

AGE ASSESSMENT IN EUROPE

APPLYING EUROPEAN AND INTERNATIONAL LEGAL STANDARDS
AT ALL STAGES OF AGE ASSESSMENT PROCEDURES

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I. INTRODUCTION

Age assessment procedures are often placed at the centre of any analysis of child-related guarantees in asylum systems across Europe. The inherent complexity of any age determination attempt, the psychological and sociocultural elements that can affect the result, and the profound effect that the procedures can have on a migrant child underline the importance of the issue.

Being misidentified as an adult can have long-term consequences for migrant children: beyond the consequences of inappropriate reception conditions for a misidentified child, an incorrect age assessment result can affect the child's navigation of the host country's asylum system and, ultimately, the effectiveness of the asylum procedure. For unaccompanied children, who are highly likely to lack the documents or the ability to support their declared age in a meaningful manner, the importance of robust child protection systems, that include safeguards against incorrect or unreasonable age assessment procedures are of crucial importance.

The applicable legal standards have been extensively discussed among academics, state officials and legal practitioners but legal, policy and practical approaches remain divergent in Europe and often nationally. Despite the increased international scrutiny of the subject, controversial practices stemming from policies that disregard child rights, or incorrectly interpret the applicable legal framework, continue to jeopardise the situation of migrant children in Europe. Litigation has led to some developments in jurisprudence but the interpretation of available legal standards has not yet solidified into a clear body of case law.

Highly technical and strictly formalised age assessment procedures that aim to generate authoritative results on the age of a person can never be in the best interests of the child. As it will be analysed in detail below, the considerable probability of an inaccurate result combined with the serious consequences of misidentification of children highlight the inappropriateness of such procedures. Where medical methods are used, the situation is compounded by the possibility of interference with the person's dignity, physical and mental health, as well as their personal development.

However, as age assessment procedures are frequently employed by Member States, there is a significant need for clarification on the guarantees that must inform, shape and limit the conduct of authorities. This legal note will analyse the applicable legal standards and the state of jurisprudence so far with an aim to interpret and apply the pertinent child-related guarantees to the most common issues that have emerged from age assessment practices in Europe. The interpretation of these standards will be based on the relevant child rights and guarantees in the international and European legal order, namely EU law, Council of Europe standards and international law.

The Analysis Section of this note is structured into three parts: [Part A](#) will briefly map the main challenges that ECRE has identified and [Part B](#) will set out the legal framework under EU law, the Council of Europe and international law. Finally, [Part C](#) will apply the legal framework to the identified practices with an aim of identifying situations of violations and suggesting approaches that can increase legal compliance, including by reference to important European and international jurisprudence.

II. ANALYSIS

A. THE MAIN CHALLENGES IN AGE ASSESSMENT PROCEDURES

As mentioned above, this legal note has been conceptualised in the context of numerous controversial practices of age assessment that have emerged in Europe over the past decade and which have led to an inconsistent application of child-related rights and guarantees. The main challenges have been identified in the course of ECRE's monitoring of the situation of migrant children in Europe and, in particular, through the development of AIDA Country Reports.

It is not the purpose of this note to describe the different practices in detail nor to engage in a comparative analysis of age assessment procedures across Europe. The issues that are presented below have been identified in the respective sections on age assessment in the AIDA Reports of 2021 where more detailed

information can be found.¹ In addition to AIDA information, the identification of problematic practices by EU Member States has been reported in the factsheet and relevant updates of the European Union Agency for Asylum (EUAA).² Information on child-specific concerns in the context of migration have been drawn from the Concluding Observations of the Committee on the Rights of the Child on the situation in different European countries.

The issues that have been raised in the national practices of Member States will be grouped into the three categories encompassing, i) the initiation of age assessment procedures, ii) the conduct of age assessment procedures and iii) the remedies against the result of age assessment procedures. Due to the multitude of non-compliant practices and the complexity of age-assessment procedures, this note does not intend to provide an exhaustive overview of all the issues that (can) arise in national age assessment procedures.

i. The initiation of age assessment procedures

In different Member States, the circumstances and reasons that prompt age assessment procedures are not consistent with European and international legal standards. Generally, any age assessment procedure should be undertaken when it is necessary following serious and substantiated doubts and where it is dictated by the best interests of the child but information on country practices suggests that this is not always the case. Either due to doubts relating to the physical appearance of the applicant,³ or by way of non-recognition of submitted documents,⁴ authorities in Europe have been reported to initiate age determination procedures in a routine and arbitrary manner.⁵

In addition to the use of age assessment procedures as a rule and not as an exceptional measure of last resort, inadequate information either on the grounds for initiating a procedure or on the methods used has raised concerns in some countries. Issues of consent, both in terms of information⁶ and on the consequences of no consent,⁷ have been reported. The lack of consistent procedural frameworks that has been reported in the national systems of many Member States exacerbates these issues further.⁸

Among the different concerns on the initiation of age assessment procedures, the following issues will be analysed in detail:

- » The grounds for the initiation of an age assessment procedure
- » The benefit of the doubt before the start of an age assessment procedure: the evaluation of available documentary evidence
- » Information provision and consent as preconditions for an age assessment procedure

ii. The conduct of age assessment procedures

The quality of age assessment procedures is an important area where multiple substantive and procedural issues have been identified. Problems in the conduct of the procedures are often owed to any of the following elements, or a combination of them: the lack of determinative accuracy for many of the methods involved in the assessment procedure, the impact on the dignity of children due to the use of medical

1. For the AIDA reports, please consult the AIDA website, available at: <https://asylumineurope.org/>

2. EUAA, Age assessment practices in EU+ countries: updated findings, 1 September 2021; EUAA, Assessing the age of minor applicants for international protection, Fact sheet EASO/IAS/2021/5, December 2021.

3. ECRE, AIDA Report: Belgium, 2021, pp. 65-68.

4. ECRE, AIDA Report: The Netherlands, pp. 58-60; ECRE, AIDA Report: France, 2021, pp. 80-82.

5. ECRE, AIDA Report: Austria, 2021, p. 44; ECRE, AIDA Report: Portugal, 2021, pp. 89-91; ECRE, AIDA Report: Spain, 2021, pp. 73-79; ECRE, AIDA Report: Serbia, 2021, pp. 104-107.

6. ECRE, AIDA Report: Hungary, 2021, pp. 55-57; ECRE, AIDA Report: Malta, 2021, pp. 60-62; ECRE, AIDA Report: Bulgaria, 2021, p. 48.

7. ECRE, AIDA Report: Poland, 2021, p. 45; ECRE, AIDA Report: Switzerland, 2021, pp. 59-60.

8. See for example, ECRE, AIDA Report: France, 2021, pp. 80-82; ECRE, AIDA Report: Greece, 2021, pp. 119-123; ECRE, AIDA Report: Spain, 2021, pp. 73-79; ECRE, AIDA Report: Ireland, 2021, pp. 54-55; ECRE, AIDA Report: Italy, 2021, pp. 90-93.

procedures; the role of the representative/legal guardian in the procedure; the length of procedures.⁹ In addition, the application of the presumption of minority is not properly guaranteed during procedures.

The best interests of the child are referred to as an essential guarantee in general and asylum-specific EU law, as well as in the national legislation of EU Member States. National child protection agencies often refer to this principle when providing guidance on proper age assessment procedures. However, despite the positive references in law and policy frameworks, a practically meaningful assessment of the child's best interest is not always undertaken in the context of these procedures. As noted in the above group, divergence among EU Member States, but also among the regional authorities that conduct age assessment procedures within a single Member State, hamper possibilities for conduct that is consistently lawful and appropriate.

Under this group, the note will analyse the following two issues:

- » The use of medical examinations to determine the age of asylum applicants
- » The benefit of the doubt during age assessment procedures

iii. Remedies against the result of age assessment procedures

One of the most consistent concerns in the age assessment practices of migrant children is the lack of an effective remedy to challenge the result.¹⁰ Some countries offer a possibility to challenge the result in the context of an appeal against the decision on the application for international protection,¹¹ an arrangement that complicates the child's capacity to effectively challenge the age result. In other countries, the possibility to appeal the result of an age assessment procedure is either non-existent or is not easily accessible in practice due to the absence of information and the lack of specialised review procedures or competent review bodies.¹² The child's participation in remedial procedures must include an adequate consideration of their views in accordance with their age and maturity. This is practically impossible where deficiencies in national systems of guardianship and legal aid preclude the child's effective representation.

In this context, the note will analyse the obligation to provide a remedy against the result of the age assessment and the required characteristics of that remedy. The section will not examine the requirement for remedies against the decision referring a person to an age assessment procedure.

B. THE LEGAL FRAMEWORK RELATING TO THE PROTECTION OF CHILDREN IN MIGRATION AND DURING AGE ASSESSMENT PROCEDURES

i. EU law

The rights of the child are enshrined in the European Union's primary law. Article 3 of the Treaty on the European Union (TEU) includes the protection of the rights of the child among the Union's general obligations.¹³ The protection of children should inform all aspects of the EU legal order, from law-making to the interpretation and implementation of secondary legal instruments. Another source of primary law, Article 24 of the Charter of Fundamental Rights of the EU (CFREU)¹⁴ establishes a right to protection and care in

9. See the concerns and recommendations by the Committee on the Rights of the Child in its Concluding Observations on the conduct of age assessment procedures in different European countries: CRC, Concluding Observations, Greece, CRC/C/GRC/CO/4-6, 9 June 2022, para. 39; CRC, Concluding Observations, Iceland, CRC/C/ISL/CO/5-6, 23 June 2022, para. 41; CRC, Concluding Observations, Cyprus, CRC/C/CYP/CO/5-6, 24 June 2022, para. 37; CRC, Concluding Observations, Luxembourg, CRC/C/LUX/CO/5-6, 21 June 2021, para. 28; CRC, Concluding Observations, Czech Republic, CRC/C/CZE/CO/5-6, 22 October 2021, para. 43; CRC, Concluding Observations, Switzerland, CRC/C/CHE/CO/5-6, 22 October 2021, para. 42; Concluding Observations, Portugal, CRC/C/PRT/CO/5-6, 9 December 2019, para. 41; Concluding Observations, Austria, CRC/C/AUT/CO/5-6, 6 March 2020, para. 39; Concluding Observations, Malta, CRC/C/MLT/CO/3-6, 26 June 2019, para. 41; Concluding Observations, Italy, CRC/C/ITA/CO/5-6, 28 February 2019; Concluding Observations, Belgium, CRC/C/BEL/CO/5-6, 28 February 2019, para. 41; Concluding Observations, Spain, CRC/C/ESP/CO/5-6, 5 March 2018, para. 44.

10. ECRE, AIDA Report: Switzerland, 2021, pp. 59-60; ECRE, AIDA Report: Romania, 2021, pp. 78-79.

11. ECRE, AIDA Report: Austria, 2021, pp. 69-70; ECRE, AIDA Report: Hungary, 2021, pp. 55-57; ECRE, AIDA Report: Bulgaria, 2021, p. 48; ECRE, AIDA Report: Cyprus, 2021, pp. 61-62.

12. ECRE, AIDA Report: Malta, 2021, pp. 60-62; ECRE, AIDA Report: Ireland, 2021, pp. 54-55.

13. Consolidated version of the Treaty on European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

14. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

accordance with the child's needs and well-being.¹⁵ The second paragraph of the article reiterates the best interests of the child as a primary consideration in all actions involving children. The provisions place the child at the centre of any procedure or situation that concerns them and require authorities to always and fully consider their well-being, as well as their views in accordance with their age and maturity.

In secondary law, the different instruments of the Common European Asylum System (CEAS) reiterate the general importance of the rights of the child in the context of asylum and migration and offer specific guarantees related to the conduct of age assessment procedures. The best interests of the child must be a primary consideration when Member States implement the Asylum Procedures Directive,¹⁶ the Reception Conditions Directive (RCD)¹⁷ and the Dublin III Regulation (DRIII).¹⁸ The introduction of the best interests of the child in the recitals of every CEAS instrument underlines the importance of the principle and reaffirms the obligation of Member States to apply the Union's asylum *acquis* in a manner that secures and promotes the protection of migrant children. Similarly, special procedural guarantees and other vulnerability considerations must be considered when the age of the asylum applicant requires so – both in the context of access to asylum and in terms of reception conditions for minors.¹⁹

The Court of Justice of the EU (CJEU) has considered that in all cases involving children the child's best interests must be a primary consideration.²⁰ The evaluation of the best interests of the child is connected to the specific circumstances of the child, including their age and physical and emotional development.²¹ Where the determination of the best interests of the child is required, only a general and in-depth assessment of the situation of an unaccompanied minor will be sufficient.²²

In addition to the general guarantees and principles that must inform the application of the CEAS, the APD, offers more concrete guarantees that directly concern age assessment procedures. Article 25 (5) of the Directive allows the use of medical examination for the purpose of assessing the age of an unaccompanied minor where there are doubts concerning their age. A set of specific requirements and guarantees follow from this provision:

- » The use of medical examinations is permitted only where “general statements or other relevant indications” have led to doubts regarding the applicant's age;
- » Authorities have an obligation to inform the minor of the possibility of an age determination procedure, the method of examination, the consequences of the result of the examination or those in the event of a refusal to undergo the examination;
- » Authorities have an obligation to obtain consent from the minor and/or their representative;
- » The refusal to undergo the examination may not be the sole basis to reject an application for international protection and cannot prevent the authorities from deciding on an application for international protection;
- » Where doubts on the age of the applicant persist, despite the conduct of a medical examination to determine their age, the authorities must consider that the applicant is a minor (the benefit of the doubt).

The requirements above are specifically designed to respond to issues that can emerge in age determination procedures and aim to ensure the dignity and well-being of minors. However, as discussed above, the authorities of Member States do not always consider, or correctly interpret, these provisions when they organise and implement national age assessment procedures.

15. It should be noted that the Explanations relating to the Charter highlight that this article is based on the Convention on the Rights of the Child and that this clarification must be considered to require the article's interpretation in line with the Convention on the Rights of the Child. See Article 24, Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).

16. Recital 33 and Article 25 (6), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

17. Recital 9 and Article 23, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

18. Recital 13 and Article 6 (1), Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

19. Recitals 29 & 30, Article 24 APD; Article 22 RCD.

20. CJEU Judgment of 1 August 2022, XC, C-279/20, ECLI:EU:C:2022:618, paragraph 48.

21. CJEU, Judgment of 11 March 2021, M.A., Case C-112/20, ECLI:EU:C:2021:197, paragraph 27.

22. CJEU, Judgment of 14 January 2021, TQ, Case C-442/19, ECLI:EU:C:2021:9, paragraph 46.

ii. Council of Europe

Save for a few specific provisions,²³ the European Convention on Human Rights (ECHR) does not contain provisions that explicitly refer to the protection of children. However, the European Court of Human Rights (The Court) has consistently employed a protective, child-specific interpretation of the Convention's articles when children are involved in any of the cases under examination. Despite the absence of statutory provisions relating to children, the Court has developed a large body of case law on the main guarantees in child protection.

Often referring to Article 3 of the Convention on the Rights of the Child (CRC),²⁴ the Court has reiterated the broad international consensus that "*in all decisions concerning children, their best interests must be paramount*"²⁵ and has noted that the assessment of the child's best interests must be undertaken separately and before any decision that will affect the child's life.²⁶ Consequently, as it will be analysed in detail below, the procedural requirements and other protection-related obligations in age assessment procedures must be informed by the Court's approach that has transformed the best interests of the child into a central element of interpretation of any Convention article that is applicable in a situation that involves children.

In addition, the Court has sought to ensure the protection of migrant children on the basis of their increased vulnerability. According to its jurisprudence, children are among the most vulnerable persons in society in general, due to their age and personal situation.²⁷ For migrant children, however, this inherent vulnerability is further compounded because they also happen to belong to another particularly vulnerable group, that of asylum seekers.²⁸ In such cases, the Court has clarified that the migrant children's extreme vulnerability and needs take precedence over any considerations relating to their irregular status in a host country and result in an obligation for increased and appropriate protection measures.²⁹

Following this line of reasoning, the Court has confirmed that the obligations of protection under the Convention, including those under Article 3, must be upheld in a manner that is in line with the special protection that children need and with the aim of avoiding stress, anxiety and particularly traumatic consequences.³⁰ It is important to note that the increased obligations vis-à-vis children are not dependent on whether the child is accompanied by family or not.³¹

The Council of Europe's Convention on the Exercise of Children's Rights,³² although not widely ratified and with a specific scope,³³ offers authoritative guidance on the effective access of children to their rights and the role of states in facilitating this access. The Convention codifies the principle of the best interests of the child in the context of access to judicial and administrative proceedings and confirms a series of procedural rights and other guarantees that are highly relevant for age assessment procedures, including the following: right of information and right of a child to express their views (Article 3); right to a representative (Article 4); involvement in decision-making processes in accordance with the age and maturity of child (Article 6); speedy administrative and judicial procedures (Article 7).

iii. International law

International law offers the most detailed and specific guarantees for the protection of migrant children, not least because of the existence of a dedicated Convention on the Rights of the Child (CRC).³⁴

23. Most notably, Article 5 (d), but also Article 4, Protocol 7.

24. ECtHR, *H.A. and others v. Greece*, Application no. 19951/16, 28 February 2019, paragraph 205.

25. ECtHR [GC], *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, 6 July 2010, paragraph 135.

26. ECtHR, *Rahimi v. Greece*, Application no. 8687/08, 5 April 2011, paragraph 107-109.

27. ECtHR, *Rahimi v. Greece*, Application no. 8687/08, 5 April 2011, paragraph 87.

28. ECtHR, *M.S.S. v. Belgium and Greece* [GC], Application no. 30696/09, 21 January 2011, paragraph 232;

29. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no. 13178/03, 12 October 2006, paragraph 55.

30. ECtHR, *Tarakhel v. Switzerland* [GC], Application No. 29217/12, 4 November 2014, paragraph 118 and 119.

31. ECtHR, *Popov v. France*, Application nos. 39472/07 39474/07, 19 January 2012, paragraph 91.

32. Council of Europe, European Treaty Series - No. 160, European Convention on the Exercise of Children's Rights, Strasbourg, 25.I.1996.

33. As of November 2022, 20 State Parties have ratified the Convention. According to Article 1 (1) of the Convention, State Parties must, at the moment of signature or ratification, declare at least three categories of family cases before a judicial authority to which this Convention is to apply. While some states have focused on family cases, other states have included other forms of procedures involving children that go beyond family cases. For more information on the status of ratification and scope of application for each state, see here: <http://bit.ly/3hzd2pT>

34. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

Article 3 of the CRC established the principle of the best interests of the child as a primary consideration in all actions concerning children. The Convention further protects the child's right to their identity (Article 8) and to the expression of their views (Article 12), enshrines guarantees against all forms of physical and mental violence (Article 19) and special protection obligations where the child is temporarily separated from their family environment (Article 20). Asylum seeking and refugee children have a right to appropriate protection and humanitarian assistance (Article 22). Lastly, Article 37 requires states to take all necessary measures to protect children against torture, or other cruel, inhuman or degrading treatment or punishment.

The subsequent work of the Committee on the Rights of the Child has further elaborated these obligations both in respect of vulnerability considerations and in line with the principle of the best interests of the child. General Comment no. 14 requires authorities and decision-makers to take into account the different kinds and degrees of vulnerability of each child, in particular when the child belongs to a minority group such as refugees or asylum seekers.³⁵ In such situations, the adoption of specific measures to guarantee the equal exercise of rights is required.³⁶ In the same line, any decision-making process involving children requires an evaluation of the possible impact of the decision on the child's best interests³⁷ and, in the case of a displaced child, the best interest of the child principle must be respected during all stages of displacement.³⁸

In addition to the specific guarantees of the CRC, the International Covenant on Civil and Political Rights (ICCPR) requires states to provide additional safeguards and guarantees for the protection and care of children under Article 24.³⁹ In its General Comment No. 17, the Human Rights Committee clarified that the implementation of Article 24 "[...] entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant."⁴⁰

Lastly, UNHCR has elaborated on age assessment procedures as an identification measure for unaccompanied or separated children. It emphasizes the exceptional nature of age assessment procedures, the lack of a definitive outcomes and the benefit of the doubt in favour of the child.⁴¹ It also reiterates the importance of a personal interview and a holistic approach as a sufficient and appropriate procedure to assess the age of the child and the centrality of the best interests of the child in the procedure.

C. APPLYING INTERNATIONAL AND EUROPEAN LEGAL STANDARDS IN AGE ASSESSMENT PROCEDURES

i. The initiation of age assessment procedures

The grounds for the initiation of an age assessment procedure

As noted above, Article 25 APD contains specific provisions on the initiation of medical examination procedures to determine the age of an applicant for international protection. The provision clearly requires authorities to resort to medical procedures where there are doubts and where these doubts are based on "general statements and other relevant indications." While the wording is abstract, the existence of statements and indications that demonstrate that the applicant's declared age might not be true is a prerequisite for the application of the provision.

It should be noted that the phrase "general statements and other relevant indications" was only included in

35. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, paragraphs 75 and 76.

36. *Idem*, paragraph 54.

37. CRC, GC No. 14, *op. cit.*, paragraphs 6(c) and 14(b).

38. CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras. 19 and 20. At any of these stages, a "best interest" determination must be documented in preparation of any decision fundamentally affecting the unaccompanied or separated child's situation, and should include a comprehensive assessment of the child's identity, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.

39. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171].

40. UN Human Rights Committee, CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, paragraph 1.

41. UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum – Case No. CIK-1938/2014 – Lithuanian Supreme Court, paragraph 9.

this article during the recast of Directive 2005/85/EC (the previous APD).⁴² Article 17 of the previous Asylum Procedures Directive mentioned the possibility to conduct medical examinations for the determination of the age of an applicant without requiring any conditions to be present for the application of the provision. In the proposal to reform the previous APD,⁴³ the new Article 25 replaced Article 17 and introduced new requirements for the initiation of medical procedures, namely the existence of doubts as to the age that are based on general statements and other relevant indications. The evolution of the APD is a testament to the intention of the EU legislature to prevent the involvement of children in unnecessary or unreasonable medical examinations and to preclude the lawfulness of arbitrary decisions of national authorities. This is further supported by the explanatory memorandum of the proposal to amend the previous APD which states the reduction of administrative errors in asylum procedures and the promotion of the best interests of the child among its objectives.⁴⁴

In addition to the intention of the legislature in the new APD, there are additional reasons for a narrow interpretation of the conditions that can permit an age assessment procedure. Article 25 (5) permits medical examinations only in specific circumstances when certain conditions are fulfilled; it is therefore evident that medical examinations to determine the age of an asylum applicant are an exceptional measure and not a general rule. When applying this provision, it should be borne in mind that all exceptions must be interpreted narrowly⁴⁵ and even more so when a restriction to a fundamental right may result from the application of the legally prescribed exception.⁴⁶ An age assessment procedure places the child in a situation of uncertainty in a context that is already difficult and precarious, namely that of the flight and arrival into a new and unknown country. The child's right to protection and care under Article 24 CFREU is clearly at stake. In addition, due to the impact of such a procedure on the child's moral and physical integrity, as well as the relevance of the procedure for the child's identity and dignity, Article 7 CFREU must be considered to be equally engaged in situations of age assessment,⁴⁷ along with Article 1 CFREU.

Lastly, it should be noted that the Directive's objective is to further develop the standards of asylum procedures and to establish common procedures across the Member States.⁴⁸ Member States must apply the provisions of the Directive, avoiding overly broad interpretations that could jeopardise the harmonised development of the Common European Asylum System. Where a directive's provision establishes specific requirements, their disregard is not only unlawful for the evident reason of non-compliance with the law but also because it is conducive to the fragmentation of the Union's asylum system and against the Directive's objectives.

The obligation to narrowly – and carefully – interpret the provisions that justify medical examinations also stems from the principle of the best interests of the child and the presumption of minority. A determination of the best interests of the child must precede any decision to refer a child to an age assessment procedure. According to the CRC, the best interests of the child must be taken into consideration in any action involving children; the word “action” refers to decisions but also “acts, conduct, proposals, services, procedures and other measures.”⁴⁹ This requires authorities to consider the principle in every procedural step involving the preparation, assessment and decision in respect of the identification of a child, including their age assessment. UNHCR has clarified that age assessments are conducted where the age of a child is in doubt and as part of a comprehensive assessment.⁵⁰ According to the technical guidance of UNICEF, authorities should initiate age assessment procedures only as an exceptional measure after establishing that the best interest of the child and all the circumstances of the case indicate such a need due to “serious doubts” and a “blatantly incorrect” declared age.⁵¹

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42. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13–34 (the previous APD).
 43. Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM/2011/0319 final - COD 2009/0165.
 44. Section 3.6.: Impact on fundamental rights, the Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM/2011/0319 final - COD 2009/0165.
 45. Court of Justice of the EU (CJEU), Judgment of 14 November 2013, *SFIR et AGEA*, Joined Cases C-187/12 to C-189/12, ECLI:EU:C:2013:737, paragraph 30.
 46. See by analogy, CJEU, Judgment of 18 October 2018, *E.G.*, Case C-662/17, ECLI:EU:C:2018:847, paragraph 49.
 47. See, by analogy, the reasoning of the European Court on Human Rights regarding the applicability of Article 8 ECHR in age assessment procedures in *ECtHR, Darboe and Camara v. Italy*, Application no. 5797/17, 21 July 2022, paragraphs 121-127.
 48. Recital 12, APD.
 49. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 17.
 50. Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, para. 75.
 51. UN Children's Fund (UNICEF), Age Assessment: A Technical Note, January 2013, Standard 1 and 2, p. 12.

Standards set by the Council of Europe also require that age assessment “[...] *should only be carried out if there are reasonable doubts about a person being underage.*”⁵² The presumption of minority is applicable prior to any decision to assess the age of a person and should therefore inform any deliberations by authorities to refer a child to an age assessment procedure.⁵³ Similarly, the best interests of the child are also applicable before any order to conduct an age assessment, meaning that the authorities “*shall assess if referring the child to the procedure is in the best interests of the child.*”⁵⁴ The assessment of the best interests of the child must form part of the decision-making process, should assess the necessity of the age assessment and should be included in the decision ordering the procedure. This decision should include details on the reasons why the authority has serious doubts about the age of the child, why the procedure is necessary and how the best interests’ assessment was conducted.⁵⁵

In its recent judgment in *Darboe and Camara v. Italy*, the European Court of Human Rights confirmed the “[...] *the primary importance of the best interests of the child and of the principle of presumption of minority in respect of unaccompanied migrant children reaching Europe.*”⁵⁶ When examining the circumstances that prompted the referral of the applicant to an age assessment procedure the Court noted that the applicant declared his minor age after arrival and that “[...] *there is no indication that the applicant’s claims that he was a minor were unfounded or unreasonable.*”⁵⁷ The need for a careful and serious approach to the initiation of age assessment procedures is also connected to their link to the assessment of asylum claims: the Court has emphasised the importance of age assessment as “[...] *a preliminary step of an asylum assessment [...].*”⁵⁸

It follows from the above that neither every doubt nor any general statement will justify the initiation of age assessment procedures and/or medical examinations to determine the age of an applicant. Authorities must consider all the circumstances prior to the initiation of such a procedure and should do so diligently and based on the narrow interpretation of the legal basis of Article 25 (5), the principle of the best interests of the child and the principle of presumption of minority. A decision to initiate an age assessment procedure should be taken only where (a) it is clearly necessary following serious and substantiated doubts in the light of all the circumstances of the case, (b) it is directed at ensuring the safety and well-being of the child and (c) it is in line with their best interests.

The benefit of the doubt before the start of an age assessment procedure: The evaluation of available documentary evidence

Practice across Europe shows that the decision to start an age assessment procedure is often prompted by a lack of identity documents or non-recognition of the available documents that the child has submitted. As noted above, the assessment and establishment of the child’s identity is dictated first and foremost by the best interests of the child and not by the necessity to verify their age. This principle, along with that of the presumption of minority, should guide the authorities in their assessment of available documentation that can contain information regarding a person’s age before any decision to start an age assessment is taken.

According to the CRC, the comprehensive assessment of the child’s identity, including their nationality, background, vulnerabilities and other needs, is a requirement under the principle of the best interests of the child.⁵⁹ The procedure to establish the identity of the child may not only be based on documentary evidence but also on the child’s social history which should be established and assessed through the use of age and gender-sensitive interviewing techniques.⁶⁰ When the child has submitted relevant documents, these should be considered genuine unless there is proof that they are not; in addition to documents, statements made by the children or any relatives must be considered by the authorities.⁶¹ When examining specific cases of age assessment, the Committee has found that the child’s date of birth forms part of their identity and authorities

52. Council of Europe, Parliamentary Assembly (PACE), Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, 15 April 2011, para. 5.10.

53. Council of Europe, Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration, para. 47.

54. *Idem*, paras. 63, 66 and 68.

55. *Idem*, para. 94.

56. ECtHR, *Darboe and Camara v. Italy*, Application no. 5797/17, 21 July 2022, para. 139.

57. *Idem*, para. 131.

58. ECtHR, *Mahamed Jama v. Malta*, Application no. 10290/13, 26 November 2015, para. 150.

59. CRC, General Comment no. 6, para. 20.

60. *Idem*, paras. 20 and 31 (ii).

61. 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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 4.

may violate Article 8 CRC by failing to assign evidentiary value to the person's documents, including where the person's circumstances of flights precluded them from obtaining a passport.⁶²

The European Union Agency for Asylum has clarified that authorities must first consider and analyse all the available evidence and information in order to verify whether any initial doubts concerning a person's age are sufficiently justified to lead to a formal age assessment procedure.⁶³ It is after the end of this procedure that authorities will be well-placed to decide whether serious doubts persist or not. In this procedure, "*a proactive and empathetic approach*" is required. The authorities should exhaust all options regarding the assessment of available documentation, accepting as supporting evidence a wide range of evidence that contain references to the age of the person beyond identity documents, such as UNHCR travel documents, religious or civil certificates by other countries, information from databases, statements and documents made by family members or other relatives.⁶⁴ Any evidence that prove the child's position in the family, and consequently their age, may also be used.⁶⁵ The importance of an early application of the presumption of minority is also evidenced by the guarantees that the Anti-Trafficking Directive offers to child victims at the stage of identification and immediate assistance.⁶⁶ Although the Directive applies in the context of the identification of victims of trafficking, it is a highly relevant instrument in the context of asylum, particularly in situations of first contact of officials with migrants and asylum applicants.

Where documents exist but are disputed by authorities, the presumption of minority and a more liberal application of standards of proof should guide the procedure. While the existence of falsified documentation can be the basis for authorities to consider age assessment procedures, any doubts relating to the false nature of identity document must be substantiated on the basis of obvious and serious indications and in balance with the best interests of the child. The Council of Europe considers that general doubts about the rule of law situation in the applicant's country of origin "[...] *cannot be held against the individual concerned*."⁶⁷ This is very important in the context of asylum-seeking children due to their double vulnerability and the likelihood of being present in a host country without proper documentation. The European Court of Human Rights has acknowledged that the benefit of the doubt as to the credibility of statements or documents must be given to asylumseekers in light of their vulnerability and the special situation in which they find themselves in.⁶⁸

Information provision and consent as preconditions for a lawful age assessment procedure

Regardless of the lawfulness of the decision to refer a child to an age assessment procedure, national practices have raised issues on the information provided to applicants for international protection before the start of such a procedure. Article 25 (5) foresees a broad duty of information that must include information on the possibility of a medical examination, the method of such examination, the consequences of the result and the consequences of a refusal to undergo such an examination. Although information provision seems to exist as a guarantee in most Member States, this does not always include all the elements that Article 25 (5) requires. In addition, issues of representation of children, consent and the handling of situations of refusal to undergo medical examinations have also been reported as creating situations that violate children rights.

The consequences of such practices can be serious in the context of age where the best interests of the child require the effective participation of children in the procedures that involve them.⁶⁹ The right to information is closely connected to the child's right to be heard and the obligation of authorities to give due weight to the views and statements of the child in any procedure that involves and affects them.⁷⁰

62. CRC, R.Y.S. v. Spain, Communication no. 76/2019, 4 February 2021, 8.11; CRC, R.K. v. Spain, Communication no. 27/2017, 18 September 2019, 9.5 and 9.6.

63. EUAA, Practical Guide on Age Assessment, 2018, p. 41.

64. *Idem*, p. 45.

65. UN Children's Fund (UNICEF), Age Assessment: A Technical Note, January 2013, Standard 2, p. 13.

66. Article 13 (2), Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.

67. Council of Europe, Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration, para. 54.

68. ECtHR, M.A. v. Switzerland, Application No. 52589/13, 18 November 2014, para.55; ECtHR, A.A. and Others v. Sweden, Application no.34098/11, 24 July 2014, para. 73; ECtHR (GC), F.G. v. Sweden, no. 43611/11, 23 March 2016, para. 113.

69. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 89.

70. 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, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 35.

Procedures that do not provide arrangements for a child-friendly communication of the reasons behind a decision to refer a person to an age assessment procedure, as well as information on the characteristics of the process and the rights and obligations involved, can never fulfil the requirement to ensure the child's meaningful participation.

Regardless of the content and manner of the information provided, information from Member States suggests that national age assessment practices are not consistent in general or vary regionally. Even if information provision is conducted in full and in a child-friendly manner, the lack of consistency in law and in practice can undermine the right of the child to be informed by rendering the content of the information irrelevant and by causing serious problems in the way this information is perceived by the child. When information on a specific procedure is provided to a child, the content of the information must be as comprehensive and accurate as possible in order to allow the child to understand and develop trust in a specific situation.⁷¹ While an adult can use their own agency to ask questions, clarify misunderstandings and compare information, a child needs a high level of reliability in information provision in order to form an opinion and develop trust.⁷² Procedures that do not satisfy these requirements are violating the child's right to be heard, express their views and participate in the procedures that concern them.⁷³

Similarly, information provision will not be effective if it is not accompanied by an effective system of child representation. The prompt appointment of a representative⁷⁴ that can participate in all the actions concerning the child and can prepare them for the age assessment is necessary for a lawful age assessment procedure.⁷⁵ As the CRC considers the right to information as a corollary to the right to be heard under Article 12 CRC, it is only with adequate and understandable information can the child affect the procedures, request changes or make informed proposals.⁷⁶ A representative is an essential guarantee in ensuring that the child will be able to navigate the procedure with the necessary agency and the CRC considers that the child should receive information about the possibility to have a representative already from the stage of preparation of any judicial or administrative processes.⁷⁷

Beyond the right to information, the above guarantees are intrinsically connected with and essential to the child's right to informed consent according to Article 25 (5) and the right to refuse medical examinations. The fulfilment of this condition and the authorities' reaction to a situation of refusal must be assessed in the light of the child's particular vulnerability, the circumstances of the asylum procedure and the consequences of medical examinations, as well as any other circumstances that indicate a fearful experience that may have affected the child's ability to understand information and to consent. Here too, the child's access to a representative will be an important consideration in assessing the existence of consent.

The CRC has confirmed a general obligation of informed consent when a child is to be subjected to medical procedures.⁷⁸ In age assessment procedures, the Committee considers that a child cannot be said to have given informed consent where they did not receive information and were not represented.⁷⁹ Where representation was provided by domestic prosecutorial offices, the Committee has found that this was not sufficient insofar as it did not permit individualised representation.⁸⁰

In EU law, the CJEU has clarified the principles in respect of a person's subjection to psychological tests in the context of an asylum procedure. In Case C-473/16, the Court noted that such tests and expert reports

71. Council of Europe, Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration, para. 87.

72. Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, para. 75.

73. Article 12, Convention on the Rights of the Child; See the interpretation by the CRC and CMW in Joint General Comment No. 3, paras. 34-36.

74. As terminology is divergent in the different legal orders referred to in this note, the terms representative and guardian are used interchangeably in the text and include both the assigned representative of the child in accordance with national guardianship systems and the lawyer where legal representation is specifically relevant.

75. Fundamental Rights Agency of the EU and European Commission, "Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking", pp. 100-101; CRC, General Comment no. 6, para. 33; European Economic and Social Committee, The protection of unaccompanied migrant minors in Europe (own-initiative opinion), SOC/634-EESC-2020, 1.9; PACE, Resolution 2195 (2017), Child-friendly age assessment for unaccompanied migrant children, 24 November 2017, 6.2. and 6.3.

76. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 45.

77. *Idem*, para. 41.

78. CRC, General Comment 14, para. 77.

79. CRC, R.Y.S. v. Spain, Communication no. 76/2019, 4 February 2021, 8.8.

80. CRC, S.M.A. v. Spain, Communication no. 40/2018, 2 November 2020, 7.12.

acquire a special significance when they are prepared “[...] in a context where the person called upon to undergo projective personality tests is in a situation in which his future is closely linked to the decision that that authority will take on his application for international protection.”⁸¹ In such situations, even if the conduct of such assessment tests is conditional upon the consent of the person, “[...] that consent is not necessarily given freely, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves.”⁸² Applying those principles to the child’s ability to consent to (or to refuse) an age assessment procedure, it is evident that the evaluation of the child’s freedom to consent should merit special assessment and authorities must take into account the reasons why a child might refuse such procedures.

It should be noted that information and consent are not static concepts, especially when complex or multistage procedures are being employed and the understanding of the child may evolve. Every child should be accompanied by a representative that can help them understand the evolution of the procedure and access complaint mechanisms *during* the procedure.⁸³ UNHCR emphasises that a qualified independent guardian must be assigned to the child before an age assessment procedure is carried out.⁸⁴ Where a child wishes to withdraw their consent after the start of a procedure, a representative should be able to inform authorities and request the modification of procedures in accordance with the child’s views. In order to allow the child to exercise their right to consent effectively, the representative should be appointed before the start of any age assessment and should be informed and consulted about all aspects of the procedure.⁸⁵

Lastly, when it comes to the refusal to undergo medical examinations, the Council of Europe standards require states to refrain from automatically deciding on the person’s age and consider that a review of the initial best interests’ assessment should take place following a child’s refusal to undergo a medical age assessment.⁸⁶ For the CRC, the automatic declaration of adulthood in response to a person’s refusal to undergo an age assessment test has been found to be in violation of the best interests of the child and Articles 3 and 12 CRC.⁸⁷

ii. The conduct of age assessment procedures

The use of medical examinations to determine the age of asylum applicants

The use of medical examinations remains one of the most controversial and widely contested issues in age assessment procedures. The usefulness of these medical methods is often analysed in respect of the consequences on the physical and mental health of the child, as well their determinative accuracy.

Currently, there is no age assessment procedure that can accurately determine the age of a person.⁸⁸ The use of medical examinations for this purpose has not managed to achieve a broad consensus among medical experts internationally as criticism focuses on the impossibility of a scientifically accurate result and each medical method presents specific weaknesses.⁸⁹ The weight that authorities often give to such medical methods is in stark contrast to the scientific understanding that these methods are not empirically sound or reliable. The Commissioner for Human Rights considers that age assessments based on medical evidence alone are “*ethically dubious and inadequate for determining a person’s actual age.*”⁹⁰ The European Economic and Social Committee also considers that states should not employ methods that are known to be

81. CJEU, Judgment of 25 January 2018, F v. Bevándorlási és Állampolgársági Hivatal, Case C-473/15, ECLI:EU:C:2018:36, paragraphs 52-53.

82. *Ibid.*

83. Council of Europe, Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration, paragraph 176.

84. Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, paragraphs 75.

85. EUAA, Practical Guide on Age Assessment, 2018, p. 26.

86. Council of Europe, Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration, paras. 102-103.

EUAA, Practical Guide on Age Assessment, 2018, p. 26.

87. CRC, J.A.B. v. Spain, Communication no. 22/2017, 21 May 2019, 13.9.

88. EUAA, Practical Guide on Age Assessment, 2018, p. 34.

89. For detailed information on the inaccuracy of different medical methods, see Annex 11 - Compilation of Expert Medical Opinions and Positions on the Use of Medical Examinations for the Age Assessment of Non-National Children, in the Third-Party Intervention by ECRE, ICJ, AIRE Centre and Dutch Council for Refugees in the case of Darboe and Camara v. Italy before the European Court of Human Rights, available at: <http://bit.ly/3O8NoUX>

90. The Council of Europe Commissioner for Human Rights – “Realising the right to family reunification of refugees in Europe”, February 2017, p. 8.

approximate just because other reliable methods are not available.⁹¹

In a case that can be of relevance to the subject of medical age assessment, the Court of Justice of the EU has assessed the appropriateness and necessity of psychological expert reports in asylum cases based on claims relating to sexual orientation and noted that “[...] *the suitability of an expert’s report such as that at issue in the main proceedings may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community.*”⁹² Although the case did not relate to physical medical examinations, the Court set an important standard for the conduct of procedures that aim to produce medico-legal evidence in asylum cases.

In addition to the concerns over the scientific weakness of the methods currently in use, there are significant concerns over the impact these medical procedures can have on a child’s life. The Council of Europe’s standards draw attention to the harmful mental and physical consequences of initiating procedures that subject children to medical examination.⁹³ The European Committee of Social Rights has dismissed the use of medical tests for age assessment purposes due to the serious consequences they can have to minors.⁹⁴ Due to the vulnerable situation of the children, such an impact must be carefully considered at all times and, where unavoidable, should be minimised as much as possible. The CRC also considers that the best interests of the child require a conduct that is fair, scientific, safe, child and gender-sensitive without any risk of violation of the physical integrity of the child and with due respect to their dignity.⁹⁵

The use of medical methods to determine the age of a person must also be scrutinised in respect of its necessity and proportionality, as it constitutes an interference with the right to private life under Article 8 ECHR. For the European Court of Human Rights, any interference with the rights under Article 8 must be in accordance with the law and should be necessary and proportionate to the legitimate aim that is to be achieved.⁹⁶ A margin of appreciation is granted to the state to balance the necessity of the measure and the proportionality to the aim but that margin will be much narrower where vulnerable individuals are involved.⁹⁷ The margin will also be deemed to have been exceeded where the national decision-making procedure involved in a measure of interference did not offer sufficient safeguards, such as an individualised evaluation or a reasonable and objective justification.⁹⁸

In EU law, the Court of Justice of the EU has addressed the issue of seeking medical expert opinions as an interference to a person’s rights under the Charter of Fundamental Rights of the EU. The EU Court has held that the methods used by asylum authorities to assess documentary or other evidence submitted in support of asylum applications must respect the person’s human dignity under Article 1 CFREU and their private life under Article 7 CFREU.⁹⁹ In C-473/16, the Court noted that the interference with Article 7 will be serious insofar as the preparation of a psychological report on a person’s sexual orientation will require that person to undergo “[...] *a series of psychological tests intended to establish an essential element of his identity.*”¹⁰⁰ Another important finding of the Court in this judgment concerns the obligation of Member States to ensure that asylum officials are trained to assess claims based on sexual orientation. The Court focused on “*competent personnel*” and “*appropriate skills*” to assess such applications, due to the sensitive nature of the basis of the claim and the inability of any tests to determine whether an applicant is lying or not.¹⁰¹ The Court’s guarantees should be considered applicable to age assessment procedures as these involve vulnerable applicants and a claim that cannot be determined with certainty. The obligation to conduct such procedures in a child-friendly manner and with adequately trained personnel is a requirement of the best

91. European Economic and Social Committee, The protection of unaccompanied migrant minors in Europe (own-initiative opinion), SOC/634-EESC-2020, 4.10.

92. Court of Justice of the EU, Judgment of 25 January 2018, F v. Bevándorlási és Állampolgársági Hivatal, Case C-473/15, ECLI:EU:C:2018:36, paragraphs 57-58.

93. Council of Europe, Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration, para. 127-131.

94. European Committee on Social Rights, Decision on the merits: European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France, complaint No. 114/2015, 24 January 2018, para. 113.

95. CRC, General Comment no. 6, paragraph 31 (i).

96. ECtHR, Z. v. Finland, Application no. 22009/93, 25 February 1997, paragraph 94.

97. ECtHR, Alajos Kiss v. Hungary, Application no. 38832/06, 20 May 2010, paragraph 42.

98. ECtHR, Kiyutin v. Russia, Application no. 2700/10, 10 March 2011, paragraph 74. See also, ECtHR, Shtukaturov v. Russia, Application no. 4409/05, 27 March 2008, paragraphs 88-89.

99. CJEU, Judgment of 2 December 2014, A and Others, C-148/13 to C-150/13, EU:C:2014:2406, paragraph 53.

100. CJEU, Judgment of 25 January 2018, F v. Bevándorlási és Állampolgársági Hivatal, Case C-473/15, ECLI:EU:C:2018:36, paragraph 60.

101. *Idem*, paragraph 67.

interests of the child¹⁰² and one that should shift the focus of authorities away from medical methods to other child-appropriate and safe techniques.

Analysing the proportionality of age assessment measures, it should be noted that the protection of children and youth is in itself a matter of public interest and one of great importance due to the vulnerability of the persons involved. The above suggest that the subjection of children to unreliable medical procedures with serious potential for interference with their dignity cannot be a proportionate measure taken in the context of balance with other matters of public interest, such as migration management.

In addition to the proportionality of such interference with the rights of the child, the subjection of migrant children to medical procedures is inherently problematic and against their best interests. Beyond the inaccuracy of the result, medical examinations for the purpose of age assessment entail the unnecessary involvement of a child in a medical setting and the prolongation of the uncertainty over an important component of their identity. The Court of Justice of the EU has confirmed that uncertain and long procedures are not compatible with the best interests of the child. In the context of return procedures, the Court found that any procedure that is characterised by delays and places children in situations of great uncertainty regarding their legal status and future is incompatible with EU law.¹⁰³ Regarding Dublin III procedures, the Court equally stressed that procedures that prolong uncertainty are against the child's best interests.¹⁰⁴ This jurisprudence can be applied by analogy to age assessment procedures: where doubts over the correct procedure and decision exist, the one that causes less harm to the child must be chosen. This interpretation would also be in line with the European Court of Human Rights' jurisprudence that considers lengthy age assessment procedures problematic.¹⁰⁵

The CRC has examined the lawfulness of medical age assessment procedures and has condemned the overreliance of states on these methods. In a series of individuals communications, the Committee has repeatedly refused to recognise X-ray evidence as an appropriate age assessment method, stating that it lacks precision and that, generally, age assessment procedures must be holistic, scientific and child-friendly.¹⁰⁶ In their Joint General Comment, the CRC and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) described medical age assessment methods as "*traumatic*" and noted that they lead to "*unnecessary legal processes.*"¹⁰⁷ Multidisciplinary and transparent procedures, as well as adequate training of officials to assess psychological aspects and personal circumstances, are required.¹⁰⁸

Given the seriousness of the interference of such procedures with the rights of children, increased safeguards must be in place when age assessment procedures are conducted. Medical examinations that are based on improper, invasive and scientifically unreliable methods can never be proportionate to any legitimate aim, in particular taking into account the increased vulnerability of migrant children. Due to the significant mental and physical impact they can cause, age assessment procedures that rely on medical examinations must be considered to be in violation of the principle of the best interests of the child and to constitute unlawful interferences with the child's rights under the ECHR and the CFREU.

Where a substantiated need to initiate an age assessment procedure emerges, in line with the analysis in the previous section, such procedures must be comprehensive, multidisciplinary and supported by an ongoing and in-depth assessment of the child's best interests. Whenever a medical component is introduced in an age assessment procedure, this should never be used as the sole basis for determining the age of a person but it should be part of a holistic and multidisciplinary approach.¹⁰⁹ Such an approach will be able to

102. UNHCR, Guidelines on Child Asylum Claims, para. 75; See also, 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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, paragraph 4.

103. CJEU, Judgment of 14 January 2021, TQ, Case C-441/19, ECLI:EU:C:2021:9, paragraph 46; CJEU, Judgment of 17 December 2020, C-808/18, ECLI:EU:C:2020:1029, paragraph 250; CJEU, Judgment of 17 October 2018, UD, C-393/18 PPU, ECLI:EU:C:2018:835, paragraphs 26-27.

104. CJEU, Judgment of 6 June 2013, MA and others, Case C-648/11, ECLI:EU:C:2013:367, paragraph 55.

105. ECtHR, Mahamed Jama v. Malta, Application no. 10290/13, 26 November 2015, paragraph 148.

106. CRC, A.L. v. Spain, communication No. 16/2017, 31 May 2019, 12.6 and 12.7; CRC, R.Y.S. v. Spain, Communication no. 76/2019, 4 February 2021, 8.5 and 8.6; CRC, R.K. v. Spain, Communication no. 27/2017, 18 September 2019, 9.5 and 9.6.

107. 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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 4.

108. CRC, Concluding observations on the combined fifth and sixth periodic reports of Portugal, CRC/C/PRT/CO/5-6, 9 December 2019, 42 (e).

109. EUAA, Practical Guide on Age Assessment, 2018, p. 38.

consider the individual circumstances of the case and assess the situation comprehensively, in line with the best interests of the child requirements analysed above. An age assessment procedure can only offer reliable results if it is based on child-friendly social, developmental, cultural and psychological observations in addition to physical and medical elements.¹¹⁰

The benefit of the doubt during age assessment procedures

While the benefit of the doubt is a principle that is often included in national legislation concerning age assessment, the practice indicates that it is not observed at all stages of the procedure or, if it is observed, it is not always sufficiently documented. In terms of practical application, the principle is often interpreted restrictively and is considered to be relevant mostly in the technical area of medical examinations, where errors are present.

In EU law, Article 25 (5) APD explicitly requires Member States to apply the benefit of the doubt whenever the age of a person cannot be reliably determined. Article 13 (2) of the Anti-Trafficking Directive contains a similar clause of general application when a child victim of trafficking has been identified. The principle must be applied as broadly as possible, particularly for unaccompanied minors where the likelihood of documentary evidence and of being able to explain the absence of identity documents is not high.¹¹¹

The European Court of Human Rights confirmed the application of the benefit of the doubt as a prerequisite for every age assessment procedure. In *Darboe and Camara v. Italy*, the Court noted the “[...] *the primary importance of the best interests of the child and of the principle of presumption of minority in respect of unaccompanied migrant children reaching Europe.*”¹¹² More specifically, the Court lamented Italy’s failure to apply the principle and clarified that it considers the presumption of minority to be “[...] *an inherent element of the protection of the right to respect for private life of a foreign unaccompanied individual declaring to be a minor.*”¹¹³ The judgment further clarified that the margin of error in medical examinations should always be taken into consideration.¹¹⁴

The CRC equally considers the benefit of the doubt to be an important component of age assessment procedures that should apply both during the assessment procedure and in the event of an uncertain outcome.¹¹⁵ In addition, the benefit of the doubt should guarantee support and protection for everyone involved in such procedures. The Committee has interpreted the principle of presumption of minority to include a duty to transfer the person to a child protection centre and has dismissed arguments by the domestic authorities that this would pose a risk to the safety of other children in the centre.¹¹⁶ In addition, it has found that the benefit of the doubt entails an obligation to provide a representative for the person undergoing an age assessment procedure.¹¹⁷

The UN Human Rights Committee has also examined the presumption of minority in the context of migration and age assessment procedure and has employed a particularly protective approach. In *O.Y.K.A. v. Greece*, the Committee considered that the presumption of minority covers situations where the child initially submits information suggesting adulthood and subsequently requests an age assessment.¹¹⁸ In such cases, authorities should adequately consider the person’s claim considering that children may not be able to exercise mature discretion when it comes to declaring their age and can lie about some of their identity elements, especially in the migration context where they are likely to experience fear and misinformation.

In line with the above, the presumption of minority should be applied during the entire procedure, informing both medical and non-medical components of the age assessment. For non-medical components, such as social investigation, interviews with the child, information from other family members, the principle should require states to refrain from using inconsistencies and contradictions in the child’s account to the detriment of their rights, unless obvious and serious reasons emerge. This approach should include a lenient evaluation whenever the child submits incorrect information. Where medical examinations are conducted, as

110. Council of Europe, Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration, para. 121.

111. EUAA, Practical Guide on Age Assessment: Second Edition, p. 22.

112. ECtHR, *Darboe and Camara v. Italy*, paragraph 139.

113. *Idem*, paragraph 153.

114. *Idem*, paragraph 140.

115. CRC, *J.A.B. v. Spain*, Communication no. 22/2017, 21 May 2019, 13.6.

116. CRC, *C.O.C. v. Spain*, Communication no. 63/2018, 29 January 2021, 8.16.

117. CRC, *A.L. v. Spain*, Communication no. 16/2017, 31 May 2019, 12.8.

118. Human Rights Committee, *O.Y.K.A. v. Greece*, Communication no. 2770/2016, 7 November 2017, 8.11.

a measure of last resort and in line with the scientific guarantees discussed in the previous section, the benefit of the doubt is connected to the impossibility to obtain a reliable result that is inherent in such examinations. The margin of error for each medical method must be clearly written in the decisions determining the age of the person and must be interpreted in favour of the child. The medical examination cannot be the only process relied upon to determine the child's age.

iii. The remedies against the result of an age assessment procedure

The establishment of complaint mechanisms and remedial processes is an integral component of any procedure that complies with the best interests of the child. Complaint mechanisms ensure that the rights of the child are “*appropriately integrated and consistently applied in all implementation measures, administrative and judicial proceedings relevant to and with an impact on him or her.*”¹¹⁹ Such mechanisms must be in place in order to fully respect the right of the child to be heard, express their views and participate effectively in procedures that concern them.¹²⁰

Under EU law, the CJEU has confirmed that the principle of effective judicial protection is a general principle which has been reaffirmed in Article 47 of the Charter.¹²¹ According to the Court's jurisprudence Article 47 is directly applicable in the national legal order without any need for specific provisions in national law, allowing therefore individuals to rely on Article 47 even if the national law does not offer any remedies.¹²² This direct applicability is especially relevant in appeals against the result of age assessment as practice shows that Member States either do not regulate review procedures or they provide appeals that are practically inaccessible.

In addition, even if the APD does not specifically prescribe a remedy for the decisions following an age assessment, the guarantees of Article 47 CFREU should be considered to be applicable to age assessment procedures as well. The recast APD aims to improve “[...] *access to protection and justice with the guarantee that every applicant should have in the case of a negative decision the right to an effective remedy.*”¹²³ While the stated aim relates to Article 46 APD and the review of asylum decisions, the aim of the Directive to respect and reinforce the rights of defence is evident. In terms of the characteristics of the remedy, the EUAA has noted that an effective remedy requires that the decision on the age assessment be issued separately and before any decision on the application for international protection is taken.¹²⁴

In addition, as Article 47 CFREU requires that the remedy is accessible and effective,¹²⁵ child-friendly information should be provided, free and legal representation should be made available to ensure that the child can fully benefit from the available remedy. Article 25 (1) APD establishes an obligation on Member States to ensure that a representative enables the child to navigate procedures that are conducted in application of the Directive. UNHCR has relied on this article to emphasise that the presence of a representative is a requirement during the entire asylum procedure, including age assessment.¹²⁶ Such representation must be available until the end of the procedure, including for purposes of supporting the child in challenging the outcome of the age assessment.

The Council of Europe standards require the existence of a mechanism to request the review of the result of an age assessment procedure and a procedure that allows the child to “[...] *present information or documentation that has become newly available or rectify any information falsely reflected in the supporting documentation of the decision.*”¹²⁷ The appeal procedures must be child-sensitive, timely and allow for an effective participation of the child and their representative.¹²⁸ The right to an effective remedy is also

119. CRC, General Comment 14, para. 15 (c).

120. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 74.

121. CJEU, Judgment of 18 May 2021, Asociația 'Forumul Judecătorilor din România', C-83/19, EU:C:2021:393, paragraph 190.

122. CJEU, Judgment of 29 July 2019, Torubarov, Case C-556/17, ECLI:EU:C:2019:626, paragraph 56.

123. Section 3.6.: Impact on fundamental rights, the Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM/2011/0319 final - COD 2009/0165.

124. EUAA, Practical guide on age assessment, 2018, p. 37.

125. CJEU, Judgment of 29 July 2019, Torubarov, C-556/17, ECLI:EU:C:2019:626, paragraph 57; CJEU, Judgment of 30 June 2016, Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci, C-205/15, EU:C:2016:499, paragraph 43.

126. UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum – Case No. CIK-1938/2014 – Lithuanian Supreme Court, paragraph 9.

127. Council of Europe, Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration, September 2017, para. 177.

128. *Idem*, paras. 179 and 180.

protected under Article 13 ECHR, which states that effective remedies should be available for any individual to be able to complain before national authorities for violations of their rights under the Convention. Article 13 guarantees the effective functioning of the Convention system and the Court has reiterated on numerous occasions that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”¹²⁹ The remedy can be deemed effective when it is available in practice without it being compromised by acts and omissions of the domestic authorities.¹³⁰ In *Darboe and Camara v. Italy*, the Court examined the possibility for a remedy in the context of an age assessment procedure and noted that the government’s conduct was characterised by lack of communication and action.¹³¹ Due to these circumstances, any potential remedy was considered to be ineffective and in violation of Article 13 taken in conjunction with Article 8.¹³²

Under international law, the right to be heard under Article 12 of the CRC is applicable to all administrative procedures and requires that children be able to bring complaints before courts and bodies that are child-friendly and accessible.¹³³ The CRC has emphasised the difficulty of children in accessing their right to remedy and has noted that states should “[...] give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.”¹³⁴ The CRC has stated that Article 3 of the Convention on the Rights of the Child (best interests of the child) cannot be applied correctly if Article 12 is not respected; Article 3 reinforces the functionality of Article 12 by “facilitating the role of children in all decisions affecting their lives.”¹³⁵ In addition, as the right to be heard is closely connected to the representation of the child, the CRC has considered that the failure to appoint a representative for the child, or the failure to do so in a timely manner, can result in substantial injustice in violation of Article 3 and Article 12.¹³⁶

Other procedural rights are included under Article 12 CRC, such as disclosure of important information, notice of hearings and representation rights.¹³⁷ An important aspect of the right entails an obligation to provide information on how the child’s views were considered in any given procedure. According to the CRC, “[...] the feedback is a guarantee that the views of the child are not only heard as a formality [...]” and ensures the effectiveness of review procedures as “[...] the information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.”¹³⁸ In a similar manner to the guidelines of the EUAA, the CRC has also emphasised that the individual must be able to challenge the outcome of an age assessment separately.¹³⁹ Judges and other relevant professionals should receive training on the rights of migrant children and, in particular, the standards set by the Committee’s jurisprudence and General Comments.¹⁴⁰

III. CONCLUSIONS

Despite the existence of specific guarantees under EU law, international law and the ECHR, the procedures of age assessment in Europe fail to comply with the applicable legal standards in multiple ways. Although the complex and sensitive nature of the topic should lead to procedures that follow strict, objective and reliable rules, the situation is characterised by weak guarantees, inadequate assessment of the child’s best interests, arbitrary choice of age assessment procedures, and fragmented procedural frameworks. The present

129. ECtHR, *Hirsi Jamaa and Others v Italy* [GC], Application No. 27765/09, 23 February 2012, para. 175.

130. ECtHR, *Kudła v. Poland* [GC], Application no. 30210/96, 26 October 2000, para. 97; ECtHR, *De Souza Ribeiro v. France* [GC], Application no. 22689/07, 13 December 2012, para. 80.

131. ECtHR, *Darboe and Camara v. Italy*, paras. 108.

132. *Idem*, paras. 198-199.

133. 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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, paras. 14-17.

134. UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para. 24.

135. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 74.

136. UN Committee on the Rights of the Child, *N.B.F. v. Spain*, Communication no. 11/2017, CRC/C/79/D/11/2017, 18 February 2019, 12.8.

137. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, 66.

138. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 45.

139. CRC, Concluding observations on the combined fifth and sixth periodic reports of Austria, CRC/C/AUT/CO/5-6, 6 March 2020, 40 (c).

140. CRC, *R.Y.S. v. Spain*, Communication no. 76/2019, 17 August 2021, 9 (d).

analysis confirms that a wide range of safeguards under European and international law should apply in all age assessment procedures.

Before the start of an age assessment procedure, the following guarantees must be observed:

- » Age assessment procedures must not be used routinely in relation to migrant children; authorities must be aware that age assessment procedures are inherently problematic and may seriously impact children. Where a need for age assessment is considered, only a comprehensive assessment of the person's circumstances and the existence of serious and substantiated doubts regarding their age can sufficiently justify the initiation of age assessment procedures. The principle of the best interests of the child and the need to ensure the child's safety and well-being should be the main guiding elements in the decision to refer a person to an age assessment procedure.
- » The presumption of minority should be broadly applied from the outset and should inform the authorities' assessment of the need to initiate an age assessment procedure. The presumption of minority must inform the assessment of evidentiary documents and the statements of the child; where uncertainty over a child's statements and documents exists, these should be evaluated in favour of the child in line with the benefit of the doubt requirements.
- » The right to information and the obligation to obtain the consent of the child must be applied in favour of the child; this means ensuring adequate and reliable information content and appropriate and child-friendly communication. The appointment of a representative is a prerequisite to the child's understanding of the situation and a guarantee for their effective participation in the procedure. Children must be allowed to refuse medical examinations, to change their opinion and to withdraw their consent as necessary. Such changes should not lead to disproportionate consequences that can affect the child's freedom to consent.

During the age assessment procedure, authorities must ensure that:

- » Medical procedures are not used to assess the age of a person; such procedures are not supported by science, provide inaccurate results and subject children to traumatic experiences. Such procedures cannot comply with principle of the best interests of the child and should be avoided. Where a medical component is introduced, this should be done in line with international scientific guidelines and as part of a holistic social and psychological assessment of the case. The procedures must be conducted in a manner that ensures the dignity and safety of the child.
- » The presumption of minority should be applied during the entire procedure, informing all components of the age assessment. States are required to refrain from using inconsistencies and contradictions in the child's account to the detriment of their rights. This should include the submission of incorrect information by children. Where medical components are introduced, as a measure of last resort and in line with the scientific guarantees discussed in the previous section, the margin of error for each medical method must be clearly written in the decisions determining the age of the person and must be interpreted in favour of the child.

After the conclusion of an age assessment procedure, a complaint mechanism with the following characteristics must be available to challenge any outcome:

- » A complaint mechanism that is based on accessible and child-friendly procedures and can ensure an independent review of the outcome of an age assessment. The child should be informed about the mechanism and their right to resort to it; the information should be provided at the start of the procedure and explained in appropriate language.
- » Child-friendly information on the appeal procedure must be made available to the child and must include all the necessary details that could be of interest to the child and their representative. For the purpose of an effective possibility of appeal and for reasons of transparency, a separate decision on the outcome of the age assessment should be issued.
- » In order to respect the child's right to be heard and their right to express their views, the existence of representatives/guardians/lawyers may be required in the context of such a mechanism. Similarly, child-friendly justice must be ensured including through adequate training of judges and other relevant professionals.