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Detriment of the Doubt: Age Assessment of Unaccompanied Asylum-Seeking Children

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Introduction

In line with international and European standards, Member States are under an obligation to protect all children from violence, and hold primary responsibility to establish comprehensive child protection systems. The EU seeks to support Member States in this endeavour, as the promotion of the protection of the rights of the child is an explicit objective in Article 3(3) of the Treaty on European Union (TEU). Although all provisions of the Charter on Fundamental Rights of the EU (the Charter) equally apply to children, Article 24 on the rights of the child (based on the specific provisions of the UN Convention on the Rights of the Child) ensures visibility and respect for the rights of the child within EU law.¹

Against that protective backdrop, it is to be deplored that children² are not all, always, first and foremost recognised as such. This is particularly the case for Roma children and children in situations of migration, including undocumented and stateless children, whose protection rights and needs may be ignored.³ Within the context of migration, being misidentified as an adult rather than a child when seeking international protection can have considerable implications on the level of rights and protections owed to them by a receiving State. This ranges from being unable to access welfare services and support, to being detained as an adult, to not receiving public funding for legal representation during the asylum process.⁴

The need for ensuring that children's rights are protected within the Common European Asylum System (CEAS) has become more pronounced with the significant increase in children arriving on European territory in 2015 who are in need of international protection. One in five of over 870,000 refugees and migrants who arrived in Europe via the Mediterranean were children,⁵ and the number of children on the move has been growing; in June 2015 one in 10 refugees and migrants registered at the Greek border with the Former Yugoslav Republic of Macedonia (FYROM) was a child. This had increased to one in three by October the same year.⁶

Furthermore, larger numbers of asylum seekers are now being considered as unaccompanied children, with the total in 2014 comprising 14% of all child applicants.⁷

The predicament of being an unaccompanied child often is accompanied by having a lack of documentation that could aid the age determination process. Age assessment in asylum procedures refers to the procedures through which authorities seek to establish the chronological age of a person to determine which immigration procedures and rules need to be followed.⁸ This is a particularly prominent issue among certain nationalities. For instance, the coverage of live birth reporting – taken as self-evident practice in European countries – was at 6% in 2003 in Afghanistan.⁹ In this light, placing the burden of proof of age determination on an Afghan national may be far more onerous than for a European claimant.¹⁰ Afghan nationals now constitute over 60% of the 23,300 unaccompanied children arriving in Sweden between January and October in 2015.¹¹

¹ European Commission, *Reflection paper, Coordination and cooperation in integrated child protection systems*, 30 April 2015.

² In this briefing, 'child' refers to any human being under the age of 18, as per Article 1, Convention on the Rights of the Child, 1989.

³ *Ibid.*

⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), *OJ* 2013 L180/31.

⁵ IOM and UNICEF, *Data Brief: Migration of Children to Europe*, 30 November 2015.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, 4.

⁹ U.N. Statistics Division, *Coverage of civil registration system*, 2012, cited in G Noll, 'Junk Science? Four Arguments Against the Radiological Assessment of Unaccompanied Minors Seeking Asylum', 2015, available at: <http://bit.ly/1P4bYDq>, 4.

¹⁰ See to that effect G Noll, 'Creation, imagination, speculation: age assessment and the asylum procedure', Refugee Studies Centre, 5 March 2014, available at: <http://bit.ly/1P4uuK8>.

¹¹ IOM and UNICEF, *Data Brief: Migration of Children to Europe*, 30 November 2015.

The particular vulnerability of unaccompanied minors is well documented,¹² and it is persons in such a predicament that this briefing will predominantly focus on due to the associated issues with being unable to provide the identification documents that would normally serve as primary evidence in an asylum application.

There is thus clear importance in having effective age assessment procedures, particularly when faced with difficulties that have been noted in asylum procedures, with some children on the move being unwilling to be identified as being as such in order to avoid traditional protection measures that may hold them back from continuing their journey. Equally, some young adults try to claim that they are children in order to access the higher levels of protection that States are obliged to provide to children.

However, the means available for assessing a person's age have been repeatedly acknowledged as lacking determinative accuracy.¹³ The various methods used by EU Member States all have significant margins of error that can be affected by a range of different factors. Moreover, within the EU, there is no common agreement on how to assess a person's age, leading to disparities in how children are treated in different States' asylum procedures. It has further been noted that divergent practices occur not only at Member State level, but also at the regional level within Member States.¹⁴

This briefing sets out the key legal principles that should guide EU Member States' practices in age assessment within the asylum procedure, drawing on both international and EU law. It then looks at examples of how these have been interpreted in different national procedures, assessing the priority and weight awarded to medical examinations, as well as the treatment of alleged child asylum seekers throughout the age determination procedure.

“Best interests” and “benefit of the doubt”: legal principles governing age assessments

In the absence of identification documents, States carry out age assessments that may have a large impact on the lives of persons in an already vulnerable position. It is against this backdrop that international instruments that protect the best interests of the child is of paramount importance.

The Convention on the Rights of the Child

Foremost amongst the international instruments that guide age assessment practices is the Convention on the Rights of the Child, ratified by all of the European Union's Member States, which codifies that the best interests of the child shall be a primary consideration in all actions and decisions.¹⁵ Article 3 of this Convention functions on a threefold basis, encompassing a substantive right that creates an intrinsic obligation for States that is directly applicable and can be invoked before a court; a fundamental, interpretative principle where any legal provision open to more than one interpretation must be interpreted in the way that most effectively serves a child's best interests; and as a rule of procedure whereby, whenever a decision is made that will affect children, the decision-making process must include an evaluation of the possible impact of the decision on the children concerned.¹⁶

In the context of unaccompanied minors, the Committee on the Rights of the Child (CRC) has noted in a General Comment that protecting the best interests of the child must be the guiding principle for determining the priority of protection needs and the measures to be applied.¹⁷ This encompasses age assessment, which should not only take into account the physical appearance of the individual, but also their psychological maturity. The General Comment further notes that:

¹² See, for instance, UNHCR, *Guideline on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997; Committee on the Rights of the Child, General Comment No.6, *Treatment of unaccompanied and separated children outside their country of origin*, 2005.

¹³ See, for instance, UNICEF, *Age Assessment Practices: A Literature Review and Annotated Bibliography*, Terry Smith and Laura Brownlees, 2011, 13.

¹⁴ EASO, *Age Assessment Practice in Europe*, December 2013, available at: <http://bit.ly/1NQGLTp>. See e.g. AIDA Country Report France: Fourth Update, December 2015, available at: <http://bit.ly/1OtqJhg>, 61.

¹⁵ Article 3(1) Convention on the Rights of the Child provides: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

¹⁶ UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) 4.

¹⁷ CRC, General Comment No. 6 (2005).

“The assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner; avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such.”¹⁸

This both underlines the importance of incorporating “best interests of the child” principles into any age assessment, and the significance of the “benefit of the doubt” principle in coming to a decision during such practices.

UNHCR’s guidelines on international protection relating to child protection claims under the 1951 Refugee Convention and its 1967 Protocol further mention the centrality of the “benefit of the doubt” principle in age assessment procedures, stating the margin of appreciation inherent to these procedures needs to be applied in such a manner that in cases of uncertainty, the individual will be considered a child.¹⁹

The above principles make it clear that age assessment should not take place where there are no reasonable grounds for doubting the claim, and thus should not be undertaken as routine practice.

European Union law

The EU asylum *acquis* incorporates these principles into its instruments governing age assessment procedures for asylum seekers. The recast Asylum Procedures Directive provides that:

“Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant’s age. If, thereafter, Member States are still in doubt concerning the applicant’s age, they shall assume that the applicant is a minor.”²⁰

Two important elements stem from this provision. Firstly, a medical examination to assess the asylum seeker’s age may only be ordered where the person’s statements or other indications do not conclusively establish such age. Secondly, if after medical testing there remains doubt about the individual’s age, then it should be assumed that the individual is a minor. This incorporation of the “benefit of the doubt” principle is a particularly important safeguard for unaccompanied children, who may be less likely to have documentary evidence. Indeed, this principle is to be applied in cases where it is for the applicant to substantiate the application for international protection, but the applicant has no documentary or other evidence to support the claim.²¹

On protecting the best interests of the child, Article 24(2) of the Charter on the Fundamental Rights of the European Union codifies that all actions relating to children, whether taken by public authorities or private institutions, must take the child’s best interests as a primary consideration.

Confronting the primacy of medical age assessments

A last resort measure?

An appropriate reading of Article 25(5) of the recast Asylum Procedures Directive requires States to resort to medical methods of age assessment only where other methods leave doubts as to the age of

¹⁸ *Ibid*, 10.

¹⁹ UNHCR, *Guidelines on International Protection No. 8*, para 75.

²⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L180/60, Article 25(5).

²¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereafter recast Qualification Directive), *OJ* 2011 L337/9, Article 4(5).

the person concerned. The European Parliament commented on how these principles should be interpreted in Member States in 2013 for best practice in age assessment procedures:

“[The European Parliament] Deplores the unsuitable and intrusive nature of the medical techniques used for age assessment in some Member States, which may cause trauma, and the controversial nature and large margins of error of some of the methods based on bone maturity or dental mineralisation; calls on the Commission to include, in the strategic guidelines, common standards based on best practices, concerning the age assessment method, which should consist of a multidimensional and multidisciplinary assessment, be conducted in a scientific, safe, child-sensitive, gender-sensitive and fair manner, with particular attention to girls, and be performed by independent, qualified practitioners and experts; recalls that age assessment must be conducted with due respect for the child’s rights and physical integrity, and for human dignity, and that minors should always be given the benefit of the doubt; recalls also that medical examinations should only be conducted when other age assessment methods have been exhausted and that it should be possible to appeal against the results of this assessment.”²²

The European Asylum Support Office (EASO) also recommends that consideration should first be given to documentary and other available sources of evidence before resorting to medical examination.²³ Effecting these recommendations would ensure that State practice in this regard fully conforms to Article 25(5) of the Directive, as well as the best interests of the child.

Yet in practice, recourse to medical examinations does not seem to be conditional upon the exhaustion of other methods of age determination. The 2013 EASO age assessment report showed that out of the 30 countries studied,²⁴ only 10 attempted other approaches before carrying out age assessment examinations. More recent examples from practice of asylum authorities confirm an improper application of the “best interests of the child” principle as regards the use of least intrusive means for conducting age assessments. Medical assessments are systematically ordered with respect to unaccompanied asylum-seeking children following the asylum reform of July 2015 in Austria,²⁵ while Cyprus has also introduced intrusive medical tests as the main way of assessing age as of May 2015.²⁶ Moreover, the impending overhaul of Sweden’s asylum system, aimed at creating “respite for Swedish refugee reception”,²⁷ will also entail medical age assessments for children as a rule. Similar concerns have been voiced by the Children’s Ombudsman in France, where bone examinations continue to be applied even in respect of unaccompanied children who hold civil status documents.²⁸

A reliable measure?

The deference of asylum law to scientific methods of age determination requires critical consideration. In asylum proceedings, the rationale behind the conduct of age assessments is driven not by medical considerations but by precepts of fairness; asylum authorities seek to determine whether an applicant should benefit or not from the protective regime afforded to children. The relevant question deferred to medical examinations is therefore whether the individual asylum seeker should be treated or not as a child.²⁹

Member States that do use medical examinations rely on different techniques, such as dental examinations and X-rays of various bones of the body – including wrist or collarbone – to determine

²² European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)).

²³ EASO, *Age assessment practice in Europe*, December 2013, 6; See also: Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012.

²⁴ The 28 Member States of the EU, Switzerland and Norway.

²⁵ ECRE, *Hindered access to the asylum procedure and lack of accommodation in Austria*, AIDA Fact-Finding Visit, December 2015 (Forthcoming).

²⁶ AIDA Country Report Cyprus: Second Update, November 2015, available at: <http://bit.ly/1m3ktTB>, 10, 41.

²⁷ Government of Sweden, ‘Government proposes measures to create respite for Swedish refugee reception’, 24 November 2015, available at: <http://bit.ly/1L0I9f>.

²⁸ AIDA Country Report France: Fourth Update, December 2015, 61.

²⁹ Contrast the aim of age assessments in Austria, whereby authorities set a specific birthdate for the asylum seeker: ECRE, *Hindered access to the asylum procedure and lack of accommodation in Austria*, December 2015 (Forthcoming).

bone maturity.³⁰ There are significant doubts about using such radiological techniques, with medico-legal analysis raising three main criticisms. Firstly, that the estimates give a margin of error that can be a number of years out.³¹ Some reports have noted that deviation between the skeletal age of an individual and their chronological age can see a discrepancy that amounts to as much as five years.³² Secondly, the bioethics principle of non-maleficence is called into question; physicians must refrain from providing ineffective treatment for patients, and should thus not provide ineffective procedures to patients if there is no possibility of benefit. Since there is some level of risk associated with X-rays, but no health benefit to an applicant, it has been doubted whether it is an ethical method for assessing age, with Aynsley-Green suggesting that “the use of radiology for age assessment for administrative as opposed to medical purposes is not only imprecise, but also unethical and potentially unlawful.”³³ Finally, it has been posited that the techniques employed lack a sufficient scientific base for the nationalities that make up the majority of the unaccompanied adolescents arriving in Europe due to issues relating to civil registration in some countries. Given that a person’s bone maturity is assessed against that of a set reference group, if the births of citizens in a certain country are not effectively registered, a forensic researcher studying a reference group from this country cannot verify the age of the reference group from this country that they want to study.³⁴ This would mean there would be no valid reference group to compare the age-contested applicant to. It therefore would cast into doubt the medical authority of any assessment that involves a citizen from such a country, and would be at risk of lacking medical authority.³⁵

Despite indications that medical testing both has wide margins of error, and that the techniques used are not always in the best interests of the child, 2013 research from EASO showed that all but two Member States (the United Kingdom and Ireland) rely on such methods.³⁶ Practice in the United Kingdom moved away from medical testing following *R v Merton*, which led to the adoption of the ‘Merton principles’.³⁷ The Court in this case found that “given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range”,³⁸ such as 16 to 20, a medical report was not necessary. Instead, the guidelines that resulted state that in cases where the age of an applicant is not clear, and no reliable documentary evidence exists, the credibility of the applicant, physical appearance and behaviour must be assessed. This assessment must also consider the general background of the applicant, which includes ethnic and cultural considerations, family circumstances, and education. Equally, the Court emphasised that assessing a person’s age does not equate with assessing a person’s reasons for seeking international protection, and thus any inconsistencies between the account of why a person has had to flee their country of origin, and the person’s account of their age do not necessarily indicate that an applicant’s account of their age is to be doubted.³⁹

The above issues with medical examination are reflected somewhat in the practice of some Member States. Following critiques around the accuracy of the medical test to establish the age of non-Western children by the Belgian Order of Physicians (*Ordre des médecins*),⁴⁰ a margin of error of 2 years is taken into account by the Belgian authorities. This means that only self-declared children that medical assessments place from 20 years of age upwards would be registered as an adult.⁴¹ Germany, on the

³⁰ V Feltz, *Age assessment for unaccompanied minors*, Doctors of the World, August 2015, available at: <http://bit.ly/1ROXb0h>, 3.

³¹ A Aynsley-Green *et al*, *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 2012, British Medical Bulletin.

³² Ferraro, INS Public Comment in Physicians for Human Rights *et al*, 2003, 131.

³³ A Aynsley-Green *et al*, *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 2012, British Medical Bulletin.

³⁴ G Noll, ‘Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum’, January 2015, 5.

³⁵ *Ibid.*

³⁶ EASO, *Age assessment practice in Europe*, December 2013, Annex 6, 89.

³⁷ *R (on the application of B) v. London Borough of Merton*, [2003] EWHC 1689 (Admin) United Kingdom: High Court (England and Wales).

³⁸ *R (on the application of B) v. London Borough of Merton*, para. 28.

³⁹ Office of the Children’s Commissioner, *The Fact of Age*, July 2012, 28.

⁴⁰ Belgian Order of Physicians, *Age assessment tests for foreign unaccompanied minors*, 20 February 2010, available in French at: <http://bit.ly/1MBTGpj>.

⁴¹ AIDA Country Report Belgium: Fourth Update, December 2015, available at: <http://bit.ly/1O1Wwmh>, 53.

other hand, has recently introduced a new framework for age assessments which prohibits certain intrusive methods such as examination of genitals.⁴²

States' deference to the questionable reliability of medical age assessments, at odds with the "benefit of the doubt" principle enshrined in Article 25(5) of the recast Asylum Procedures Directive, is all the more dangerous for asylum seekers when it leaves no scope for contestation. The recast Asylum Procedures Directive does not provide for an effective remedy against age assessments, as opposed to other decisions taken in the asylum procedure.⁴³ This is the case in several AIDA countries such as Malta,⁴⁴ Cyprus, where authorities refuse to give applicants access to the file and documents concerning the age assessment,⁴⁵ or Hungary and Sweden, whereby the only way to challenge the age determination is an appeal against the substantive decision on the asylum claim.⁴⁶ Shielding these decisions from legal challenge, despite their potential impact on the child's fundamental rights, amounts to a restriction on the right to an effective remedy laid down in Article 47 of the EU Charter.

The treatment of age-contested asylum seekers in the procedure

As described above, age assessment procedures involve a complex, often intrusive and unreliable process for the asylum seeker. Throughout this process, and insofar as a State's asylum authorities cannot conclusively establish the person's majority, he or she should be treated as a child and afforded all guarantees available to child asylum seekers. The "benefit of the doubt" principle must therefore be construed as a running thread in the asylum procedure.

In that light, alleged children should be able to benefit – unless their majority is established – from special procedural and reception guarantees as applicants for international protection, thereby triggering special duties on the part of the host state. The power to detain an unaccompanied child is only permissible in exceptional circumstances,⁴⁷ and has been codified as a last resort measure in the countries that have not excluded it completely. In practice, however, unaccompanied children may find themselves in detention throughout the duration of the age assessment procedure.⁴⁸

Similarly, in the context of the Dublin Regulation, unaccompanied children may not be subjected to transfers to other Member States if this is against their best interests.⁴⁹ In Austria, however, the Dublin procedure is applied pending the outcome of the age assessment, before the person has been confirmed to be an adult and therefore amenable to a Dublin transfer. Unaccompanied children have therefore stayed in the initial reception centre of Traiskirchen – where Dublin cases are processed – for periods lasting up to 6 or 9 months, under particularly worrying conditions.⁵⁰

In other cases, questionable age assessments may be taken expediently with a view to stripping an alleged minor of the special guarantees afforded to children. Recent criticisms addressed against practice in the "hotspots" of Italy, where unaccompanied children from Gambia and Senegal who lack documentation are all assigned the fictitious birthdate of 1 January 1997 so as to be amenable to

⁴² AIDA Country Report Germany: Fourth Update, November 2015, available at: <http://bit.ly/1OKvtyW>, 42.

⁴³ See Article 46(1) recast Asylum Procedures Directive. This also contrasts to the recast Reception Conditions Directive, which provides for remedies against all decisions issued against an applicant, including detention and withdrawal of material reception conditions.

⁴⁴ Aitus Foundation, *Unaccompanied minor asylum-seekers in Malta: a technical report on age assessment and guardianship procedures*, October 2014, available at <http://bit.ly/1W5M0Pg>.

⁴⁵ AIDA Country Report Cyprus: Second Update: November 2015, 40.

⁴⁶ AIDA Country Report Hungary: Fourth Update, November 2015, 41; Swedish Migration Agency, *Legal guidance on age determination*, RCI 13/2014, 11 June 2014, available at: <http://bit.ly/1J8jUBt>.

⁴⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ 2013 L180/96, Article 11(3).

⁴⁸ See e.g. European Court of Human Rights, *Mahamed Jama v Malta*, Application No 10290/13, Judgment of 26 November 2015, para 147.

⁴⁹ Court of Justice of the European Union, Case C-648/11 *MA v Secretary of State for the Home Department*, Judgment of 6 June 2013, para 55.

⁵⁰ ECRE, *Hindered access to the asylum procedure and lack of accommodation in Austria*, December 2015 (Forthcoming).

expulsion,⁵¹ are a vivid illustration thereof. Such treatment of asylum seekers whose age has not been determined contradicts both the “best interests of the child” and the “benefit of the doubt” principle, which underpin States’ legal obligations.

Conclusion

This briefing has identified the main legal principles governing the treatment of children in the asylum procedure. States are required to give due consideration to the best interests of a child in all actions and decisions taken against him or her, and – when in doubt as to the person’s age – treat him or her as a minor.

The practical application of these obligations leaves worrying protection gaps, however. The over-reliance of Member States on medical methods of age assessment exposes unaccompanied children too readily to intrusive examinations of dubious accuracy, which are often immune from legal challenge. These practices run against the “best interests” principle and the right to an effective remedy. At the same time, States often seem predisposed to treat the alleged minor as an adult until the age assessment process has been completed, thus exposing him or her to detention or to deportation procedures under the Dublin Regulation, through a reversal of the “benefit of the doubt” principle in practice. These issues illustrate that the protective principles governing the treatment of children in the asylum process are regrettably resisted in Member States’ practice.

⁵¹ Redattore Sociale, ‘Sbarchi: caos identificazioni, anche I minori a rischio espulsione. “Gravi violazioni”, 13 November 2015, available at: <http://bit.ly/1jZlFF3>. See also ECRE, ‘Italy: a worrying trend is developing in the “hotspots”, 20 November 2015, available at: <http://bit.ly/1MYR1s8>.