for Immigration and the integration policies of the Ministry of Labour, which issued in 2017 the Guidelines dedicated to the opinions for the conversion of the residence permit of unaccompanied foreign minors once they reach the age of majority :[103]

*"At the age of completion, the foreigner against whom the provisions of article 31, paragraphs 1 and 2, have been applied, and to minors in any case entrusted pursuant to article 2 of the law of 4 May 1983, n. 184, a residence permit can be issued for study reasons to guarantee the access to work, of subordinate or autonomous work, for health or care needs. The residence permit for access to work is independent from the requirements of article 23."*[104]

Or that they have been admitted for a period of not less than two years in a social and civil integration project managed by a recognized public or private body according to Art. 32 paragraph 1 bis *"The residence permit referred to in paragraph 1 may be issued for study, access to work or subordinate or self-employed reasons, at the age of majority, to unaccompanied foreign minors, entrusted pursuant to Article 2 of the law 4 May 1983, n. 184, or subject to protection, (with the positive opinion of the Committee for foreign minors referred to in Article 33 of this consolidated law, or to unaccompanied foreign minors) that have been admitted for a period of not less than two years in a social and civil integration project managed by a public or private body that has national representation and that is anyway registered in the register established by the Presidency of the Council of Ministers pursuant to Article 52 of the Presidential Decree of 31 August 1999, n. 394."*

As a matter of fact, the new legislation didn't bring important changes in this field, but it certainly clarified the previous procedure, simplifying the structure of requests necessary to obtain the residence permits.

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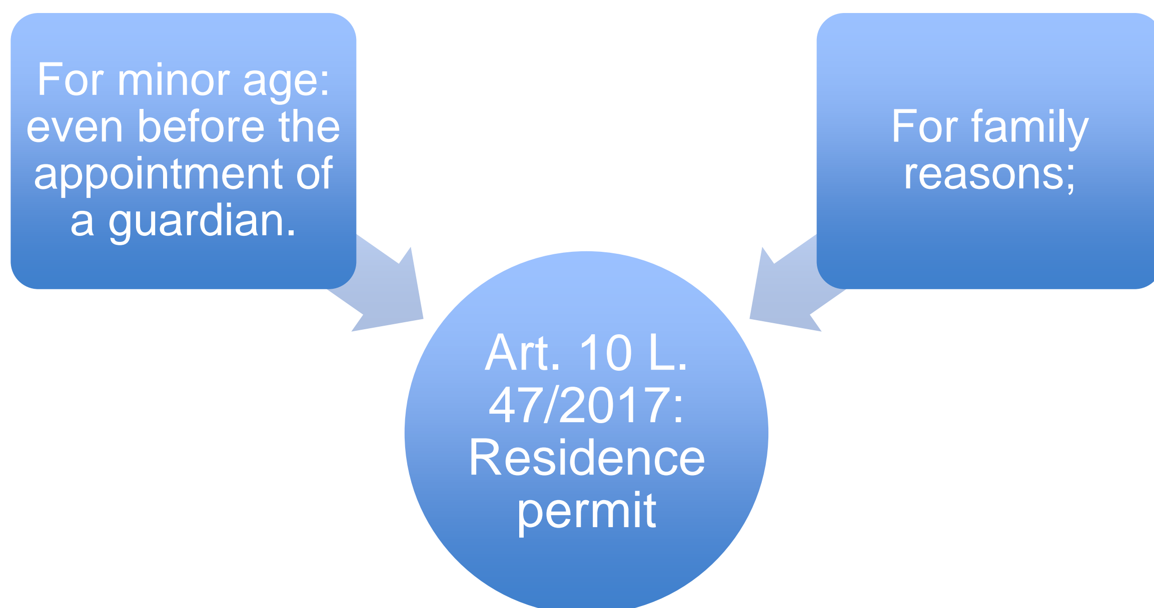
[102] Alessandra Cordiano, "Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1306

[103] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 26 nota n. 35

[104] Art. 32 Single Text, dlgs 286/1998

Moreover, unaccompanied minors can apply for the residence permit before a guardian has been appointed, emphasising, in this way, the urgent need to obtain it, in order to start a proper integration process.

In fact, what the law realizes is that the residence permits used up to now disappeared and in the legislation, an appropriate reference is only made to residence permits for minors or for family reasons:




*"When the law prohibits the refoulement or expulsion, the commissioner issues the residence permit:*

*a) For minor age. In case of an unaccompanied foreign minor, tracked down in the national territory and reported to the competent authorities, the permit of stay for minor age is issued, after the request of the same minor, directly or through the parent's liability, even before the appointment of the guardian pursuant to Article 346 of the Civil Code, and is valid until the major age;*

*b) For family reasons, for the fourteen years old minor entrusted, also pursuant to article 9, paragraph 4, of the law 4 May 1983, n. 184, and subsequent amendments, or subject to the protection of an Italian citizen living with the same, that is to say the child over fourteen entrusted, also pursuant to the same Article 9, paragraph 4, of Law no. 184 of 1983, and subsequent modifications, or subject to the protection of a foreigner regularly resident in the national territory or of an Italian citizen living with the same."* [105]

[105] Art. 10 L. 47/2017

The real innovation closely linked with the residence permit can be found in article 13, according to which specific supporting measures towards the age of majority and long-term integration measures are established.

Article 13 lays down two important principles:

- According to the first paragraph, if the General Directorate for Immigration and Integration Policies of the Ministry of Labour and Social Policies does not issue an opinion, the silent assent criterion is applied.
- According to paragraph two, when the minor reached the age of majority, even if he started an integration path, a prolonged support can be considered necessary to guarantee the success of the path. Therefore, in this case, the Juvenile Court can also order to assign him to the territorial services, for a period not exceeding 21 months, upon request of the social services.

The importance of this novelty lays in the fact that the Italian government faces the topic of unaccompanied minors in a long-term perspective.

Once incorporated in the new society, it is essential and fundamental to give the minors the chance to renew the permit and at the same time, offer them a support in case of necessity, even after they're not considered minors anymore.

Every government has the duty to help and protect minors, firstly as children and, secondly, as migrants, and in this case the measures adopted have been built on an approach that has to recognize the minor's integration at the hearth of the process.

### 3.5 THE GUARDIANSHIP AND ITS RESPONSIBILITY

Another novelty that has to be considered essential is the introduction of the guardianship, in fact within article 11, law 47/2017 introduced the list of voluntary guardians.

Before Law No. 47/2017 this task was generally entrusted to the institutional guardian, who could be the Mayor of the municipality where the minor had been accepted, or other institutional actors. The institutional guardian, however, due to the high number of minors that he was often called to support,

was not always able to guarantee an accompaniment based on an in-depth knowledge of the child himself. [106]

According to article 11 *"Within ninety days from the date of entry into force of the present law, at every juvenile court a list of voluntary guardians is established, to which private members can be registered, selected citizens and adequately trained, by the guarantors regional and autonomous provinces of Trento and Bolzano for childhood and adolescence, willing to take on the protection of the unaccompanied foreign minor or more minors, when protection considers brothers or sisters."*

In each court a list of voluntary guardians is established, in which private citizens can be enrolled and adequately trained to carry out this task, since it is extremely delicate, always considering the position of extremely vulnerable position of unaccompanied minors, and the need to include adequately the minor in the host community. Italian authorities further acknowledged that "institutional" guardianship was not effective and recognized the added value that active citizenship could bring in protecting unaccompanied children.

We can therefore say that the main innovation consists in the active involvement of the citizenship in order to make the system more effective, since *"When voluntary guardianship works properly and the child feels a connection with the guardian –that another human being genuinely cares – it has a powerful effect on reducing abuse, exploitation and harm".* [107]

In this regard, article 11 continues by establishing that *"appropriate memoranda of understanding between the aforementioned guarantors for children and adolescents and the presidents of the courts for minors are stipulated to promote and facilitate the appointment of voluntary guardians."*

The guardian is defined as an independent person who safeguards a child's best interest and his general wellbeing and also complements his limited legal capacity, and the choice of the guardian is a fundamental moment since it allows the identification of the most appropriate subject able to take care of the minor's interests. The voluntary guardian is "the person who, for free and voluntarily, not only wants but is also able to legally represent the unaccompanied

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[106] Save the Children, "Guida per i tutori volontari dei minori stranieri non accompagnati" https://s3.savethechildren.it/public/files/uploads/pubblicazioni/guida-i-tutori-volontari-di-minori-stranieri-non-accompagnati_0.pdf

[107] UNICEF "How voluntary guardianship for unaccompanied minors took root in Sicily". https://blogs.unicef.org/evidence-for-action/duty-to-protect-how-voluntary-guardianship-for-unaccompanied-minors-took-root-in-sicily/

foreign minor, and is also a motivated and sensitive person, attentive to the relationship with the minor, interpreter of his needs and problems[108].

As it had already been stated by the *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* States are required to take all the measures necessary to ensure the proper representation of unaccompanied or child's best interest.

The law established the criteria that must be followed to choose the guardian: first of all it is necessary to evaluate the indication provided by the parents themselves with will, public deed or authenticated private deed. If it is lacking or if for serious reasons the will cannot be expressed by the parents, the judge chooses between close relatives or related to the minor or, alternatively, to persons outside the family. After the introduction by the 2017 law of the voluntary guardians list, the law provides that the judge can refer to this list of voluntary guardians. The judge may therefore refer to this list for the appointment of the guardian, if there has been no designation by the parents or there are no family members available and suitable.[109]

Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory. He should be consulted and informed regarding all actions taken in relation to the child. The main task of a guardian should then be to continuously take care of the child. [110]

But what are the specific functions recognized to the voluntary guardians of foreign unaccompanied minors?

- Performs the task of legal representation of the child.
- Pursues the recognition of the rights of the child without any discrimination.
- Promotes the child's psycho-physical well-being.
- Vigilance on the paths of education and integration of the foreign minor and takes care to ensure that his inclinations and aspirations are achieved.

[108] Authority for Childhood and Adolescence - Save the Children, "Guida per i tutori volontari dei minori stranieri non accompagnati"
[109] Joelle Long, "Tutori volontari di minori stranieri non accompagnati. Materiali per l'informazione e la formazione" , pag. 143
[110] General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, paragraph 33, pag. 13

- Administers the assets.[111]

What is hoped for is to insert the guardians in special registers, following a public evidence procedure, in which the general requirements that the aspiring volunteer tutors must possess are specifically indicated.

According to the second chapter of article 11 of Law 47/2017, *"the provisions of the first book, title IX, of the Civil Code are applied"*.

This provision is certainly considered to be difficult to establish since the title to which this rule refers is specifically dedicated to *"parental responsibility and the rights and duties of the child"*.

These rules are specifically dedicated to the exercise of parental responsibility and therefore it is considered that the legislator wanted to refer instead to the title X of the first book of the civil code, expressly dedicated to the protection.[112]

We can therefore say that one of the main objectives of Zampa law is the promotion of foster care and the establishment of a system that involves locals as volunteer guardians. The fact that this provision represents one of the most significant changes of the Law was also certified by the data on the presence of voluntary guardians, one year after the enactment of the law. In this first year, almost 4 thousand citizens across Italy have given their willingness to become volunteer guardians of an unaccompanied minor: according to the Guarantor for the Infancy it is *"a patrimony of generosity and solidarity that cannot and must not be lost"*. [113]

## 3.6. RECOGNITION OF SPECIFIC RIGHTS: RIGHT TO HEALTH AND EDUCATION AND THE RIGHT TO BE HEARD

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[111] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 30

[112] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 30

[113] Save the Children, "La legge Zampa compie un anno con 4mila tutori volontari per i minori non accompagnati" http://www.vita.it/it/article/2018/04/06/la-legge-zampa-compie-un-anno-con-4mila-tutori-volontari-per-i-minori-/146480/

We have already seen how the recognition of fundamental rights to unaccompanied foreign minors is at the base of the discipline recognized to minors even at the International level, and specifically provided by article 34 of the Single Text on immigration[114].

However, the new law includes among its own rules some specifically dedicated to specific rights dedicated to unaccompanied foreign minors.

Pursuant to art. 14, Zampa law, for the first time, enables the minors to completely enjoy the right to education and healthcare, with measures that overcome the bureaucratic obstacles.

The entry into both systems was previously blocked mainly by the obtainment of essential documents, such as the residence permit without which unaccompanied minors were not allowed to enjoy any of these rights.

Indeed, the new provision seeks to improve and strengthen some of the most relevant individual rights.

Specifically, considering education, the entrance in the school system has to be valued as one of the basic steps in order to involve minors in the society.

It is therefore expressly foreseen by article 14 that the foreign minor is allowed to register with the National Health Service even pending the issue of the residence permit and while he is waiting for the appointment of the guardian.

*"In paragraph 1 of Article 34 of the Single Text, the following letter is added in the end:*

*"B-bis) Unaccompanied foreign minors, including those for whom the release of the residence permit is pending, after the reports of law when they've been discovered in the national territory ».*

*2. For unaccompanied minors, registration to the National health Service authority is requested by the operator, that even temporarily, exercises the parental responsibility or by the manager of the first reception facility. "*[115]

The same article 14 proceeds considering the scholastic and formative paths that must be guaranteed to unaccompanied foreign minors, as soon as they arrive in the reception centre, having specific projects in which it is also possible to include cultural mediators and Conventions that want to promote

[114] Article 34 Single Text on immigration, dlgs. 286/1998 *"Assistance for foreigners registered with the National Health Service."*

[115] Art. 14 paragraph 1, L. 47/2017

apprenticeship programs.[116] These specific agreements have been settled down also because the new provision encourages the completion, at least, of the compulsory education, and the established specific programs may facilitate this practice.

The possibility to actually access and reach education is one of the pillars necessary to guarantee the minor's integration, together with the learning of the Italian language. [117]

In order to guarantee their protection, they should immediately be included in the school system, and be supported to reach secondary and higher studies.

An important factor facilitating social integration of persons entitled to protection, and in this case of minors, is the recognition of degrees and qualifications acquired in the country of origin.[118]

*"Starting from the time of the insertion of the minor in the reception facilities, educational institutions of every order and degree and the educational institutions accredited by the regions and by Autonomous Provinces of Trento and Bolzano activate measures to favour the fulfilment of compulsory education, pursuant to of article 21, paragraph 2, of the legislative decree 18 August 2015, n. 142, and training of unaccompanied foreign minors, also through the preparation of specific projects that provide, where possible, the use or coordination of cultural mediators, as well as Conventions aimed at promoting specific apprenticeship programs. The administrations concerned provide for the implementation of the provisions of this paragraph, within the limits of financial, instrumental and human resources available for the legislation and in any case with new or greater charges for public finance."*[119]

Although the rights to receive education and healthcare are generally retained basic in the so-called civilized nations, they have been guaranteed to UAMs only with after the application of the new Zampa law.

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[116] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 31

[117] Ministry of the Interior, "National Integration Plan for persons entitled to international protection", October 2017
http://www.interno.gov.it/sites/default/files/piano_nazionale_integrazione_eng.pdf

[118] Art. 14 paragraph 4, L. 47/2017 *"In case of unaccompanied foreign minors, the final titles of the study courses of the educational institutions of each order and grade are issued to the same minors with the data identifiers acquired at the time of registration, even themselves have reached the age of majority in the completion of their studies."*

[119] Art. 14, paragraph 3, L. 47/2017

### 3.7. THE RIGHT TO BE HEARD AND LEGAL AID: ART. 15 AND 16 L. 47/2017

Article 15 is specifically dedicated to the emotional and psychological assistance reserved to unaccompanied foreign minors who will be assured in every state and degree of the procedure, thanks to the presence of suitable persons indicated by the minor or with adequate experience in assisting unaccompanied foreign minor and included in the register referred to in Article 42 of the Consolidated Law.

The unaccompanied foreign minor will have the right to participate, through one of his legal representatives, in all jurisdictional and administrative proceedings.

In this regard he also has the right to be heard, also guaranteeing the presence of a cultural mediator.

This regulation was previously regulated by the Legislative Decree 142/15[120], in article 18, second paragraph, but even then the law didn't clarify which is the subject that should provide the listening of the minor, whether it should be the judicial authority or the local authority that takes charge of it.

Indeed, the recognition of the importance of hearing the child's view, especially in administrative and legal proceedings, is an essential step for two principal reasons: firstly, in order to prioritize the best interest of the child and secondly, to underline, the importance of treating the child as an active subject.

*"After paragraph 2 of article 18 of the legislative decree 18 August 2015, n. 142, the following words have been included:*

*"2-bis. The affective and psychological assistance of unaccompanied foreign minors and insured, in any state and degree of the procedure, from the presence of suitable persons indicated by the minor, as well as groups, foundations, associations or not governmental organizations of proven experience in assisting foreign minors and properly registered in the register referred to in article 42 of the consolidated text such as the legislative decree 25 July 1998, n. 286 with the consent of the minor, and admitted by the judicial authority or administrative proceeding.*

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[120] Art. 18, paragraph 2 dlgs. 142/15: "*For the evaluation of the best interests of the child, it is necessary to listen to the minor, taking into account his age, his degree of maturity and his personal development, also for the purpose of knowing the previous experiences and evaluate the risk that the minor can be a victim of human trafficking, as well as verifying the possibility of family reunification pursuant to article 8 paragraph 2 of EU regulation no. 604/2013 of the European Parliament and of the Council, of 26 June 2013, only if it is in the child's best interest.*"

*2-ter. The unaccompanied foreign minor has the right to participate through one of his legal representatives in all jurisdictional and administrative proceedings concerning him and to be heard on the merits. For this purpose the presence of a cultural mediator is guaranteed».*

Specifically, the right to be heard is also supported by a psychological assistance thanks to the participation of specific associations with the aim of defending children's rights, or other qualified people.

Considering the child's right to be heard, this had already been recognized and underlined by Article 12 of the Convention on the Rights of the Child (CRC), which is also closely linked to the achievement of the best interest of the child: *"the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*[121]

The right of all children to be heard and taken seriously, is one of the most fundamental values of the Convention[122], and one of the main novelties introduced by Zampa law.

With respect to legal assistance, the provision specifies that every unaccompanied minor has the right to be informed about the possibility of receiving the appropriate legal assistance in every jurisdictional procedure in which he or she is involved.

*"To article 76 of the consolidated text of the legislative provisions and regulations on the cost of justice, as for the decree of President of the Republic May 30, 2002, n. 115, the subsequent changes, and the following paragraph is added at the end:*

*'4 quater: The unaccompanied foreign minor involved in a judicial proceeding is entitled to be informed about the opportunity to appoint a trusted lawyer, also through the appointed guardian or the operator who has parental responsibility within the meaning of article 3, paragraph 1 of the law of 4 May 1983, n. 184, and subsequent amendments, and to use, based on the current legislation, legal aid at the expense of the State in every state and degree of the proceedings. For the implementation of the provisions contained in this paragraph the expense of 771,470 euros per year starting from the year 2017 is authorized".*[123]

The child will therefore first have the right to be informed of the possibility of appointing a trusted lawyer and will also be entitled to receive free legal

[121] Art. 12 of the Convention on the Rights of the child, 1989

[122] "General Comment No 12 (2009): The right of the child to be heard", CRC/C/GC/12

[123] Article 16 Law 47/2017

aid, and in this case, for the implementation of these provisions, the expense of 771,470 euros every year is authorized starting from 2017.

According to the provision established by article 16, therefore, the admission of unaccompanied foreign minors to legal aid is envisaged, but with a maximum annual expenditure for this requirement.[124] The active involvement of children within the legal aspect, clearly shows how the law effectively placed the unaccompanied minor's interest in first place, before anything else, establishing a quite effective protection system for unaccompanied vulnerable minors.

## 4. CONCLUDING OBSERVATIONS

Having completed the analysis of the Italian regulatory system that specifically deals with the protection of unaccompanied foreign minors, we can therefore say that the discipline that has been introduced by Zampa law seeks to give homogeneity to a subject that until that time had been regulated by different disciplines, creating a system quite heterogeneous and extremely fragmented.

Law 47/2017 is identified in its peculiarity and size even because it deals with the issue of unaccompanied foreign minors, regulating the specific protections recognized to them as vulnerable subjects, as it is already specified by the notion of unaccompanied foreign minors, to whom the law is dedicated.

The law introduces important changes to the legislative framework so far recognized, so much that it has been recognized as a model because *"While in Europe we have seen the construction of fences, minors detained and promises not kept, the Italian Parliamentarians have shown understanding and respect for young refugees and migrants"*.[125]

Certainly, given the innovations introduced by the law, we can talk and consider a system that recognizes "lights" in unaccompanied minor's protection, reception and their subsequent integration within the host community,

[124] Alessandra Cordiano,"Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", NGCC9/2017, pag. 1309
[125] Fshan Khan, UNICEF Regional Director and Special Coordinator.
"UNICEF su legge Zampa: un modello per l'Europa"
https://thedailycases.com/unicef-legge-zampa-un-modello-leuropa/

also thanks to the fact that we have also tried to include private citizens in protecting minors, by introducing the voluntary guardians figure.

This datum should not be underestimated, since when even within the society we succeeded in bringing the citizens ever closer to the issue of immigration in the first place, and in the specific case with reference to the phenomenon of child immigration, we could open more and more "glimmers of hope" in their legal protection. For our country the introduction of this law also had an historical importance, because it has been the first discipline specifically dedicated to under-age persons coming from non-EU countries and actually staying on our territory, without any kind of assistance from parents or adults legally responsible for them.

If we talk about lights, can we therefore say that we are trying to envisage a safer future, able to protect these subjects, primarily as minors, taking into account their vulnerability?

Alongside the undeniable recognition of positive and important changes and evolutions of the regulatory system, which gives minors the right to protect their own rights, against any kind of discrimination, unfortunately there also are some identifiable criticalities, which we can define as those "shadows", given by the fact that, once again, the declamation of rights is not always followed by the provision of adequate means and resources able to render these rights effective.

These criticalities are already identifiable in the fact that within the same law, it is envisaged that the implementation of the provisions contained in the new law will be carried out within the limits of the human, financial and instrumental resources available under the current legislation and without new or greater charges for the public finance.[126]

It becomes very difficult to achieve an adequate protection and integration program for unaccompanied children without a real investment of resources, knowing that the resources today available are not sufficient.

This law is not just considered as a legal model, but it also introduces a specific cultural message for the host community, the message of bringing the entire system ever closer to the protection of unaccompanied foreign minors.

*"This new law will not only give refugees and migrant children a sense of security to their uncertain lives after having risked so much to reach Europe, but it will also be a model*

[126] Ciro Cascone, "Brevi riflessioni in merito alla legge n. 47/17 (disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)" in "Diritto, Immigrazione e Cittadinanza" n. 2/2017, pag. 34

*for other European countries, to ensure a legislative framework able to support the child protection. "*[127]

[127] "UNICEF su legge Zampa: un modello per l'Europa" https://thedailycases.com/unicef-legge-zampa-un-modello-leuropa/