



AGE ASSESSMENT:

RIGHTS OF THE CHILDREN, METHODS, AND CHALLENGES



SEMI-FINAL B:

EU AND EUROPEAN FAMILY LAW

2022

TEAM CZECH REPUBLIC

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List of abbreviations

APD	Asylum Procedures Directive recast
CEAS	Common European Asylum System
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMN	European Migration Network
EUAA	European Union Agency for Asylum
FRA	European Union Agency for Fundamental Rights
MRI	Magnetic resonance imaging
QD	Qualification Directive recast
RCD	Reception Conditions Directive recast
RD	Return Directive
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

Introduction

After the Taliban takeover of Afghanistan in August 2021, Ahmad fled to Romania where he applied for international protection. His family could not afford to travel and therefore remained in their homeland. Using the services of smugglers, Ahmad tried to get to Germany in the trailer of a truck, but he was intercepted by a Foreign Police patrol in the Czech Republic. During the check, he repeatedly claimed that he was born on 1 January 2005 and is a minor,¹ but he could not present any identity card, travel document or residence permit. However, Ahmad appeared rather physically and mentally mature to the Foreign Police officers. Due to serious doubts concerning Ahmad's minority, he was detained in a refugee facility in order to undergo an age assessment process.

According to Eurostat statistics, 472 395 people applied for asylum in the EU in 2020, 13 550 of them being unaccompanied minors.² The migration influx varies from one Member State to another, and Member States also differ in their preparedness for child migration. Legal systems are facing new challenges in connection with migration, one of which is the issue of distinguishing between children and adults.

Unaccompanied minors find themselves in a situation of 'double vulnerability'³, due to their status as migrants and children. The particular vulnerability of unaccompanied minors demands specific measures to be taken in response to their status. The age of applicants thus has a major effect on how they will be treated when they come into contact with public authorities on their migration journey. Those who are adults may face detention in a refugee facility. On the other hand, unaccompanied minors, given the lack of parental care, need to be provided with alternative care. Minor applicants, whether accompanied by an adult or not, enjoy special rights and privileges.⁴ In this situation, applicants around the age of majority have high motivation to conceal their actual age. On the contrary, some minors may pretend to be adults under the false conviction that they will avoid the application of protective measures and therefore will be able to continue their journey to their targeted Member State. Others may

¹ The term 'minor' will be used for both those who have been proven to be minors and those who claim to be minors, where appropriate.

² Eurostat, *Asylum and first time asylum applicants - annual aggregated data (rounded)*, 7 April 2022, available at <https://ec.europa.eu/eurostat/databrowser/view/tps00191/default/table?lang=en>. Eurostat, *Asylum applicants considered to be unaccompanied minors - annual data*, 31 March 2022, available at <https://ec.europa.eu/eurostat/databrowser/view/tps00194/default/table?lang=en>.

³ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, at 2.

⁴ See the summary of the most relevant international and EU provisions concerning migrant children in EASO, *Practical Guide on age assessment* (2nd ed., 2018), at 78-80.

claim to be adults in order to be able to work or get married, or may just follow instructions they received from smugglers seeking to deprive the children of protection from exploitation.⁵

The age of the most unaccompanied minors arriving in the EU is accepted by authorities and they can effectively enjoy all the rights recognized in the CRC. In a considerable number of age disputed cases⁶ like Ahmad's, however, the applicant's claim on the one hand and reasonable doubts of responsible authorities on the other hand need to be scrutinized. Age assessment methods vary in their intrusiveness, reliability, and validity. Their common denominator there is that none of them is universally used in all Member States.⁷ A precise legal framework that would comprehensively harmonize the age assessment process at the EU level is absent. Minimal guarantees of medical examinations to determine the age of unaccompanied minors are enshrined only in Article 25(5) of the APD.⁸

In this paper, the authors will seek to analyse the current legislation and practice in the CEAS concerning the age assessment process. The primary focus will be on children's rights and procedural safeguards provided for minors while determining their age. Further the pros and cons of the most commonly used methods will be examined. As regards the findings of the EUAA⁹, CoE and EMN,¹⁰ the authors propose an 'ideal' approach for application in all Member States. Finally, the major challenges of the age assessment process will be presented along with possible recommendations to ensure equal, transparent and dignified treatment of all asylum seekers in the EU.

1. General principles and rights of the children

A. European union law

The need to verify the age of a minor can arise in all Member States through which the minor transits to their destination Member State. It seems appropriate to treat minors uniformly throughout the CEAS.

⁵ EASO, *supra* note 4, at 17.

⁶ Official statistics of age disputed cases in the EU are not available. For the UK see Refugee Council, *Information: Children in the Asylum System* (2021), at 2.

⁷ European Economic and Social Committee Opinion SOC/634 of 18 September 2020, at 2.8. and 4.6., and UNHCR, *Recommendations for the European Commission's Proposed Pact on Migration and Asylum* (2020), at 9.

⁸ Directive 2013/32/EU of 26 June 2013, OJ 2013 L 180/60 (APD).

⁹ From 19 January 2022 replacing the EASO.

¹⁰ Initiated in 2021 by the EMN National Contact Point for the Czech Republic, see *AD HOC QUERY ON 2021.10 Unaccompanied minors - age assessment methods used by Member States* (2021), available at https://ec.europa.eu/home-affairs/system/files/2021-05/202110_unaccompanied_minors_age_assessment_methods_used_by_member_states.pdf.

At the level of EU primary law, the issue concerns mainly Article 6 (the right to liberty and security) and 24 (the rights of the child) of the Charter. At the level of EU secondary law, the rules of age assessment are explicitly stated in Article 25 APD.

Age assessment is usually performed when deciding on detention alternatives. In this context, it may be noted that under EU law, a minor may be detained under the RD,¹¹ which applies to third country nationals staying illegally on the territory of the EU, and the RCD,¹² which applies to applicants for international protection.¹³ The asylum procedure itself is regulated by the APD. The minimum standards for qualification for international protection and the scope of protection is regulated by the QD.¹⁴ Age assessment is covered, somewhat haphazardly, only in the context of international protection in Article 25 of the APD. Consequently, minors from third countries illegally staying on the territory of Member States do not enjoy explicit guarantees of correct age assessment. The Return Handbook¹⁵ states that it is ‘recommended’ to apply the rules of age assessment under the APD even for the minors who are subject to the RD.

The regulation of age assessment in Article 25 APD concerns unaccompanied minors specifically. The APD refers to the definition of an unaccompanied minor formulated in Article 2(l) of the QD,¹⁶ which provides that the unaccompanied minor is ‘*a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.*’ It should be remarked that the need to verify age may also apply to minors who come accompanied by their family or different adults.

Article 25(5) of the APD formulates the basic rules for age assessment of unaccompanied minors. The rules may be summarized in the following principles:

¹¹ Directive 2008/115/EC of 16 December 2008, OJ 2008 L 339 (RD).

¹² Directive 2013/33/EU of 26 June 2013, OJ 2013 L 180 (RCD).

¹³ The detention of applicants for international protection for the purpose of transport to the Member State responsible for examination of the application for international protection is specifically regulated under the Article 28 Dublin III regulation, although the RCD remains applicable. See Article 8(1)(f) RCD and the Recital 11 Regulation 604/2013 of 26 June 2013, OJ 2013 L 180.

¹⁴ Directive 2011/95/EU of 13 December 2011, OJ 2011 L 337 (QD).

¹⁵ The European Commission’s official non-binding explanatory manual to the RD, established by Commission Recommendation 2017/2338 of 16 November 2017, OJ 2017 L 339/83.

¹⁶ Article 2(m) APD.

- i. medical examination as a means of last resort: age assessment should be based primarily on general statements and other relevant indications. Only if after such examination, reasonable doubts concerning remain, should a medical examination be performed;
- ii. presumption of minority: if the medical examination does not clear doubts concerning age, the applicant should be regarded as minor;
- iii. proportionality: the least invasive form of medical examination should be chosen, and the examination should be performed with respect for human dignity;
- iv. reliability: medical examination should be performed by qualified medical professionals, so that a reliable result is guaranteed;
- v. informed consent: the minors and/or their representative have the right to refuse the medical examination, having been informed about the method and consequences of the examination and its refusal in a language they understand. Although the refusal of a medical examination does not prevent the responsible authorities from deciding on the application for international protection, the decision shall not be based solely on that refusal.

The legislation on age assessment in the APD is brief, focusing mainly on medical methods of age assessment, and it does not address specific medical and non-medical methods. However, recital 10 of the APD refers to the EUAA guidelines which Member States ‘*should take into account*’ when implementing the Directive. The EUAA has paid significant attention to the issue and has developed comprehensive material with many recommendations, considering not only EU law but also international human rights treaties such as CRC and the ECHR.¹⁷

The age assessment of unaccompanied minors has not been yet addressed in the case-law of the CJEU.

B. United Nations Convention on the Rights of the Child

In the process of age assessment, as in any other activity concerning children, the best interests of the child shall be a paramount consideration, as stated in Article 3(1) of the CRC. Among competing public interests, the interests of the child should always take precedence. This simple rule is reflected in many ways with regard to age assessment, such as by the general prohibition of the usage of invasive assessment methods, even at a cost of deterioration of the evidential situation. The same negative impact may be caused by the need to proceed with haste. In case

¹⁷ See EASO, *supra* note 4.

of doubt, the presumption of minority must be granted, even if the minority status may facilitate the minor's illegal stay on the territory of Member States.

Two of the UN Committees, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child clearly and concisely present the basic guarantees of a correct age assessment in their joint comment as follows:

*'To make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes. States should ensure that their determinations can be reviewed or appealed to a suitable independent body.'*¹⁸

Allowing the children to be heard during the age assessment process is a necessary precondition for the primary consideration of their best interests. The right to be heard guaranteed under Article 12 of the CRC enables children to comment on what is in their best interests and to raise objections to the procedures they are subject to. In order to enable the children to exercise their right to be heard, additional procedural safeguards for the children need to be guaranteed, bearing in mind their double vulnerability arising from their status as minors and migrants. For this reason, minors, whether unaccompanied or not, need to be provided with an interpreter and a legal representative. In addition to the legal representative and interpreter, unaccompanied minors should be provided with a guardian.¹⁹

¹⁸ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, at 14.

¹⁹ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, at 9.

C. European Convention on Human Rights

Some of the aspects of the age assessment process have been addressed in the case law of the ECtHR. Consider the following cases.

*1. Abdullahi Elmi and Aweys Abubakar v. Malta*²⁰

Two Somalis were detained in Malta after their irregular arrival in the country on boats. Both claimed to be children and both were subject to the age assessment process. They were both informed orally of the results of the examination after the examination had taken place, and they were told it had been confirmed they were minors and they were going to be released from detention. Having spent eight months in the detention centre, they did not receive the written decision with the results of the age assessment nor were they released from the detention.

Both applicants were placed in an adult detention facility in unsatisfactory conditions, which the ECtHR considered as degrading treatment in the sense of the Article 3 ECHR. A violation of Article 5(1) ECHR was also found due to the fact that delivery of the outcome of the age assessment took eight months, notwithstanding the double vulnerability of the applicants who were both minors and asylum seekers. Detention of such length was deemed to have been arbitrary and not carried out in good faith. The ECtHR also held that Article 5(4) ECHR had been violated as the minors did not have an effective and speedy remedy to challenge the lawfulness of the detention.

*2. Darboe and Camara v. Italy*²¹

This pending case specifically concerns age assessment methods. Two asylum seekers from Gambia and Guinea named Darboe and Camara were placed in an adult detention facility in Italy on the basis of a bone examination with a result which indicated they were both 18 years old. They complain about the age assessment process they were subjected to and argue that in breach of national law, no margin of error was reported in the bone test results. The examination was based solely on a radiological examination, although national law required a multidisciplinary approach, including examination by a paediatrician and a psychologist. The Greulich-Pyle bone age assessment method was carried out with a radiological examination, which is a method based on data from the Euro-American population, while the applicants come from Africa and the African population has a different body constitution than that of Euro-Americans. Moreover, the result of the age assessment was

²⁰ ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Appl. nos. 25794/13 and 28151/13, Judgement of 22 November 2016. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

²¹ ECtHR, *Darboe and Camara v. Italy*, Appl. no. 5797/17.

not communicated to the applicants, who were not considered as minors before the end of the age assessment process.

The applicants claim that Article 3 (prohibition of torture) and 8 (right to respect for private and family life) ECHR have been violated by the lack of procedural guarantees during the age assessment process and by the fact that Italy had not taken any measures in response to their status as unaccompanied minors.

D. Other legal instruments

The above-mentioned legal instruments can be considered the most relevant for the issue of age assessment in the context of migration. However, the above list of legal instruments touching this area is not exhaustive. Numerous studies and recommendations have been issued by international human rights organisations, such as the CoE, UN Refugee Agency, UNICEF, FRA and others.

2. Age assessment methods

As human beings, we have two distinct ‘ages’ – chronological and biological. The former refers to the objective and irreversible amount of time that has passed from the moment the person was born, while the latter indicates the relative physiological state of an individual and depends on several factors such as genetics (more specifically DNA methylation), lifestyle and nutritional intake. Moreover, age may be defined from a psychological and social perspective considering the behavioural capacities and interpersonal skills of an individual.²² Although these concepts correlate with each other, it should be emphasized that no person has precisely the same chronological, biological, psychological, and social age, especially around the time of late puberty. However, it is only the chronological age of 18 years that is decisive for the legal definition of a child.²³

Age assessment is generally a complex process by which public authorities seek to estimate the chronological age of a person when reasonable doubts are present. In cases where the applicant is obviously a child or where the applicant’s physical appearance and demeanour very strongly suggest they are significantly over 18 years of age (i.e., 30 years of age or over in absence of any contradicting evidence), further age assessment may not be performed.²⁴ In the context of the asylum procedure, it is not necessary to determine the exact age

²² EASO, *supra* note 4, at 65.

²³ Article 1 CRC and Article 2(1) APD.

²⁴ EASO, *supra* note 4, at 17, and Home Office, *Assessing age* (5th ed., 2018), at 12.

of an applicant but to confirm or refute the claimed minority.²⁵ Unless there is clear evidence implicating that the person is an adult, presumption of minority should prevail.²⁶

Chronological age is normally proven by documentary evidence, e.g. birth certificate, identity card or passport. While almost all children in the EU are officially registered immediately after birth, a large number of minors in African and Asian countries are not given any document that would reliably prove their date of birth. In Afghanistan, for example, only around 40% of the population is provided with legal documentation to claim identity.²⁷ Local children do not often obtain a birth certificate even if they were born at a health facility because the parents traditionally choose a baby's name afterwards in a ceremony attended by relatives.²⁸ Besides that, many cultures do not give birthdays the same importance as in Europe and children are treated as adults as soon as they become physically mature. Therefore, a significant percentage of Afghan applicants for international protection declare a date of birth on January 1 of the Gregorian calendar as it is easy to remember.²⁹

These are just some of the many aspects that make age assessment in the absence of reliable documentation complicated. Ignoring these cultural, demographic, or biological differences (e.g. the mere fact that members of some ethnic groups look older than others), which may not be obvious to the decision-makers at first glance, increases the final margin of error of the age assessment. The whole process should thereby involve qualified and impartial professionals with appropriate training in communicating with children with different cultural backgrounds.³⁰ Examples of good practice in this field include France and Sweden, where training for social workers or officers dealing with unaccompanied minors is institutionally organized.³¹

The EU asylum *acquis* does not set forth which specific age assessment methods should be performed. Priority should generally be given to the least intrusive methods with full respect

²⁵ See judgements of the Regional Court in Prague (Czech Republic) on 21 December 2021, rf 53 A 3/2021 - 13, at para. 47, and on 22 December 2021, rf 50 A 23/2021 - 17, at para. 28.

²⁶ Article 25(5) APD.

²⁷ UNICEF, *Status of civil registration and vital statistics in South Asia countries* (2019), at 28.

²⁸ *Ibid.*

²⁹ Sieff Kevin, *In Afghanistan, Jan. 1 is everyone's birthday* (2013), available at https://www.washingtonpost.com/world/in-afghanistan-its-everyones-birthday/2013/12/31/81c18700-7224-11e3-bc6b-712d770c3715_story.html. It should be noted that this date has no relevance in the local Solar Hijri calendar.

³⁰ Article 24(4) RCD, see judgement of the Supreme Administrative Court (Czech Republic) on 26 September 2019, rf 7 Azs 87/2019 - 22, at para. 19.

³¹ CoE, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration* (2017), at 34.

for the individual's dignity.³² In other words, the methods ought to be used successively so that unnecessary or repetitive examinations are avoided. All evidence must be naturally gathered in a way that is consistent with '*relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life, guaranteed by Article 7 thereof.*'³³ However, there is currently no single method – neither non-medical, nor medical – to estimate age with determinative accuracy and every approach is subject to discussions or even disagreements concerning its reliability and/or invasiveness.³⁴ As a result, the use of different methods or combinations of methods varies considerably from one Member State to another.³⁵ The most commonly used methods can be summarized as follows.

A. Non-medical methods

Non-medical methods include all procedures not involving the participation of a physician, particularly the use of documents (including those that do not explicitly state the applicant's age, e.g. school and medical records, or photos), age assessment interviews conducted by an official, psychosocial assessments conducted by a specialist and general estimations based on physical appearance and demeanour. As none of these is regulated in the APD, their use is left solely to the Member States. All Member States perform at least one of these methods in combination with a medical method. The only exception is Ireland, which claims³⁶ to use exclusively non-medical methods.

The obvious advantage of non-medical methods is that they are not physically invasive. Nevertheless, the responsible authorities must be mindful of the applicant's potential vulnerability and utilise with adequate sensitivity, only less intrusive techniques.³⁷ It should be also noted that all of these methods have a wide margin of error and (especially in the case of interviews) largely depend on subjective evaluation as their result cannot be verified with

³² Article 25(5) APD.

³³ CJEU, C-473/16, *F v Bevándorlási és Állampolgársági Hivatal* (EU:C:2018:36), at para. 35.

³⁴ CoE, *Age assessment for children in migration: a human rights-based approach* (2019), at 13.

³⁵ For details see EASO, *Age assessment practice in Europe* (2014), at 23, 88 and 89, EASO, *supra* note 4, at 106, and EMN, *supra* note 10.

³⁶ EASO, *Age assessment practices in EU+ countries: updated findings* (2021), at 9. Differently Malekmian Shamim, *The State Has No Guidelines for Judging If Asylum Seekers Are Children, but It Does So Anyway* (2021), available at <https://www.dublininquirer.com/2021/11/10/the-state-has-no-guidelines-for-judging-if-asylum-seekers-are-children-but-it-does-so-anyway>, and Buczkowska Teresa, *Ireland: Issues in the age assessment of unaccompanied child asylum seekers* (2021), available at https://ec.europa.eu/migrant-integration/news/ireland-issues-age-assessment-unaccompanied-child-asylum-seekers_en.

³⁷ Articles 4(3), 15(3) and 25(3)(a) APD.

exactitude.³⁸ Possibly misleading conduct on the part of the applicant, such as lying about the chronological sequence of their life and simulating childish behaviour, must also be taken into account.

In terms of the non-medical methods, practice in Malta may serve as a model. There, age assessment interviews are conducted by a multidisciplinary panel of trained social workers, asylum officials and psychologists.³⁹ Only if the in-depth interview about the applicant's personal history does not lead to an undoubted conclusion, can a medical examination be performed.⁴⁰ A similar approach is followed in Germany and the Netherlands.⁴¹ Further inspiration can also be found in practice in the United Kingdom based on the *Merton* judgement and further case law setting out guidance and minimum standards that must be applied by social workers, e.g. that applicants must have the opportunity to explain any inconsistencies in their account that would be likely to result in an adverse credibility finding.⁴²

B. Medical methods

Medical methods are based on research into what are known as age biomarkers, i.e. physiological aspects 'that run through phases that are distinguishable from each other and where each phase is linked to a specific period of chronological age.'⁴³ Their observation can simply be made visually (dental, physical development and sexual maturity inspection) or by medical imaging techniques such as X-rays (radiography), MRI or ultrasonography.⁴⁴ The most relevant biomarkers are the development of the wrist and hand bones (or more precisely degree of epiphyseal ossification), collar bone (fusion of the medial clavicle), third molars ('wisdom teeth'), hip (iliac crest) and knee joint.⁴⁵ In addition to anatomical tests, forensic scientists have attempted to determine age by 'epigenetic clocks' using DNA samples from buccal cells and blood.⁴⁶ However, all of these methods have a certain margin of error

³⁸ EASO, *supra* note 4, at 47-51.

³⁹ CoE, *supra* note 31, at 24.

⁴⁰ Questionable may be however the actual length of the age assessment procedure conducted by the Maltese authorities, see above ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, *supra* note 20.

⁴¹ EMN, *supra* note 10, at 13 and 22.

⁴² Judgement of the High Court of Justice (United Kingdom) on 14 July 2003, *B v. London Borough of Merton* (2003) EWHC 1689 (admin), at para. 55. For details see Home Office, *supra* note 24, at 29 *et seq.*

⁴³ Joint Research Centre, *Medical Age Assessment of Juvenile Migrants* (2018), at 11.

⁴⁴ EASO, *supra* note 4, at 52-59.

⁴⁵ Joint Research Centre, *supra* note 43, at 13-19, and EASO, *supra* note 35, at 29-41.

⁴⁶ Abbot, 'DNA clock may aid refugee age check', 561 *Nature* (2018), at 15.

because they are based merely on mapping an individual to a particular statistical sample of a population in a relevant age range, which is necessarily approximate.⁴⁷

As for medical examinations Article 25 APD provides minimal requirements on the consent of applicants and/or their representatives, the level of intrusiveness of the medical examination, qualifications of the examiner and the probability of a reliable result (see above). Taking into account the EUAA guidelines,⁴⁸ Member States may thus set additional requirements in the form of binding legislation or soft law instruments such as recommendations of the ministries or research institutions.⁴⁹

An applicant's consent to undergo a certain medical examination must be informed and voluntary. Whereas the presence of an interpreter should be ensured not only before the examination itself but also during it.⁵⁰ In this context, it must be emphasized that in some Member States (Austria, Portugal and Slovakia) the consent of the legal representative is exclusively required, but the applicant's is not.⁵¹ In contrast, in some Member States the medical examination may proceed only with consent of the applicant (France, Italy, Spain) or both applicant and legal representative (Finland, Germany and Sweden). Although the refusal of a medical examination does not prevent the responsible authorities from deciding on an application for international protection, the decision cannot be based solely on that refusal.⁵²

The main disadvantage of medical methods is their necessary physical invasiveness, which manifests itself especially in the sexual maturity observation or examination. As methods requiring nudity significantly conflict with the applicant's right to privacy and dignity, they have been banned in some Member States (France, Luxembourg).⁵³ EUAA also considers that '*no method implying nudity or the examination of genitalia as a sexual maturity observation should be used under any circumstance.*'⁵⁴ However, despite their intrusiveness and unreliability, these methods continue to be used in a substantial number of Member States

⁴⁷ Salamánek and Weissová, 'Zajištění nezletilého cizince bez doprovodu, zjišťování jeho věku v případě pochybností a související otázky soudního přezkumu', 54 *Správní právo* (2021) 221, at 226.

⁴⁸ Recital 10 APD.

⁴⁹ E.g., guidelines of the French Ministry of Solidarity and Health (*Ministère des Solidarités et de la Santé*) or German Working group for forensic age diagnostics (*Arbeitsgemeinschaft für Forensische Altersdiagnostik*).

⁵⁰ See decision of the Constitutional Council (France) on 21 March 2019, no. 2018-768 QPC, at para 10, and judgement of the Constitutional Court (Czech Republic) on 7 July 2021, rf II. ÚS 482/21, at para 62 and 64.

⁵¹ FRA, *Age assessment and fingerprinting of children in asylum procedures* (2018), at 9-11.

⁵² Article 25(5)(c) APD.

⁵³ EMN, *supra* note 10, at 12, and EASO, *supra* note 36, at 8.

⁵⁴ EASO, *supra* note 4, at 55.

(Austria, Germany, Hungary, Italy, Romania).⁵⁵ Also, the fact that some methods – especially those involving radiation – may have potential health implications must not be overlooked.⁵⁶ It follows that radiation-free methods such as MRI should generally be given priority. From an ethical point of view, it is further appropriate that the results of medical examinations should not be used only to determine age, but also for their original purpose, which is to care for the patient’s health. For example, in Finland, dental radiographs are subsequently used for dental care.⁵⁷

All medical methods should be undertaken by impartial professionals who are specifically qualified for the purpose of age assessment. The CPT⁵⁸ and the Helsinki Committee⁵⁹ have thereby criticized practice in Hungary, where examinations were recently carried out by military doctors without special training in transit zones insufficiently equipped for this task. However, according to the Hungarian Ministry of the Interior, examinations are currently performed only by ‘medical experts with many years of experience’.⁶⁰ In contrast, inspiration for best practices in terms of qualification can be found in Finland and Sweden, where the ‘four eyes principle’ is applied, i.e. that two or more doctors are involved in the evaluation of examination results.⁶¹

A major source of criticism about medical methods is their reliability, or rather their margin of potential error. Particularly controversial are bone maturity tests, which might be highly affected by genetic, nutritional and socioeconomic factors.⁶² Several international, EU and professional bodies (such as the Committee on the Rights of the Child,⁶³ EESC⁶⁴ and the European Academy of Paediatrics⁶⁵) have therefore called on states to refrain from using them. Moreover, the reliability of some evaluation methods (e.g. the Greulich-Pyle method for wrist and hand bone X-ray) have been questioned before national higher courts for having a wide

⁵⁵ *Ibid.*, at 106.

⁵⁶ Joint Research Centre, *supra* note 43, at 22-23.

⁵⁷ EMN, *supra* note 10, at 12, and EASO, *supra* note 36, at 10.

⁵⁸ CPT, *Report to the Hungarian Government on the visit to Hungary* (2018), at 5.

⁵⁹ Hungarian Helsinki Committee, *Input by civil society to the EASO Annual Report 2019* (2020), at 9.

⁶⁰ EMN, *supra* note 10, at 15.

⁶¹ *Ibid.*, and Rättsmedicinalverket, *Medical age assessment* (2020), available at <https://www.rmv.se/medical-age-assessment/>

⁶² EASO, *supra* note 35, at 35, and Joint Research Centre, *supra* note 43, at 19-20.

⁶³ Joint general comment No. 4 (2017) *supra* note 18, and No. 23 (2017) *supra* note 18, at 4.

⁶⁴ European Economic and Social Committee Opinion SOC/634 of 18 September 2020, at 1.12. and 4.10.

⁶⁵ Sauer, Nicholson and Neubauer, ‘Age determination in asylum seekers: physicians should not be implicated’, 175 *European Journal of Pediatrics* (*Eur J Pediatr*) (2016) 299, at 302.

margin of error, especially once the subject has reached the age of 16.⁶⁶ For that reason Sweden has opted for a combination of MRI imaging of the knee joint and dental X-ray of third molars instead of carpal examination.⁶⁷ As the different methods cover different age ranges,⁶⁸ the usage of multiple age biomarkers and approaches to their evaluation should be the general rule. In addition, any doubts concerning the outcome of the medical examination must always be resolved in favour of the applicant.⁶⁹

3. Challenges and recommendations

A. Cornerstones of an 'ideal' age assessment process

National courts have acknowledged that there is not one universal method that would assess the age of a person with a guarantee of complete accuracy. For that reason, a multidisciplinary and holistic approach based on a combination of methods should be conducted by two or more professionals who have special expertise in child development.⁷⁰ First of all a non-medical assessment should be performed; using any available documents (school and medical records or photos), age assessment interview, or a psychosocial assessment. If their result is not definite, a medical examination could take place. If responsible authorities are still in doubt about the applicant's age, they should presume that the applicant is a child.⁷¹ The age assessment process should generally consider psychological, developmental, environmental, and cultural factors.⁷²

A model multidisciplinary and holistic approach can be found, for example, in Sweden where methods are conducted in the following order: written evidence from the applicant, interview, medical examination (X-ray of wisdom teeth and MRI of knee joint).⁷³ France also applies a multidisciplinary and holistic approach where age assessment is based on interview and social assessment. A complementary medical examination is performed only with the consent of the applicant and when approved by the judicial authorities; margin of error must be

⁶⁶ Decision of the Federal Administrative Court (Switzerland) on 4 March 2019, rf E-7333/2018, at para 2.3., and judgement of the Supreme Administrative Court (Czech Republic) on 25 June 2020, rf 5 Azs 107/2020 - 46, at para 42-44.

⁶⁷ EASO, *supra* note 36, at 8.

⁶⁸ For details see 19 anonymised examples from practice in Joint Research Centre, *supra* note 43, at 37-55.

⁶⁹ Constitutional Council (France) *supra* note 50, at para 11.

⁷⁰ Constitutional Court (Czech Republic) rf II. ÚS 482/21, *supra* note 50, and judgement of the Higher Regional Court Bremen (Germany) on 4 June 2018, rf OVG 1 B 82/18.

⁷¹ EASO, *supra* note 4, at 38-39.

⁷² *Ibid.*, and Council of Europe, *supra* note 31, at 25.

⁷³ EMN, *supra* note 10, at 28.

specifically indicated; and examination of pubertal development has been abandoned.⁷⁴ French authorities also have published a multidisciplinary guide on best practices for age assessment to harmonize the evaluation process.⁷⁵

The age assessment process should be guided by the principle that until evidence proves otherwise the applicant is to be treated as a minor. Therefore, the applicant will have the procedural guarantees of an unaccompanied minor such as a right to a representative,⁷⁶ right to be heard,⁷⁷ right to be informed and right to communicate in a language they understand or are reasonably supposed to understand.⁷⁸ The child's legal representative and/or guardian and interpreter should be present during all stages of the age assessment, including the psychosocial interview or medical examination.⁷⁹ The age assessment process should be performed in a timely manner.⁸⁰ The applicant should be able to appeal the age assessment decisions or decisions where the age assessment is an integral part (such as a decision on detention or a decision on international protection).⁸¹ The subsequent movement of the applicant within the CEAS is determined by the age assessment outcome. It is therefore necessary that Member States recognize age assessment conducted by other Member States. Mutual trust is necessary to prevent the minor from multiple age assessments. It also reduces costs and resources loads for Member States.⁸² Basic guarantees declared in the joint comments of the UN Committees⁸³ have summarized the leading cornerstones of age assessment.

B. Is the current legislation sufficient?

As has been discussed above, the age assessment process is not homogenous across Member States and various combinations of distinct, variously invasive methods are used. The main principles as described above (presumption of minority, proportionality, reliability, informed consent and right to refuse medical examination) are legally binding only when conducting a medical examination.⁸⁴ There are no procedural guarantees for other age assessment

⁷⁴ *Ibid.*, at 12-13.

⁷⁵ EMN, *supra* note 10, at 12-13. Guidelines of the French Ministry of Solidarity and Health, *supra* note 49.

⁷⁶ Article 25(1) APD, Article 2(1) and 24(1) RCD.

⁷⁷ Article 12(2) CRC.

⁷⁸ Article 12(1) APD, see also Constitutional Court (Czech Republic), rf II. ÚS 482/21, *supra* note 50, at para 46 and 48, stated that the applicant must have an effective option to comment on the alleged contradiction of evidence.

⁷⁹ Constitutional Court (Czech Republic), rf II. ÚS 482/21, *supra* note 50.

⁸⁰ CoE, *supra* note 31, at 34.

⁸¹ *Ibid.*, at 36.

⁸² *Ibid.*, at 39.

⁸³ Joint general comments No. 4 (2017) and No. 23 (2017) *supra* note 18.

⁸⁴ Article 25(5) APD.

methods. Recital 10 of the APD recommends using relevant EUAA guidelines when implementing the Directive. Although implementing national guidance based on the EUAA recommendations could also contribute to harmonizing the age assessment practice in the CEAS, in 2021 only 16 Member States adopted some national guidance.⁸⁵

The age assessment process could be related to decisions on detention that are restricted by short time limits.⁸⁶ In some Member States judges are not specialized and do not frequently encounter the issue of age assessment. It could be a challenge to autonomously assess the reliability of various methods of age assessment within a defined time limit because it is a conclusion based on professional medical and/or psychosocial evaluation. In addition, there is currently no relevant case law from the CJEU and the ECtHR, and international guidance is neither legally binding nor adapted to national legislation. If it is based only on one expert opinion without declaring the margin of error, and no time to perform a revision evaluation, the judge cannot properly review the legality of the age assessment process, which only increases uncertainty about the applicant's chronological age.

It follows, that trying to comprehensively regulate the age assessment process is not achievable. Efforts to find a single best age assessment method is unrealistic, because none exists. Each Member State possesses different personnel capacities and financial means. Non-medical methods require enough professionally trained staff, such as psychologists and social workers to ensure that the age assessment is conducted in a timely manner. Medical methods also require highly trained staff and expensive medical equipment. As a result, procedural guarantees are more essential than regulation of the age assessment process at the EU level or attempts at harmonization of practices of Member States.

This leads the authors to the conclusion that the APD should be extended slightly to guarantee procedural rights regardless of the chosen methods. Some non-medical methods (such as psychosocial interviews) may be more invasive for minors suffering from abuse or traumatic memories than undergoing an X-ray. Therefore, it is necessary to establish procedural safeguards to ensure that the minor was given all the necessary information to be able to give voluntary consent. The minor must be accompanied by a guardian, a legal representative, and an interpreter at all stages of the age assessment process. The APD should oblige Member States to use a combination of methods that are chosen by their responsible

⁸⁵ EASO, *supra* note 36, at 6.

⁸⁶ For example, in the Czech Republic, judges have to decide within 7 working days from the date of delivery of the administrative file to the court, which must be delivered within 5 days from the date of delivery of the action against decision on detention or against decision to extend the duration of the detention or against decision not to release from detention, see section 172 para 4 and 5 Act on the Residence of Foreigners [1993] No. 326/1999 Coll.

authorities on a case-by-case basis. Granting autonomy to choose and combine methods respects the varying capacities of each Member State. The most invasive methods that violate human dignity (especially those implying nudity or the examination of genitalia) would be explicitly excluded. A demonstrative enumeration of viable methods should be transparent and available in advance. Age assessment must be conducted by two or more experts working independently regardless of the chosen method to increase the level of objectivity. Medical reports would note the methodology used, clearly explain its possible margin of error, and specify the minimum and maximum value of the estimated age range. Description of the methodology would be transparently published to enable critique by other experts.⁸⁷ These standards increase the level of the assessment's objectivity, provide judges and other professionals better knowledge to consider the relevance of the age assessment evidence,⁸⁸ and enable higher mutual trust of age assessment conducted in other Member States within the CEAS

C. Juveniles as a vulnerable group

Finally, it should be emphasized that unaccompanied minors represent a particularly vulnerable group of applicants. In addition, minors may also be vulnerable due to other factors beyond their age and status as asylum seekers. They may be fleeing their country of origin because of a war, may have been victims of human trafficking, sexualised behaviour or abuse or may have witnessed a high level of violence.⁸⁹ Because of such traumatic events a minor may suffer from a mental disorder that is recognized as a particular vulnerability factor.⁹⁰ A child's development may be influenced by factors such as lack of care and education, inappropriate diet and living conditions.⁹¹ A young person who is 18 years old or slightly older may have similar psychological maturity as a child due to these factors.⁹² Undoubtedly, how long a child has attended school must also affect the psychosocial development of the applicant. It is therefore necessary to assess the maturity of applicants in the context of their story and life experience (such as Ahmad's journey across the continent through a system of smugglers). The maturity of such applicants will be logically different from the average individual growing

⁸⁷ EASO, *supra* note 4, at 35.

⁸⁸ *Ibid.*

⁸⁹ CoE, *supra* note 31, at 18, and UNICEF, *A Deadly Journey for Children: The Central Mediterranean Migration Route* (2017).

⁹⁰ Article 21 RCD, Article 20(3) QD, recital 29 APD.

⁹¹ CoE, *supra* note 31, at 29.

⁹² *Ibid.*, at 17-18, and United Nations High Commissioner for Refugees, *Guidelines on Child Asylum Claims* (2009), par. 7 at 5.

up in the EU.⁹³ That corresponds with the children's right to development under Article 6(2) of the CRC. Children have the right to develop their evolving capacities, their skills, talents, and potentials.⁹⁴ To fulfil this principle, access to education is essential.⁹⁵ Under the RCD, secondary education should not be withdrawn only because the applicant is legally an adult.⁹⁶

Even if the concept of majority when reaching the chronological age of 18 is long-established in the European legal tradition, we should not fail to remember that young people do not stop being vulnerable when reaching adulthood. This can be illustrated by the example of young people who were in institutional care until they were 18 years old. In the Czech Republic, children still may be in residential care, as, unfortunately, foster care is not available for all children in need. Sociological research⁹⁷ shows that immediately after being released from residential care, these young adults might be significantly struggling to integrate into adult life.

Applicants around the age of 18 face the same challenge of transitioning and integrating into adult life. Moreover, they come from different socio-economic and cultural backgrounds and are unfamiliar with the new environment and cultural context. The Parliamentary Assembly of the CoE has called to '*establish a transition category between the ages of 18 and 25 to help young migrants, and take political measures geared to welfare assistance and education; access to information on the relevant administrative procedures; extensions of housing assistance; access to health care.*'⁹⁸ The authors consider this proposal to be an appropriate solution to the current situation where the age of applicants is not assessed uniformly within the CEAS. Supporting young adults at an early stage can have positive effects in the long term as it can lower their risk of being involved in criminal behaviour, drug trafficking, prostitution, and other dangerous behaviour.⁹⁹ Young adults aged around 18 and slightly older should have access to education and adequate support if there are other vulnerability factors present that should be considered by the responsible authorities at any stage of the asylum procedure.

⁹³ Judgement of the Regional Court in Prague (Czech Republic) rf 50 A 23/2021 - 17, *supra* note 25, at para 27, and Constitutional Court (Czech Republic), rf II. ÚS 482/21, *supra* note 50, at para 46 and 48.

⁹⁴ CoE, *supra* note 31, at 17.

⁹⁵ Article 28 and 29 CRC.

⁹⁶ Article 14(1) third subpara RCD.

⁹⁷ K. Žďárská, *Vliv dlouhodobého pobytu v dětském domově na vstup do samostatného života a možnosti následné pomoci* (2018), available at https://is.muni.cz/th/q17pn/DP_Zdarska_final.pdf.

⁹⁸ CoE Parliamentary Assembly, Res. 1996, 23 May 2014, *Migrant Children: What rights at 18?*, Article 10.4.

⁹⁹ *Ibid.*, Article 6.

Conclusion

Age assessment is essential for determining what standards of the asylum procedure the state is obliged to apply. If the applicants are evaluated as minors, they will be entitled to special protection in accordance with the principle of the best interests of the child, which is reflected in many ways during the age assessment process and should always take precedence. Analysis of relevant EU law and other international obligations shows that there is no sufficient legislative basis to ensure a uniform level of procedural guarantees during the age assessment process in all Member States. The APD briefly regulates basic rules for age assessment of unaccompanied minors but only in the context of medical examinations. Even if rules derived from the child's right to be heard under Article 12 of the CRC should be guaranteed, it is not specifically determined for the age assessment process. The discussion of (pending) ECtHR cases has shown how age assessment can encroach on an applicant's fundamental rights.

Applicants from African and Asian countries often do not obtain a birth certificate or any other documentary evidence proving their chronological age. Therefore, their age must be determined or, more precisely, estimated by non-medical or medical methods. Although there are various age assessment methods available, none of them can determine the exact age with absolute accuracy. As a result, the use of different methods or combinations of them varies considerably from one Member State to another. This fact leads to a dismal situation, when applicants for international protection, who are in a fundamentally similar position are treated disparately in different locations within the CEAS.

A multidisciplinary and holistic approach that enables to proceed on a case-by-case basis and combine available age assessment methods, should therefore be considered as a key to the age assessment process. Without further necessary guidance the current legislation is not sufficient. Judges and other decision-makers face great challenges to evaluate the evidence on age assessment. Because there is no ideal method of age assessment, trying to comprehensively regulate the age assessment process is not feasible. In order to ensure the same standard of treatment of applicants when assessing their age, wider procedural guarantees should be enshrined in the legislation regardless of the chosen method. In the conclusion, the concept of vulnerability and special needs of unaccompanied juveniles is addressed. In general, it should be borne in mind that during the age assessment process other factors can be identified for which minors or young adults may be considered as vulnerable persons.

ABSTRACT

Legal systems are facing new challenges in connection with migration. One of these is the issue of distinguishing between children and adults. This paper analyses the current legislation and practice in the Common European Asylum System regarding the age assessment process. The focus is primarily put on the rights and procedural safeguards provided for minors while determining their age. Pros and cons of the most used non-medical and medical methods of age assessment are further discussed. Particularly highlighted are the major challenges of the age assessment process and possible solutions that would ensure the equal, transparent, and dignified treatment of all asylum seekers in the EU. In conclusion the authors propose an ‘ideal’ approach for application in all Member States.

KEYWORDS

age assessment, unaccompanied minor, procedural safeguards, international protection, Directive 2013/32/EU, Common European Asylum System