

4.3. Standard of proof

It follows from the above case law that the obligation to establish minority when authorities have doubts about an applicant being a child, pursuant to Article 25(2) of the APR, may give rise to a lower standard of proof, although this issue has not often been explicitly discussed in age assessment case law (for information on standards of proof, see EUAA's Practical Guide on Evidence and Risk Assessment, January 2024, pp. 109-111).

As judicial review does not happen in a vacuum and there is no common approach to appealing age determination decisions *(see Section 5.3.3),* the standard applied by courts may vary across contexts: the safeguards and standards of proof considered when reviewing the consequences of an age assessment may differ depending on whether the proceedings concern detention, international protection or the plausibility of a date of birth recorded in a database. For instance, rulings delivered by the Swiss Federal Administrative Court in August 2018 and December 2025 arguably suggest the application of a balance-of-probabilities standard, under which a factual proposition must be more likely than not to be true in disputes concerning entries in the Swiss Central Migration Information System (*Zentrales Migrationsinformationssystem* (ZEMIS) in German; *Système d'Information Central sur la Migration* (SYMIC) in French; and *Sistema d'Informazione Centrale sulla Migrazione* (SIMIC) in Italian).

The standard of proof applicable to age assessments themselves was distinctly discussed in Norwegian case law in a case where a group of five undocumented Afghan applicants were initially classified as adults by the Directorate of Immigration (UDI) solely on the basis of medical examinations. During the administrative proceedings, three applicants were detained with a view to deportation and two of them were returned to Afghanistan. The applicants challenged their age assessments separately before the Immigration Appeals Board (UNE) and jointly before the Oslo District Court (30 November 2017), which upheld their appeals, a ruling which was subsequently set aside by the Norwegian Court of Appeal (29 April 2019) and the Norwegian Supreme Court (12 December 2019).

The District Court recalled that the general rule in civil proceedings in Norway is the balance of probabilities/preponderance of the evidence standard. It noted that a lower threshold applied in international protection proceedings, because the consequences of wrongly rejecting an application were far worse than those of wrongly accepting it, thereby justifying the application of the benefit of the doubt. Although Norwegian law contained no specific provision governing the standard of proof in age assessments, the District Court held that the lower threshold should also apply in this context, having regard for the best interests of the child, the vulnerability of minor applicants, and the potentially severe consequences of an erroneous age determination.

However, the above ruling was later set aside by the Court of Appeal, which maintained that, although an incorrect age determination may deprive an applicant of rights accorded to children, it would not have the “catastrophic consequences” of an incorrect refusal of international protection. Interestingly, the Court of Appeal held that the lower standard of proof may be justified when age is directly linked to the grounds for asylum or the need for protection but does not necessarily apply when age is relevant solely to establish identity. The Court of Appeal further noted that a lowered threshold was not supported by the Immigration Act, nor could it be inferred from the CRC, which contains no provisions governing the standard of proof, or necessarily from the benefit-of-the-doubt principle referred to in paragraph 31(a)40 of the CRC Committee’s General Comment No 6.41 It held that, while this principle could indeed imply a lower standard of proof, it could also merely require that applicants be treated as children when the evidence leaves genuine uncertainty, without requiring authorities to depart from the conclusion most likely supported by the evidence. Holding that the CRC Committee’s General Comments are not generally binding on Norway under international law, the court found it unnecessary to endorse either interpretation.

The Court of Appeal’s ruling was upheld by the Supreme Court, which reasoned that the abovementioned paragraph in General Comment No 6 falls under the heading “Initial assessment and measures” and thus concerns only the preliminary stage of the procedure, while noting that Norwegian law already required applicants to be presumed minors during that phase (see “triggering the presumption of minority” in *Section 5*). It therefore concluded that neither the General Comment nor the obligation to uphold the best interests of the child under Article 104 of the Norwegian Constitution and Article 3 of the CRC supported applying either a lower or a higher standard of proof during the age assessment itself.

It is worth noting that, although Norway is not bound by either the APD or the APR, and the Supreme Court therefore did not examine those instruments, the benefit-of-the-doubt rule under Article 25(2) of the APR closely resembles that set out in paragraph 31(a) *in fine* of General Comment No 6. The APR provision, however, unequivocally applies to the outcome of the age assessment and may reasonably be interpreted as requiring a lower threshold than the preponderance of the evidence standard when determining whether a person is a minor.

Similarly, Article 25(2) of the APR stipulates that when a medical age assessment produces an estimated age range, Member States must select the lowest possible age within that range, an approach that was already applied before the Pact by several EU+ jurisdictions, including Belgium, Cyprus, Denmark, Germany, Greece, Finland, Slovakia and Slovenia (see EUAA’s report Age Assessment Practices in EU+ Countries: A baseline for Pact implementation, March 2026, p. 18). This provision may, in practice, result in a standard of proof approaching the ‘mere possibility’ threshold. For instance, in April 2017 the Bavarian Higher Administrative Court held, with reference to the benefit of the doubt under Article 25 of the recast APD, that the lowest possible age should be assumed and that a person should be treated as a minor unless adulthood could be established with certainty. In the same vein, the Belgian Council of State (9 December 2019) annulled an age assessment on the basis that the authorities had not explained the precedence given to a clavicle X-ray that concluded that the applicant was 26.7 years old, with a standard deviation of ±2.6 years, while another test, that of the hand and wrist, which the expert report does not indicate would be less conclusive, did not exclude the

possibility that the applicant could still be a minor. These criteria have continued to guide Belgian case law; for example, in July 2023 the CALL held that, when medical tests leave doubt as to an applicant's minority, the lower age must be assumed.

Taken together, the above case law points towards a lower evidentiary threshold for establishing minority under Article 25(2) of the APR, which, in several EU+ jurisdictions, may be close to the 'mere possibility' standard.

- 40

  "Prioritised identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities (Article 8). Such identification measures include age assessments and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such" (underlining added).

- 41

  UN Committee on the Rights of the Child (1 September 2005). General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, para 31.

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