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6.3 Age assessment of minors

Developments in legislation, policy and practices

Establishing if an applicant is a minor is a critical step in the identification and vulnerability assessment process, with important consequences, for example, for the conduct of the asylum procedure and reception rights. Improving processes for age assessment has been steadily on the policy agenda over the past years, while civil society and international organisations continue to observe gaps and deficiencies in the process.

Significant changes occurred in France where a new database *(Appui à l'évaluation de minorité)* was created under Decree No. 2019-57 to provide support from central state authorities to the *départements* in carrying out age assessments (FR LEG 04). The system was rolled out in 68 out of 101 *départements* at the end of 2019. The Circular of 20 November 2019 includes provisions on the age assessment of persons claiming to be unaccompanied minors and underlines that the evaluator should compare physical appearance, behaviour, degree of independence and autonomy, ability to reason and ability to understand questions with the stated age throughout the whole assessment process (FR LEG 03).

The French Constitutional Council examined and affirmed the constitutional conformity of the Civil Code's provisions on age assessment through bone X-ray and highlighted that these tests can only be carried out if the applicant agrees, the judicial authority approves and the margin of error inherent to these tests must be indicated in the results. A new guide on best practices for age assessment was published as a result of a multi-partner collaboration initiated by the Ministry of Justice, the Ministry of Solidarity and Health, the Ministry of the Interior and the Ministry of Territorial Cohesion and Relations with Local and Regional Authorities.[222] Human Rights Watch noted issues in the Hautes-Alpes region, where flaws in the age assessment procedure led to summary returns of unaccompanied minors to Italy.[223]

A decree in Hungary entered into force in January 2019 clarifying the types of administrative actions that the Aliens Policy can carry out in the absence of a legal guardian when the applicant is presumed to be an unaccompanied minor, including asking the minor's consent for health and age assessments (HU LEG 01). The Hungarian Helsinki Committee underlined that in practice this means that the age assessment takes place before a guardian is appointed and the child is alone in a process where a military doctor measures the child's height and size of hips, looks at the teeth and examines the shape of the body with signs of sexual maturity. Military doctors are usually not specifically trained for the process and a psycho-social assessment is typically not carried out. The National Directorate General for Aliens Policing (NDGAP) does not have an age assessment protocol and considers that this is a medical competence. The results of an age

assessment still cannot be appealed separately by law (it can only be appealed against a negative asylum decision).[224]

A multi-disciplinary board was established in Malta to carry out age assessments. The 2019 update of the AIDA report on Malta noted that the procedure was extended to 21 days but in practice took much longer, while children were kept in closed centres.[225] Maltese authorities clarified that minor applicants were kept in closed centres due to a temporary lack of space in open centres, and an age assessment was performed upon release to an open centre. In the framework of the new operating plan for 2020, EASO will provide support for the age assessment process through the deployment of an expert team.[226]

Some other countries also made adjustments to their methodologies. The Department for Asylum and Migration Policy of the Ministry of Interior in Czechia launched a pilot project using non-medical methods for age assessment. The Ministry of Foreign and European Affairs in Luxembourg announced that the authorities discontinued the inspection of genitals as part of the age assessment process. The Dutch Aliens Circular was amended following a Council of State ruling to clarify that an age assessment takes place in two separate sessions, one with the AVIM and one with the IND. Employees of the same public authority assess the age independently, but they can attend the same assessment session. The UK Home Office updated its guidance on age assessment[227] following the ruling of the Court of Appeal and clarified that an applicant may only be assessed as an adult if the physical appearance and demeanour strongly suggest that he/she is at least 25 years old.

Existing challenges reported by civil society organisations

There was still room for improvement in conducting age assessments in Spain, according to some civil society organisations,[228] the Spanish Ombudsman[229] and the United Nations Committee on the Rights of the Child (UNCRC). The UN Committee on the Rights of the Child considered that an age determination procedure undergone by the applicant, who claimed to be a child, and provided evidence to support this claim, was not accompanied by the safeguards needed to protect his rights under the Convention. Given the fact that he was not accompanied by a representative during this procedure and the state party rejected the documents provided as evidence,[xxxvii] including a passport, the Committee was of the view that the best interests of the child were not a primary consideration in the age determination procedure, contrary to the Convention, Articles 3 and 12.

Spain is working to improve the age determination procedure. For this purpose, a group of experts is updating the Framework Protocol on Certain Actions Concerning Unaccompanied Foreign Minors, which regulates the procedure for age assessments and establishes measures of protection of unaccompanied foreign minors.

In another case, the Committee determined that an age assessment should be based on a global evaluation of the physical and psychological development of the child, carried out by specialists, not merely based on bone and teeth analyses.[xxxviii] The evaluation should be based on scientific criteria,[xxxix] security and impartiality, taking into account the child's interest and gender considerations, and in case of uncertainty, granting the individual the benefit of the doubt[xl] so

that the applicant is treated as a minor. These requirements, namely identity check and assessment of the particular situation, should also apply in deportation procedures.

The Border Violence Monitoring Network reported on several instances in Croatia, when police officers convinced or coerced children to declare themselves adults.[230] Croatian authorities underlined their rebuttal of those reports and contested the methodology of the reporting, which relied on mostly anonymous complaints that are considered by the authorities to be unverified and thus not credible.

The Belgian authorities interestingly reported that the number of age assessments and the appeals lodged against age decisions considerably increased in Belgium, while the age assessment process itself became shorter.

The Norwegian Supreme Court heard a case on evidence requirements and reaffirmed that preponderance of evidence in civil cases, which is satisfied if there is a greater than 50 % chance that the alleged fact is credible, must be applied in the assessment of whether an applicant is younger or older than 18 years not a reduced evidence requirement. In a similar case, the Court of Appeal in Norway assessed to what extent the medical age survey can provide guidance in the procedure.

The Constitutional Court in France reviewed the use of bone assessments to determine the age of applicants, asserting the constitutional character of such practice. It concluded that, according to current scientific knowledge, the results of this type of examination may include a significant margin of error. However, the legislator took into account the existence of this margin in the guarantees he established.In contrast, the Federal Administrative Court in Switzerland noted the margin of error of age assessment examinations after the age of 16. Due to a low probative value, authorities should carry out an overall assessment of the evidence.[xli] In Belgium, the Council of State ruled on the consequences of an age assessment that could lead to the cessation of guardianship.

[xxxvii] According to the Organic Law 1/1996, Article 12.4 on the protection on minors, “When a person's legal age cannot be established, he shall be considered a minor for the purposes of this Law, pending determination of his age. For this purpose, prosecutors shall make a proportionality assessment that adequately considers the reasons why the passport or equivalent identity document presented, if any, is not considered reliable. Medical tests to determine the age of minors shall be subject to the principle of celerity, shall require the prior informed consent of the person concerned and shall be carried out with respect for their dignity and without posing a risk to their health, and may not be applied indiscriminately, especially if they are invasive”.

[xxxviii] The medical practitioner determines the appropriate and sufficient examination to eliminate uncertainty about the applicant’s age. A physical and personal examination of the applicant is required prior to other tests, such as determining bone or dental maturity through an X-ray of the left carpal or an examination of the dentition, in particular the third molar, through orthopantomography and an X-ray of the clavicle to quantify the changes in ossification).

[xxxix] The committee advocates a holistic (not merely scientific) assessment in which the interest of the alleged child is unrelated, since two issues are at hand: age determination which must be objective and the protection of the alleged child.

[xl] It should be recalled that the proceedings initiated by prosecutors under the provisions of the Organic

Law 4/2000, Article 35.3 on the rights and freedoms of aliens in Spain and their social integration seek to determine the age of the applicant as a precautionary measure and as a matter of urgency in order to provide the protection and assistance prescribed in the Spanish legal system. Prosecutors are bound by strict compliance with the law in accordance with the provisions of the Spanish Constitution, Article 124 and the Organic Statute of the Public Prosecutor's Office. To determine the age of an applicant without documentation, the prosecutors guarantee and protect fundamental rights in general and the best interests of minors, supervising administrative and institutional processes. The best interests of the child are guarded by a) preventing, even against their will, that minors are treated as adults and removed from the system of institutional protection and b) preventing adults posing as minors being a detriment to minors who have the right not to live with adults. In addition, in cases of doubt, the decision goes in the favour of a minor child and the necessary procedures are implemented.

[xli] Information is based on the European Database of Asylum Law (EDAL) summary.

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