

A new approach to age assessment of Unaccompanied and Separated Children: Current practices and challenges in the UK

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Unaccompanied and separated asylum seeking children (hereafter ‘UASC’) present one of the greatest challenges facing governments in the realm of international protection. Many UASC arrive without identity documents, birth certificates or travel documents and lack any satisfactory evidence of their age. This poses an additional challenge in cases of children approaching the age of 18.

An incorrect age assessment can have grave consequences by denying vulnerable UASC the services that they are entitled to and putting them at risk. The case of ‘Miss T’ (real name unavailable for legal reasons), a young Cameroonian girl, claimed asylum as a child in Liverpool. After an age assessment was requested, the Local Authority wrongly assessed her to be 23 when she was 15 years old and thus she was denied adequate protection which resulted in her being sexually abused.¹ This case demonstrates the potential human cost of inadequate practice.

On the other hand, there have been cases when young adults have falsely put forward a lower age to authorities in order to access more beneficial services and protections designed for children. There have been reports including high profile cases of applicants claiming to be children and being supported by Social Services as children later discovered on social networking sites to be adults, with reports of some even married with children.² This puts pressure on already limited resources and results in governments and local authorities becoming skeptical and reluctant to apply benefit of the doubt in borderline cases.

This paper seeks to provide the reader with a fresh approach to age assessment. While it does not propose a specific model in terms of methodologies, it is intended to identify the overarching framework to be upheld in age assessment cases and underpinned by the principle of the best interest of the child. By looking at the challenges faced in the UK asylum system, the paper demonstrates the need for upholding the best interest of the child as the overriding principle in devising and implementing an effective age assessment process. It argues that an improved age assessment process would combine methodologies to narrow down the margin of error, resulting in speedy and fairer conclusions to cases.

Current Practice on age assessment of UASC in the UK

In the UK, an asylum-seeking child under the age of 18 and not accompanied by a close relative, is defined as a UASC. Children are entitled to a considerably more favourable treatment than adults in the asylum process. They are entitled to full child services provided by the local authority. Even if found not to be in need of international protection they are nevertheless entitled to discretionary leave to remain until the age of seventeen and a half, or for three years, whichever is sooner, unless there are ‘safe and adequate reception arrangements’ in their country of origin.³ Furthermore, unaccompanied children are not subject to detention for immigration purposes.

¹ <http://www.cypnow.co.uk/news/ByDiscipline/Social-Care/994198/Failed-age-assessment-denied-15-year-old-asylum-seeker-appropriate-care/>

² <http://www.dailymail.co.uk/news/article-1303217/Rabar-Hamad-bogus-boy-asylum-seeker-makes-Facebook-getaway.html>

³ At the time of writing, the definition of ‘safe and adequate reception arrangements’ remains to be clarified and few minors have been returned from the UK unless they were willing to go and their parents had been traced. However this is likely to change in the near future with the proposed returns of Afghan minors to reception centres in Kabul.

The current practice in the UK in determining whether a presenting individual is the age he or she claims to be remains extremely problematic.⁴ It has been developed through an evolving process of social services practice and legal challenges.⁵

In the vast majority of cases, age is disputed at the time of the asylum screening interview.⁶ An immigration official, having carried out an initial preliminary assessment based on the physical appearance and demeanour of the child will then refer the disputed case to an on-site social work team for an age assessment.⁷ Where no on-site social work teams exist, the burden is on the applicant to present themselves to social services for an age assessment. In these cases they will be informed that their claimed date of birth has not been accepted and that they should go to social services for an age assessment should they wish to contest that finding.⁸

The local social services authority will carry out an age assessment in accordance with the Merton guidelines.⁹ The guidelines were devised by Judge Stanley Burnton in the case of *B v Merton LBC*. They state that in a case where age is not clear, and no reliable documentary evidence exists, the credibility of the applicant, physical appearance and behaviour must be assessed. The assessment must also include general background of the applicant, including ethnic and cultural considerations, family circumstances, education and history over the past few years. The Court in *B v Merton* found that a medical report was not necessary.

The Merton standard has drawn various criticisms. First of all, the differing capacity of local authorities to make such assessments inevitably results in a variation in the quality of age assessment. Given its largely subjective nature, the process depends entirely on the ability of the local authority and individual social worker charged with the task. Secondly, the Merton standard encourages disproportionate weight being given by social workers to the perceived credibility of the individual, a factor that also has serious consequences for the asylum claim.¹⁰

In the case of Miss T, apparent inconsistencies in her story appear to have influenced the judgment on her age without her having the opportunity to clarify matters. The assessors were also found by the ombudsman to have speculated about matters without having asked Miss T for further information. Miss T suffered for 18 months the injustice of loss of care services that she needed and was entitled to receive, as well as suffering stress and uncertainty while still a child, in making appeals against decisions to deport her.

Due to the limitations of the Merton standard, legal practitioners commonly rely upon paediatric reports to improve accuracy of age assessments. In *A v Croydon*¹¹, however, the

⁴ According to research carried out by the Nuffield Foundation in 2005, 45% of all asylum applicants presenting as separated children, were age disputed and treated as adults. Many of these disputes remain unresolved with implications for the Home Office, social services departments, legal representatives, voluntary sector practitioners and, most importantly, separated asylum-seeking children themselves. Cited from http://www.icar.org.uk/download/ILPA_%20Exec_Summary.pdf

⁵ The key UK Border Agency policy document in this area is the asylum process guidance on "Assessing Age"; <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary>

⁶ If the applicant is claiming to be under the age of 18 years and their physical appearance/demeanour very strongly suggests that they are significantly over the age of 18 years the applicant is treated as an adult and the case progresses as such. These cases do not fall within the age dispute process.

⁷ On-site Social Work teams are currently available in Dover, Gatwick, Heathrow and Croydon (Asylum Screening Unit).

⁸ See footnote 5.

⁹ *B v Merton London Borough Council* [2003] EWHC 1689; See the procedural guidance given by Stanley Burnton J in *R (B) v Merton London Borough Council* (2003) EWHC 1689 (Admin), [2003] 4 All ER 280. In March 2003 practice guidelines were published by the London Borough of Hillingdon and Croydon that were thereafter approved by the High Court, resulting in the legal standard for formal assessments known as the Merton compliant age assessment.

¹⁰ UNHCR has, for example, observed that information gleaned from the age assessment interview can be used inappropriately to discredit the child's credibility in their asylum claim (see UNHCR Quality Initiative Project, Sixth Report to the Minister, April 2009: section 3.4.10)

¹¹ *R (on the application of A) (FC) (Appellant) v London Borough of Croydon (Rev 1)* (2009) UKSC 8 (26 November 2009)

UK Supreme Court clarified that since these medical reports have a margin of error of two years, they cannot be considered as conclusive evidence of age, and should only be taken into consideration with all evidence presented.

The example of the shortcomings of the UK asylum system in handling borderline UASC cases demonstrates the urgent need for a balanced framework that not only upholds the norms set by international human rights law but also practically and effectively implements them. In order to do so, we now return to the rights of the child in international law before providing a policy proposal for improving the current system.

Legal and normative framework for assessing age of UASC

The rights of the child are set out in the Convention on the Rights of the Child (hereafter ‘CRC’).¹² The UK ratified the CRC in 1989 and on 18 November 2008 removed its reservation to Article 22, which demands that asylum seeking children, unaccompanied or accompanied, shall receive appropriate protection and humanitarian assistance in the enjoyment of all the rights under the CRC and shall be afforded the same protection as any other child permanently or temporarily deprived of his or her family environment. The UK must therefore ensure that the CRC rights of unaccompanied asylum seeking children are upheld in exactly the same way as those of a UK-born child.

While the rights are dependent on the individual being a child¹³ and not upon the legal status of that child, UASC remain particularly vulnerable to violations of their rights under the CRC due to their marginalization and uncertain situation. They are particularly at risk during and after the age assessment process on a number of levels. Firstly, as explained above, the current practice is inadequate and places them under intense pressure. Secondly, they may be denied CRC rights during the time their age remains in dispute.¹⁴ Thirdly, if the conclusion of the assessment is incorrect, then they may be denied the protection and services to which they are entitled.

These shortcomings conflict with the overriding principle of the CRC, which is enshrined in Article 3. The article sets out the principle of the ‘best interests’ of the child and states that ‘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.’ The principle is to be a primary consideration with regard to all decisions and must be mainstreamed into the procedural operations of every stage of displacement.

The guidelines set out by the UN Committee on the Rights of the Child in General Comment 6 for displaced UASC, have clear implications for the current age determination systems.¹⁵ The views of the Committee on the Rights of the Child in its General Comment interpret and develop the core principles of the CRC. While not legally binding, the Committee’s views hold great weight in terms of interpreting what States are expected to do at any stage of the

¹² <http://www2.ohchr.org/english/law/crc.htm>

¹³ The CRC defines a child as every person below the age of 18 years unless under the law applicable to the child, majority is attained earlier. UK law provides for all persons under 18 years to be deemed a child.

¹⁴ For example UKBA detention figures for age disputed cases revealed that between April and September 2010, there was one Type 1 case where an applicant was held in detention as an adult on the basis of appearance). In this case, the UASC claimed asylum at a Local Immigration Team (LIT) and presented a passport as documentary evidence that he was a child. The applicant was detained on the basis of an initial assessment by the local authority. UKBA considered the passport was not his and that his appearance demonstrated that he was an adult. The applicant was detained until the local authority could attend the Immigration Removal Centre to conduct a Merton Compliant Age Assessment. As the local authority was unable to attend the Applicant was released from detention into care of the local authority and later assessed as a child. This occurred despite current UKBA policy that requires an applicant be given the benefit of the doubt until satisfactory evidence of age is received or until a decision is made on the asylum application.

¹⁵ See General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children outside their Country of Origin, in particular para.19 and 20 setting out the centrality of the best interest principle ‘during all stages of the displacement cycle’.

UASC asylum process. Article 3 of the CRC places a positive obligation upon states to ensure that the age assessment process for UASC is conducted in the best interests of the child. The Committee on the Rights of the Child has made clear that this requires taking positive steps to ensure it is as efficient, timely, accurate and safe as possible and that where a margin of error does prevail in borderline cases, the benefit of the doubt is automatically applied.¹⁶

In addition to positive obligations signatory states have to protect, respect and fulfill under CRC – in themselves enough to advocate for change – this paper argues that the best interests principle under Article 3 of the CRC holds the key to improving the effectiveness and accuracy of age assessment. The principle strengthens states’ ability to offer protection to those who need it, including borderline cases where the benefit of the doubt will apply (within the plus and minus one year margin of error), while at the same time identifying those who are clearly over the age of 18. This will ensure that those who are not entitled are swiftly removed from the process so that limited resources can be focused on those who are entitled.

The remaining part of the paper sets out how the UK can meet this positive obligation by proposing a methodology and age assessment process that is underpinned by the principle of best interests of the child in accordance with Articles 3 and 22 of the CRC.

A proposal for ‘Best Practice’

(a) Methodological best practice

The shortcomings of the current practices in age assessment can only be addressed by a more robust and multi-faceted methodology. Given the complexities surrounding age assessment in borderline cases, the assessment must take into account a range of factors including physiological, psychological, cultural, linguistic, etc, carried out by specialists in those disciplines. Such a multi-disciplinary methodology must abide by scientific principles in order to ensure coherent and consistent outcomes, regardless of the capacity of the local authority and the complexities of each individual case.¹⁷ Medical (or scientific) assessments should only be used in cases when a young person’s age is in doubt and must take into account both the physical and psychological maturity of the individual. As stated by the Committee on the Rights of the Child;

“... 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, and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt....”
(Emphasis added)¹⁸

Best practice must also take into account that certain tests used for age assessment might require a greater application of weight in some cases than in others. For example, in the case of a marginally obese 15 year old boy, more weight might be given to a psycho-social assessment than to a physical assessment. Thus, rather than a rigid and linear check list, what is needed is a flexible yet at the same time robust and dependable toolkit, which can utilise a variety of tests tailored to a particular case. For example, while physiological laboratory tests for age assessment can be effective in some cases, with a margin of an error of plus or minus 2 years, they cannot be relied on in isolation for borderline cases.¹⁹ No single test should be

¹⁶ See EXCOM Conclusion, Children at Risk, 5 October 2007, No. 107 (LVII) – 2007; www.unhcr.org/4717625c2.html

¹⁷ See EXCOM Conclusion, Children at Risk, 5 October 2007, No. 107 (LVII) – 2007; www.unhcr.org/4717625c2.html which advocates for the use of scientific means.

¹⁸ Para 31 (a) of General Comment No. 6 (2005)

¹⁹ See for example, *A, R (on the application of) v Liverpool City Council*, EWHC 1477 (Admin) (26 June 2007) where the Government were criticized for not having regard to varied sources of information, stating ‘*The letter of 6 November 2006 simply shuts out anything other than dental matters*’ (para 40)... ‘*what needs to be done is to examine matters other than dental age, in order to see what light they shed on the question whether the claimant falls into that part of the group that is under the*

used in isolation. Yet, at the same time, each test can be an integral additional procedure used alongside other tools.

The state should therefore employ a multi-faceted approach with various disciplines and methodologies engaged. This includes objective methods that are thorough and scientific in their assessment of age where it will aid or ensure safer and more accurate decisions. Rather than see medical assessments as invasive, provided there is strict adherence to the safeguards set out above, the use of such methods in borderline cases will ensure genuine children receive the protection they are entitled to, upholding the overriding principle of best interests. Unless proven to be harmful,²⁰ their use in such cases may therefore be considered as proportionate and necessary.

This means that the states must actively involve cultural, psycho-social and medical expertise and information sources in the decision making process. Without such a broad analytical awareness, the cultural and biological assumptions of social workers are likely to result in misplaced judgments. For example, in the case of Miss T cited above, her 'age' was assessed to be 23 when she was merely 15. In reviewing the case, the Ombudsman found faults in the way the Council conducted the assessment making clear that the failure arose from the fact that no consideration was given to whether other professional input was needed. If a multi-disciplinary approach had been used in Miss T's case, the tragedy could have been avoided.

While it is clear that such an approach is more effective and fair than those used currently, it is also deeply grounded in international law. By making the best interest of the child its corner stone, the proposed approach would minimize the potential for error in the age assessment process. Because the state would be in a more confident position to apply the benefit of the doubt in borderline cases, it would uphold all CRC rights and avoid the risk of violating the Convention. This would in turn ensure that vulnerable children, who had already suffered uncertainty, hardship and pressure, are not put through unnecessary processes.

(b) Procedural best practice

The methodological sophistication argued for above has tangible outcomes for day-to-day practice, starting from the point a UASC is identified in the country until the case for asylum/BID reaches a conclusion.

Keeping the best interest of the child as the ultimate quality standard for the process means that in the case of an age dispute, the case is referred for an immediate age assessment if it is an issue. It is in the best interests of the child for any age dispute to be resolved as early as possible in the asylum process. An asylum case cannot be fairly concluded without the age of the UASC, where it is in dispute, being established at the outset. The assessment should obviously be completed before the substantive asylum process begins and any decision is made. Age assessment must therefore begin and be concluded in a timely fashion.²¹

The best interest principle also affects how and where the age assessment is undertaken. The assessment must take into account the vulnerabilities of UASC and their individual needs.²² An age assessment performed in the child's best interests would allow the child to express him/herself, be given due weight in accordance with their age and maturity as set out in

age of 18' (para 41).

²⁰ See Article 8 of the European Convention on Human Rights – an interference of the right to privacy is lawful if in accordance with the law, proportionate and necessary.

²¹ See Heaven Crawley, 'When is a child not a child, Asylum, Age Disputes and the Process of Age Assessment'; <http://www.ilpa.org.uk/publications/ILPA%20Age%20Dispute%20Report.pdf>, at p.130, where she recommends a suitable period of 7 days.

²² UNHCR has pointed to the importance of establishing and considering carefully the child's age and stage of development when assessing the asylum claim (see UNHCR Quality Initiative Project Sixth Report to the Minister, April 2009: section 3.4.3).

Article 12 of the CRC,²³ as well as allowing the child an opportunity to respond to issues that are identified in the assessment process.

The assessments should not be undertaken at screening units and ports of entry, unless such facilities have the required means, expertise and child-friendly environment.²⁴ UKBA's current screening facilities do not always meet these criteria. While commenting on assessment process during displacement, General Comment 6 clearly states in paragraph 20 that "the assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques."

A key implication of the best interest principle in practice would be the appointment of a guardian for every UASC, as set out in paragraphs 21 and 33 of General Comment 6. The Committee on the Rights of the Child has stated that the appointment of a competent guardian, as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of a UASC throughout the stages of the asylum process.²⁵ The role of the guardian in such an administrative procedure is to ensure that the minor is properly represented, that his or her views are expressed, and best interests upheld, thus safeguarding the UASC's rights in a foreign and unfamiliar process. In addition, involving a person who is known and trusted by the child and who is independent can facilitate the process and thereby contribute to a successful outcome.²⁶

The best interest principle also requires that all disputed cases be governed by an independent review process.²⁷ This has been clarified in *A v Croydon*, where the Supreme Court held it was the role of the court to make its own decision on the age of the individual rather than merely check that social services have properly considered the case and reached a reasonable decision. The difference is considerable. While previously the only remedy was judicial review, which required the courts to determine whether social services had considered all the evidence in deciding the case, now it is for the court to examine the evidence for itself and reach its own decision. In other words, 'if the court considers that the asylum seeker is a child, the court must make that finding – even if the court also considers that it was reasonable, on the evidence, for social services to have concluded that the asylum seeker is an adult.'²⁸

Conclusion

A brief survey of the current weaknesses in the treatment of UASC cases in the UK reveals that an age determination process that respects the overriding principle of the best interests of the child is the only legitimate means of assessment. While from a legal position this would ensure governments comply with their obligations under international law, it would also facilitate more accurate and fair results and avoid potential pitfalls of the current system.

²³ The relevance of ensuring that age is clearly established is in addition because of the fact that a child's views must be "given due weight in accordance with the age and maturity of the child" and this can not be done without knowing the child's age.

²⁴ Further research and discussion is needed on the development of regional age assessment centers, which would provide facilities that ensure a confidential, trustworthy and professional environment that adheres to the best interest principle.

²⁵ See CRC General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin at Para 21 and 33;
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>

²⁶ The role of a guardian in the asylum process for UASC is the focus of a pilot project currently being conducted in Glasgow. The Guardian Pilot Project is still in its early days and it may be too premature to make definitive findings. However a successful outcome would ensure the guardian maintains independence and objectivity throughout the assessment for facilitating a successful and accurate result. For more information on the pilot project in Glasgow see;
<http://www.aberlour.org.uk/scottishguardianshipservice.aspx>

²⁷ While we are aware of the need for an independent review process to form the part of the wider age assessment process at second instance or in the case of dispute, a full consideration of judicial oversight is beyond the scope of this paper, which focuses on establishing a UKBA age assessment effective procedure at first instance.

²⁸ <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/15708.htm>

While objections might be made that the establishment of a robust age assessment process that methodologically and practically builds on the best interest of the child might put further financial constraints on the system, this has to be offset against the current mounting costs of legal challenges, ongoing disputes and age assessments currently conducted by individual local authorities.²⁹ Finally it should be noted that a reliable age assessment process, as a key first step in expedited procedures that reach a conclusion on the status and future of a UASC with the minimum delay, thereby limiting the period of uncertainty and stress, is clearly in the child's best interest.

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