



Age Assessment of Undocumented Migrants in the UK and Best Interest of the Child

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Age Assessment of Undocumented Migrants in the UK and the Best Interests of the Child

By Amanda Gray

Unaccompanied and separated asylum seeking children ('UASC') are a particularly vulnerable group of displaced persons. Identification as a child (i.e. under 18 years old) is vital to ensure they benefit from the unique rights granted to them by international law. Yet, the task is easier said than done especially for children approaching 18-years-old. Lack of reliable identity documents, developmental and physiological variations among and within different ethnic groups and the effects of poor nutrition exacerbate the difficulties.

This article argues the principle of the best interests of the child is key to improving the effectiveness and accuracy of age assessment of UASC's. Article 3 of the UN Convention on the Rights of the Child ('CRC') makes clear the best interests of the child is the primary consideration for states in all actions concerning children.

Age Assessment in the UK:

The current practice for age assessment in the UK has evolved through social service processes and legal challenges to such processes. In most cases age is first disputed when the individual approaches the authorities to claim asylum. The initial dispute is between what an Immigration Officer (checked by a more senior staff) believes the age of the young person to be based on physical appearance and demeanour and what that person says their age is.¹⁷ If disputed, the individual is referred to the local authority for an assessment, unless they are believed to be 'significantly' over 18, when they will be immediately placed into adult procedures.¹⁸

The leading UK authority on age assessment is *B v Merton LBC*¹⁹, which created a pseudo legal standard for formal assessments, known as 'Merton Compliant'. Merton Compliant age assessments are conducted by local authority social workers. Where age is disputed, the credibility of the applicant, physical appearance and behaviour, general background of the applicant – including ethnic and cultural considerations, family circumstances, education, and recent history – must be assessed by two trained social workers. The Court in *B v Merton* found a medical report was not necessary.

The *Merton* standard has come under criticism due to concern over accuracy of the process, the lack of independence of social services who have resource implications when children are identified and the use of the assessment in the asylum adjudication.²⁰ In practice these assessments are often appealed by legal practitioners who commonly rely upon medical evidence. In *A v Croydon*, however, the UK Supreme Court clarified that since medical reports have a margin of error of two years or more, they too cannot be considered as conclusive evidence of age and should only be taken into consideration with all evidence presented. As a result, we are currently caught between three positions in the UK, with lawyers appealing cases using medical

¹⁷ Age may also be disputed by Social Services at a later stage after they have been referred to the local authority by UKBA.

¹⁸ See UKBA Asylum Instruction at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age>

¹⁹ *B v Merton* London Borough Council [2003] EWHC 1689 (Admin)

²⁰ See Anna Verley Kvittingen 'Negotiating childhood: Age Assessment in the UK asylum system' Working Paper Series No. 67 Oxford (RSC. 2010)

evidence, the Supreme Court questioning the authority of medical evidence alone, and the Merton Compliant standard relying on a subjective assessment. With delays caused by appeals, some age assessments in the UK can take several months or more. This adds additional burdens to resources and has a damaging practical and emotional impact on USAC's.

The removal of the UK's reservation to Article 22 of the CRC²¹ in November 2008 means CRC rights now apply to non-British children. Introduced in 2008, UK domestic legislation gives specific effect to Article 3 of the CRC with s.55 of the Borders, Citizenship and Immigration Act 2009 obligating all public bodies to safeguard and promote the welfare of *all* children in the UK.²² Those s.55 duties, which extend to matters of legislation policy and practice, apply also to age assessment. With such legal obligations, age assessment in the UK must be revisited to ensure it is in line with these legal obligations, of primary importance the child's best interests.

Legal obligations require a new approach:

Given the difficulties of assessing age in borderline cases, an assessment must take into account all relevant determining factors, including physiological, psychological, cultural, linguistic and religious factors, and must be carried out without delay by specialists in those disciplines. The use of objective methods that are thorough, multi-disciplinary and include a scientific method, would contribute to fairer and safer decisions and increase confidence in the system. The introduction of scientific principles is necessary in order to ensure coherent and consistent outcomes.²³ While more research is required into effective medical methods which uphold the rights of the child, with appropriate safeguards and for borderline cases, such methods may be proportionate and necessary.

The former UK Children's Commissioner, Sir Anselm Green concludes that a combined approach is a pragmatic way forward:

Multi-professional assessment involving social workers, educationalists, paediatricians and psychologists.....would seem to be a pragmatic way forward in order to obtain a consensus decision on age.²⁴

The UN Committee on the Rights of the Child has made clear states are required to take positive steps to ensure any age assessment process is as efficient, timely, accurate and safe as possible and that where a margin of error prevails in borderline cases, the benefit of the doubt is automatically applied.²⁵ By increasing confidence in the system, in borderline cases states may be more willing to apply the benefit of the doubt. The starting point, however, in accordance with Article 8 of the CRC must be one that respects the identity of the child. Hence age assessment is a last resort. Only borderline cases can justify a legitimate aim (assessing the age of the child) as is required by Article 8 of the European Convention of Human Rights which protects the right to privacy. There should also be informed consent by the individual to any assessment procedure

²¹ Article 22 requires states to ensure all refugee seeking or refugee unaccompanied children receive appropriate protection and humanitarian assistance in the enjoyment of the rights within the CRC.

²² While the terminology of s.55 ('safeguarding and promoting the welfare of the child') is different from that of Article 3 of the CRC, the UK meaning is the same. 'Every Child Matters – Change for Children' is the statutory guidance to UKBA staff issued under s.55 of the 2009 Act. It states that, 'in accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration'.

²³ EXCOM Conclusion, Children at Risk, 5 October 2007, No. 107 (LVII) – 2007; www.unhcr.org/4717625c2.html

²⁴ 'The assessment of age in undocumented migrants', p.12, Professor Sir Al Aynsley-Green Kt, A report for the Office of the Defensor del Pueblo, Madrid Spain, March 2011

²⁵ Para 31 (a) of UN Committee on the Rights of the Child General Comment No. 6 (2005)

taking into account the physical and psychological maturity of the child. This is supported by the UN Committee;

.... The (age) 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.... (emphasis added)²⁶

A multi-disciplined approach is more likely to increase accuracy and safety of results, reducing the risk of appeals and making the process more efficient. Respecting the principle of best interests, it is vital the assessment is completed before the asylum decision as whether they are a child is a key factor to assessing persecution and risk.

Conclusion

A fresh approach to age assessment for UASC's is urgently required in the UK. This approach should be substantiated by the principles of international law with regard to children – with the primary consideration being the best interests of the child. Best practice must be an approach that increases the fairness and accuracy of the decision at the outset, which can be best done by using a multi-disciplinary approach which is more likely to narrow the margin of error in decisions. This should increase the confidence of all involved in the decision-making process, reducing the need for appeals to challenge less reliable assessments and facilitating the application of the benefit of the doubt.

This more sophisticated approach is vital to ensure age assessment is fair, accurate and timely. In light of the legal obligations upon the UK to respect the best interests of all children, it must urgently revisit its age assessment procedures so the rights of this vulnerable population are protected at every stage of displacement.

References

Statutes:

UN Convention on the Rights of the Child accessed at;
<http://www2.ohchr.org/english/law/crc.htm>

European Convention of Human Rights accessed at;
http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

UN Documents:

UN Committee on the Rights of the Child, General Comment No. 6 (2005) accessed at;
<http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6>

EXCOM Conclusion, Children at Risk, 5 October 2007, No. 107 (LVII) – 2007 accessed at;
www.unhcr.org/4717625c2.html

²⁶ See footnote 9

Statutory Guidance:

'Every Child Matters – Change for Children' accessed at;
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/bci-act1/change-for-children.pdf?view=Binary>

Articles:

"A New Approach to Age Assessment of Unaccompanied and Separated Children: Current Practices and Challenges in the UK," *Fabamu Refugee Legal Aid Newsletter*, no. 11 (Jan. 2011)

Negotiating Childhood: Age Assessment in the UK Asylum System, Working Paper, no. 67 (RSC, Nov. 2010)

'The assessment of age in undocumented migrants'. Professor Sir Al Aynsley-Green Kt, A report for the Office of the Defensor del Pueblo, Madrid Spain, (2011)