

Fatoumata Diaraye BARRY v. Belgium

THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE (HRC) AND THE CENTRE FOR THE SOCIAL STUDY OF MIGRATION AND REFUGEES (CESSMIR), GHENT UNIVERSITY¹

The case of *Fatoumata Diaraye BARRY v. Belgium* raises important issues regarding the age assessment methods used with regard to unaccompanied migrants and the ensuing (lack of) protection as an unaccompanied minor.

This submission first sets out the Belgian legal framework and practice regarding age assessments, demonstrating an overreliance on medical assessments to the detriment of other probative elements (e.g. documents) and a failure to apply a presumption of minority (*Section 1*). Such practice is, however, problematic in light of the lack of reliability of skeletal and dental age assessment methods (*Section 2*). It is also problematic in light of the consensus among international human rights bodies on the need to only use medical examinations as a last resort (in particular with regards to bone and dental analysis on account of their unreliability) and to also take into account documents (*Section 3*). In light of the serious impact of age assessment on the private life of the persons concerned (*Section 4*), it is submitted that such assessments must be carried out in a human rights-based manner. For this purpose, the Court is invited to recognize that an exclusive focus on *medical* age testing is incompatible with the State's obligations under the right to respect for private life (Article 8 ECHR), alone or in conjunction with the prohibition of discrimination (Article 14 ECHR) (*Section 5*).

1. The Belgian context

Under Belgian law, two legal frameworks are of relevance for the age assessment of unaccompanied migrants: (1) the specific rules on guardianship of unaccompanied minors and (2) the private international law rules that apply when age determination and the adoption of child protective measures have a cross-border/international element (as is the case for migrant children).

1.1. The Guardianship Act

According to the Guardianship Act of 24 December 2002², an unaccompanied migrant child is a person under 18 years old, who stays in Belgium without his parent(s) or (legal) representative(s) and who has filed an application for international protection or stays in Belgium without legal residence documents.³

The status of minority has important consequences for unaccompanied persons. If minority is confirmed, the Guardianship Service assigns a guardian.⁴ The different roles of the guardian have been defined in the Guardianship Act (see *infra*, 4.2). The guardian has a central role in the different residence procedures (including legal remedies); he represents the unaccompanied minor in all administrative or judicial proceedings.⁵

Prior to the assignment of a guardian, however, the Guardianship Service and the Belgian migration authorities can express doubt about the person's age.⁶ According to the Belgian Council of State, the Guardianship Service is under no obligation to justify why it is questioning the age.⁷ As is apparent from the Council of State's case law, the Guardianship Service and migration authorities usually rely on the physical appearance of the person in front of them to question their age.⁸ At this stage, there is no thorough interview by specially trained officials that could be the basis for expressing a doubt about the age, as affirmed by persons working at the Guardianship Service themselves.⁹

Article 7, §1 of the Guardianship Act stipulates that when the authorities foster doubt about a person's age, the Guardianship Service "immediately commissions a **medical examination** to be carried out by a doctor to verify whether or not the person is under 18 years old". In Belgian practice, the medical examination consists of a triple radiograph of

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² Programme Act of 24 December 2002 establishing a guardianship system for unaccompanied foreign minors, *Moniteur Belge* 31 December 2002, 58.686 (hereinafter: Guardianship Act).

³ Article 5 Guardianship Act.

⁴ Article 6, §2, 2^o Guardianship Act.

⁵ Article 9, §1 Guardianship Act.

⁶ Article 7, §1 Guardianship Act.

⁷ Council of State 12 June 2020, nr. 247.786; Vluchtelingenwerk Vlaanderen, "Leidraad bij het leeftijdsonderzoek bij niet-begeleide minderjarige vreemdelingen", date unknown, available at <https://crm.vluchtelingenwerk.be/sites/default/files/leidraad_bij_het_leeftijdsonderzoek_-_def_0.pdf>, p 7.

⁸ See e.g.: Council of State 3 March 2021, nr. 249.957; Council of State 6 October 2015, nr. 232.460.

⁹ E. DELWICHE and P. PEDE, "De specifieke voogdij voor niet-begeleide minderjarige vreemdelingen" in S. BOUCKAERT, E. DESMET and J. VERHELLEN (eds.), *Rechten van niet-begeleide minderjarigen in België*, Brugge, die Keure, 2019, (113) 118.

the teeth, collarbone and wrist. This examination takes place in a hospital, under the supervision of the Guardianship Service. In case of doubt about the age, the youngest age is considered.¹⁰ **During the period in which doubt is expressed and during the performance of medical age examinations, no guardian is appointed, not even a provisional guardian.** This indicates that **no presumption of minority** is being applied.

While the Belgian authorities automatically proceed to the triple radiograph in case of doubt, the Royal Decree of 22 December 2003 implementing the Guardianship Act provides for **other age assessment methods**. According to Article 3 of the Royal Decree, the medical examination “can, among others, include **psychoaffective tests**”. Such tests are, however, hardly ever performed in practice in Belgium.¹¹ In this regard, the Council of State has held that neither conducting a personal interview, nor requesting the advice of social assistants is legally *required* by Article 3. This provision contains only a possibility - not an obligation - to conduct psychoaffective tests.¹²

Article 3 of the 2003 Royal Decree however starts by stipulating that the Guardianship Service verifies the unaccompanied minor’s statements “regarding his name, nationality and age, in particular by means of his **official documents** or information provided by the consular or diplomatic missions of the country of origin or transit”.¹³ When taking into consideration such official documents, rules of private international law apply. This brings us to the second set of rules applicable to the age assessment of unaccompanied migrants in Belgium.

1.2. Rules of private international law

When people cross borders and questions arise concerning their personal status (name, age, marital status, parentage, etc.), rules of private international law apply. In Belgium, these rules are set out in both national law (the Belgian Code of Private International Law of 2004, hereinafter: PIL Code)¹⁴, international conventions (e.g. the 1996 Hague Child Protection Convention) and EU law (e.g. the Brussels IIa Regulation). All these rules are relevant when it involves the cross-border protection of migrant children under civil law. However, when it comes to age assessment, the Belgian Code of Private International Law is decisive.

When the unaccompanied minor has a foreign birth certificate, all Belgian public authorities can **recognize** (accept) this foreign personal status document without any (court) procedure being required (recognition by operation of law)¹⁵, provided that certain requirements are fulfilled. These requirements are provided in Article 27 PIL Code, which concerns the *recognition* of foreign authentic acts. They include, *inter alia*, that the document is authentic and does not entail an infringement of public policy. This means that when an unaccompanied minor presents a foreign birth certificate, for example, the Guardianship Service but also the Immigration Office must examine whether the certificate is eligible for recognition under these private international law rules.

In practice, however, Belgian authorities often fail to take into consideration foreign documents that indicate minority. The Council of State has repeatedly held that the Guardianship Service is not obliged to let foreign documents prevail over the results of the medical examination.¹⁶ Belgian migration authorities even adopt this reasoning when the foreign document is legalised and its authenticity has thus been confirmed.¹⁷ This reasoning, however, completely ignores the private international law rules on the recognition of foreign authentic acts (Article 27 PIL Code). This is also visible in the case law of the Council of State. In the appeal procedures against age determination decisions of the Guardianship Service, the Council of State does not refer to this Article 27 but applies a very specific provision on the probative value of foreign authentic acts (Article 28 PIL Code). This provision stipulates that the finding of the facts established by the foreign authority (and visible in the authentic act) can be used as evidence; and evidence to the contrary can be brought by any legal means.¹⁸ In this reasoning, the result of medical examinations is considered as ‘evidence to the contrary’. It should, however, be emphasized that this provision only deals with *probative value* and not with the more far-reaching effect of the *recognition* of foreign documents. **Only in case of recognition, one’s personal status (e.g., age) is equally lawful and valid in both legal orders.** A minor in Guinea is then a minor in Belgium too, and vice versa.

¹⁰ Article 7, §3 Guardianship Act.

¹¹ Vluchtelingenwerk Vlaanderen, “Leidraad bij het leeftijdsonderzoek bij niet-begeleide minderjarige vreemdelingen”, date unknown, available at <https://crm.vluchtelingenwerk.be/sites/default/files/leidraad_bij_het_leeftijdsonderzoek_-_def_0.pdf>, p 2.

¹² Council of State 9 November 2021, nr. 252.072; Council of State 9 December 2019, nr. 246.340.

¹³ Insofar as this request for information does not endanger the minor or his family staying in the country of transit and/or origin.

¹⁴ For an English translation, see: <https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf>.

¹⁵ S. DEN HAESE, *Crossing Borders: Proving your Personal Status. Interactions between private international law and human rights law*, PHD obtained in 2021.

¹⁶ E.g.: Council of State 13 January 2015, nr. 229.784; Council of State 6 October 2015, nr. 232.460; Council of State 2 March 2016, nr. 233.998; Council of State 22 March 2016, nr. 234.211; Council of State 5 September 2016, nr. 235.668; Council of State 14 December 2016, nr. 236.766; Council of State 31 March 2017, nr. 237.879; Council of State 12 June 2020, nr. 247.786.

¹⁷ Council of State 28 January 2016, nr. 233.664; Council of State 28 April 2016, nr. 234.579; Council of State 9 January 2018, nr. 240.367; Council of State 22 January 2019, nr. 243.452; Council of State 12 December 2019, nr. 246.486.

¹⁸ Article 28, §2 PIL Code.

1.3. Conclusion

The Belgian law and practice on age assessments of unaccompanied minors are characterized, among others, by the following elements:

- *No guardian*, not even a provisional one, is appointed during the period of doubt and the age assessment, indicating the absence of the application of a presumption of minority.
- Medical examinations are *immediately* carried out upon an expression of 'doubt' by the Guardianship Service or migration authorities.
- This medical examination comprises of a *triple radiograph* of the teeth, collarbone and wrist. Even though the law provides for the possibility of psychoactive tests, this is not done in practice.
- *Documents* are not appropriately taken into account, even though this is required by the rules of private international law.

2. The (lack of) reliability of skeletal and dental age assessment

In a survey carried out in 34 countries,¹⁹ it was found that many countries rely on medical examinations, primarily in the form of radiographs of the hand/wrist (23), collar bone (15) and/or teeth (17).²⁰ However, the biologic variation in human development implies that any inference of chronological age from skeletal and dental examination in children and youth will suffer from **considerable inaccuracy**.²¹ This is especially the case after the onset of puberty, since skeletal age to a large extent is determined by sexual maturation.

The most common method used for skeletal age assessment is to analyse an x-ray of the hand and wrist in relation to the Greulich and Pyle reference atlas.²² This atlas was created in the 1930s in the U.S.A. **in a population of white middle-class children and youth** to assess the developmental status of the skeleton in children in relation to a known chronological age.²³ During puberty, the skeletal age is determined through the examination of form and size of bone elements and the degree of fusion of the epiphyses with their shafts. After fusion is completed, the image stays the same in older ages.²⁴ Epiphyses in the hand and wrist are completely fused at a mean age of less than 17 years in girls and around 18 years in boys, yet with a wide variation which makes this method poorly suited for age assessment in relation to the crucial age limit of 18 years.²⁵ Furthermore, the purpose of the Greulich-Pyle table was to predict adult height from the level of skeletal maturity at specific ages during childhood, not the age from skeletal maturity. Because of this particular purpose, the endpoint of full maturity was never precisely determined by Greulich-Pyle, rendering it impossible to make precise calculations of the likelihood of being under the age of 18 for individuals with fully matured growth zones on X-rays, a task which is further hampered by variations in developmental patterns between ethnic groups.²⁶

Age assessment based on an x-ray of the sternal end of the clavicle has been advocated as a more suitable method, since growth of this bone continues into the twenties,²⁷ and has been widely used to assess young asylum seekers' age in Belgium and the Netherlands. However, also this method has been criticized, because of the **radiation of sensitive internal organs** involved²⁸ and the **low precision** of this method. The variation between individuals of this method is large,²⁹ with a variation of complete closure of the clavicle between 14.7 and 30 years for girls, and between 16.0 and 30 years old for boys.

Dental age assessment of minors is generally restricted to assessment of the third molars, the "wisdom teeth", as these are the only teeth still forming in the later teens. The third molars are however also the most variable teeth in the dentition and are congenitally absent in one out of ten.³⁰ Assessment of the third molars is a routine method in forensic medicine, where it is used to assess the age in the process of identification of decomposed bodies. Thus, there exists a considerable literature of charts from different high- and middle-income populations around the world, but

¹⁹ The 28 EU member states, Norway, Switzerland, Australia, Canada, New Zealand and the United States of America.

²⁰ EASO, "Age assessment practice in Europe", 2014, available at < <https://op.europa.eu/en/publication-detail/-/publication/7d181c3b-48f4-4ae8-98af-d8e82b1612d1>>, 98 p.

²¹ A. HJERN, M. BRENDLER-LINDQVIST and M. NORREDAM, "Age assessment of young asylum seekers", *Acta Paediatr.* 2012, nr. 101, 4-7.

²² W. GREULICH and S PYLE, *Radiographic atlas of skeletal development of the hand and wrist*, Stanford, Stanford University Press, 1959, 272 p.

²³ *Ibid.*

²⁴ T.J. COLE, "The evidential value of developmental age imaging for assessing age of majority", *Ann Hum Biol* 2015, nr. 42, 379-388.

²⁵ *Ibid.*

²⁶ H. THODBERG and L. SAVENDAHL, "Validation and reference values of automated bone age determination for four ethnicities", *Acad Radiol* 2010, nr. 10, 1425-1432.

²⁷ G. GESERICK, A. OLZE, W. REISINGER and A. SCHMELING, "Age estimation of unaccompanied minors. Part I. General considerations", *Forensic science international* 2006, nr. 159 suppl. 1, S61-4.

²⁸ A. HJERN, M. BRENDLER-LINDQVIST and M. NORREDAM, "Age assessment of young asylum seekers", *Acta Paediatr.* 2012, nr. 101, 4-7.

²⁹ K.F. KREITNER, B. NAFE, T. RIEPERT, F. J. SCHWEDEN and M. THELEN, "Bone age determination based on the study of the medial extremity of the clavicle", *European Radiology* 1998, nr. 8, 1116-22.

³⁰ R. SARUP NANDA, "A genesis of the third molar in man", *AM J Orthod* 1954, nr. 40, 698-706.

rarely from the low income countries where the majority of refugees originate. The standard deviation in these charts is generally around two years, yielding a confidence interval of eight years to include 95% of the examined individuals.³¹ The charts usually used in Europe, however, are based on studies of **middle class white American or European populations**, and the **influence of socio-economic factors and ethnicity on these charts has not been much evaluated**.³² One of the few studies of differences of maturity patterns of the third molar between ethnic groups has demonstrated a considerable variation: the third molar in black South Africans matured on average one to two years earlier than in Germans, and three to four years earlier than Japanese populations.³³ Another major problem with assessment of dental maturity is that the inter-rater concordance (if assessment is done by different persons) is only 60 to 85%.³⁴

Even ignoring the probable socio-economic, ethnic and secular variation in skeletal and dental age, when we allow two standard deviations (which would encompass 95% of the population), this would give a span of 4 to 8 years with skeletal and dental age assessment respectively. This means that neither skeletal nor dental x-ray age assessment can establish chronological age with sufficient accuracy to be of decisive value in age assessment of young migrants.³⁵

3. Guidance in European and international law

3.1. UN Committee on the Rights of the Child

In follow-up to fourteen individual complaints,³⁶ the UN Committee on the Rights of the Child (hereinafter: CRC Committee) has provided guidance on how children's rights should be interpreted in the context of age assessment of unaccompanied migrants. Given that the outcome of an age assessment determines, by definition, whether a person can invoke the rights contained in the UN Convention on the Rights of the Child (CRC), it is crucial that such age assessment is done in a children's rights compliant manner. **As long as the outcome is not certain, the young person should be given the benefit of the doubt and be considered a minor.**

- *Safeguards in age tests (Articles 3 and 12 CRC)*

According to the CRC Committee, a medical examination is not necessarily excluded or prohibited, but is only necessary when no identity documents or other evidence can be produced from which the person's age can be determined. Available documents should be considered authentic unless there is evidence to the contrary, and statements made by young people should be taken into account. A person should not be declared of age solely on the basis of a refusal to undergo a medical examination.³⁷

A test must include an assessment of the child's physical and psychological development and must be conducted by specialized pediatricians or experts knowledgeable in various aspects of development. **States are prohibited from relying solely on an assessment of external appearance or a mere physical examination.** Medical methods based on bone analysis and dental analysis, among others, are considered inaccurate because of their large margins of error. At a minimum, in order to assess a person's psychological maturity, interviews should be conducted and, where appropriate, with accompanying adults.

The CRC Committee also indicates that testing should always be conducted in a **scientific, safe, smooth and fair manner** in a language that the young person understands. The implementation should be child-friendly, gender-sensitive and culturally appropriate. In addition, States should avoid testing that would be traumatic and lead to unnecessary legal proceedings. To ensure that the best interests of the child are safeguarded during an age assessment procedure, the Committee focuses primarily on the appointment of a guardian or other legal representative for the

³¹ H.M. LIVERSIDGE and P.H. MARSDEN, "Estimating age and the likelihood of having attained 18 years of age using mandibular third molars", *Br Dent J* 2010, nr. 209, E13.

³² G. GESERICK, H. MAEDA, A. OLZE, A. SCHMELING, M. TANIGUCHI, P. VAN NIEKERK and K.D. WERNECKE, "Forensic age estimation in living subjects: the ethnic factor in wisdom tooth mineralization", *International Journal of Legal Medicine* 2004, nr. 118, 170-173.

³³ *Ibid.*

³⁴ National Board of Health and Welfare, "Metoder för radiologisk åldersbedömning. En systematisk översikt. [Imaging methods for age assesment. A systematic review]", Stockholm, 2016.

³⁵ D. NEUBAUER, A. NICHOLSON and P.J. SAUER (ADVOCACY & ETHICS GROUP OF THE EUROPEAN ACADEMY OF PEDIATRICS), "Age determination in asylum seekers: physicians should not be implicated", *Eur J Pediatr* 2016, nr. 175, 299-303.

³⁶ CRC 4 February 2021, Views 76/2019, R.Y.S./Spain; CRC 29 January 2021, Views 63/2018, C.O.C./Spain; CRC 28 September 2020, Views 40/2018, S.M.A./Spain; CRC 28 September 2020, Views 38/2017, B.G./Spain; CRC 28 September 2020, Views 37/2017, L.D./Spain; CRC 28 September 2020, Views 28/2017, M.B./Spain; CRC 28 September 2020, Views 26/2017, M.B.S. /Spain; CRC 7 February 2020, Views 25/2017, H.B./Spain; CRC 7 February 2020, Views 24/2017, A.B./Spain; CRC 4 February 2020, Views 21/2017, A.D./Spain; CRC 18 September 2019, Views 17/2017, M.T./Spain; CRC 31 May 2019, Views 22/2017, J.A.B./Spain; CRC 18 September 2019, Views 27/2017, R.K./Spain; CRC 31 May 2019, Views 16/2017, A.L./Spain; CRC 27 September 2018, Views 11/2017, N.B.F./Spain.

³⁷ *J.A.B. v. Spain, supra note 36.*

young person. Inadequate compliance with the above guarantees leads according to the Committee to "substantial injustice" and consequently to a violation of Articles 3 and 12 CRC in all fourteen cases.

- *Right to identity (Article 8 CRC)*

The age and date of birth of young people are part of their identity. States have a duty to respect the child's right to preserve their identity without depriving them of elements of it. Therefore, according to the CRC Committee, official documentation confirming a person's identity should be taken as true. If in doubt, further investigation may be necessary (for example, by making inquiries in the country of origin), but this burden of proof does not lie solely with the author. Attributing to a young person an age and date of birth different from those indicated on his or her identity documents leads to a violation of Article 8 CRC.³⁸

- *Right to care and protection for unaccompanied minors (Articles 20 and 22 CRC)*

The CRC has several provisions that provide care and protection for children and adolescents in a situation of increased vulnerability. For the Committee, unaccompanied minors fall under this group. For instance, when a young person is not assigned a guardian to file an asylum application as a minor, he is denied crucial protection, which implies a risk of irreparable harm upon a possible return.³⁹

► *Recommendations to Belgium*

The CRC Committee has criticised the current system of age assessment in Belgium. **The Committee is concerned that "the three-phase test used to determine the age of unaccompanied children is intrusive and unreliable".**⁴⁰ Therefore, the Committee has recommended Belgium to "[d]evelop a uniform protocol on age-determination methods that is multidisciplinary, scientifically-based, respectful of children's rights and used only in cases of serious doubt about the claimed age and in consideration of documentary or other forms of evidence available".⁴¹

As indicated in *Section 1*, age assessments in Belgium are carried out upon an expression of doubt (not 'serious doubt'), and documentary evidence is not appropriately considered. As shown in *Section 2*, the accuracy of the skeletal and dental age assessment is highly contested, and can thus not be said to be 'scientifically based'.

3.2. Council of Europe

- *The European Committee of Social Rights (ECSR)*

The ECSR has concluded that "the use of bone testing to determine the age of unaccompanied foreign minors is inappropriate and unreliable" and that such bone testing in France constituted a violation of Article 17§1 of the Revised European Social Charter (the right of children and young persons to social, legal and economic protection).⁴²

- *Parliamentary Assembly of the Council of Europe (PACE)*

The PACE has called on member States to "conduct case-by-case, reliable age assessment of unaccompanied minor children only in cases of *serious* doubt about the child's age and *as a last resort*" (6.1, emphasis added) and to appoint a guardian during the age assessment (6.3). Moreover, member States are called upon to "use *only as a last resort* dental or wrist x-ray examinations and all other invasive medical procedures" (6.5, emphasis added) and to "ensure that all medical examinations are sensitive to the child's gender, culture and vulnerabilities and that the interpretation of results takes into account the child's national and social background as well as previous experiences" (6.6).⁴³

- *Committee of Ministers of the Council of Europe*

According to the Committee of Ministers, "[w]hen there is uncertainty as to whether a person is a child, and even after the national age assessment procedures have been conducted, States should ensure that they have a guardian or that a guarantee of respect for their rights is upheld by a competent authority." (Principle 3, no. 4).⁴⁴ The guardian's tasks

³⁸ *J.A.B. v. Spain*, supra note 36, §13.10; *A.L. v. Spain*, supra note 36, §12.10; *M.T. v. Spain*, supra note 36, §13.9; *R.K. v. Spain*, supra note 36, §9.10; *A.D. v. Spain*, supra note 36, §10.17; *M.A.B. v. Spain*, supra note 36, §10.10; *H.B. v. Spain*, supra note 36, §10.10; *L.D. en B.G. v. Spain*, supra note 36, §10.16; *M.B. v. Spain*, supra note 36, §9.15; *M.B.S. v. Spain*, supra note 36, §9.16; *S.M.A. v. Spain*, supra note 36, §7.15; *C.O.C. v. Spain*, supra note 36, §8.14; *R.Y.S. v. Spain*, supra note 36, §8.11.

³⁹ This leads to a violation of Article 22 UNCRC, taken together with Article 20 UNCRC, in the cases of *M.T. v. Spain*, supra note 36, §13.8; *R.K. v. Spain*, supra note 36, §9.12 and *R.Y.S. v. Spain*, supra note 36, §8.14.

⁴⁰ CRC, *Concluding observations in the combined fifth and sixth reports of Belgium*, 1 February 2019, CRC/C/BEL/CO/5-6, §41 (a).

⁴¹ *Ibid.*, §42 (a).

⁴² ECSR 24 January 2018, Complaint No. 114/2015, European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF)/France, §116.

⁴³ Parliamentary Assembly of the Council of Europe, "Child-friendly age assessment for unaccompanied migrant children", Resolution 2195 (2017).

⁴⁴ Committee of Ministers of the Council of Europe, "Effective guardianship for unaccompanied and separated children in the context of migration", Recommendation CM/Rec(2019)11.

include “co-operating with competent authorities to ensure the child’s best interest e.g. in ... age assessment processes.” (Principle 4, no. 1, (i)).⁴⁵

- *Council of Europe Commissioner for Human Rights (CHR)*

Following a visit to France, the CoE Commissioner for Human Rights called on the authorities “to guarantee in particular that all age assessment procedures are multidisciplinary. The use of bone age tests must cease to be automatic and effectively only be a last resort, within a legal framework. Their results must in no circumstances be the sole factor in age assessment.”⁴⁶

3.3. European Union

- *Asylum Procedures Directive (APD)*

The APD provides for the possibility to use medical examinations to determine the age of unaccompanied minors in the context of the international protection procedure “where, following general statements or other relevant indications, Member States have doubts concerning the applicant’s age. If, thereafter, Member States are still in doubt concerning the applicant’s age, they shall assume that the applicant is a minor.”⁴⁷ Such a medical examination “shall be performed with full respect for the individual’s dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.”⁴⁸

- *European Parliament (EP)*

In a 2013 resolution, the EP “deplores the unsuitable and intrusive nature of the medical techniques used for age assessment in some Member States, which may cause trauma, and the controversial nature and large margins of error of some of the methods based on bone maturity or dental mineralization.”⁴⁹ In its view, the age assessment method “should consist of a multidimensional and multidisciplinary assessment, be conducted in a scientific, safe, child-sensitive, gender-sensitive and fair manner, with particular attention to girls.”⁵⁰ Moreover, the EP recalls also that medical examinations should only be conducted when other age assessment methods have been exhausted.”⁵¹

- *European Economic and Social Committee (EESC)*

The EESC noted that “in accordance with the ‘presumption of minority’ principle, a young person who presents themselves as a minor must be considered a minor until a final court ruling has been delivered” (1.10). As such, “every unaccompanied minor must be supported by a qualified guardian who is assigned as soon as possible” (1.9).⁵²

With regard to age assessments, the EESC calls on the Member States “to evaluate minority based on a body of evidence, consisting principally of the declarations by the person in question, civil status documents presented, interviews with the person conducted by qualified professionals and, where appropriate, verification of the authenticity of civil status documents” (1.10). The EESC adopts a firm position regarding the use of bone tests: “Given that bone tests are not really reliable, the EESC calls for them to simply be stopped. Methods we know to be approximate should not be employed just because no reliable verification method is available.” (1.12)⁵³

- *EASO (now EUAA)*

Similarly, EASO (now the European Union Agency for Asylum (EUAA)) has recommended, among others, that “age assessment should not be conducted as a routine practice” (B.1), to “exhaust all sources of information at disposal before deciding to undertake an age assessment” (B.2), to “[c]onsider all evidence in conjunction with a wider range of factors (physical, psychological, developmental, environmental and cultural factors, gender) to save the need for later age assessment” (B.3) and to “[a]ssume that the applicant is a child (benefit of the doubt) while there are doubts on the applicant’s age” (B.4).

On the methods to carry out an age assessment, EASO provides the following guidance: “First analyse any existing evidence before deciding to undertake further assessment” (D.1); “Once age assessment is deemed to be necessary, apply non-medical methods first and then medical methods only if doubts remain. In such cases, radiation-free methods should be applied first and only as a last resort can other methods involving radiation be considered” (D.2). Given that none of the methods can currently determine the exact age of the person, EASO recommends to “[e]xplore different aspects involving psychological and physical development as part of the process to improve the accuracy so that the decision is based on a wider range of evidence” (E.2).⁵⁴

⁴⁵ *Ibid.*

⁴⁶ CHR, Report following his visit to France from 22 to 26 September 2014, CommDH(2015)1, 2015, §96.

⁴⁷ Article 25(5) 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) (hereinafter: Asylum Procedures Directive). Emphasis added.

⁴⁸ *Ibid.*

⁴⁹ European Parliament, “The situation of unaccompanied minors in the EU”, Resolution of 12 September 2013 (2012/2263(INI)), §15.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² European Economic and Social Committee, “The protection of unaccompanied minors in Europe (own-initiative opinion)”, SOC/634-EESC-2020.

⁵³ *Ibid.* In its specific comments, the EESC further elaborates its vision on age assessments.

⁵⁴ EASO, “Practical Guide on age assessment: Second edition”, *EASO Practical Guide Series*, 2018, p. 60-63.

- *Fundamental Rights Agency (FRA) and European Commission*

Finally, according to the FRA and the European Commission, “[b]efore the age assessment procedure begins, the person who carries out a guardian’s tasks should be assigned to the individual claiming to be a child. ... The person should prepare the child for the assessment and should accompany and support the child throughout the entire process.”⁵⁵

3.4. Conclusion

Notwithstanding some diversity in the emphases made, the European and international guidance on age assessments of unaccompanied minors is consistent in emphasizing the following principles:

- The appointment of a *guardian* as soon as possible, and before the age assessment begins (e.g. CRC Committee, PACE, CoM, EESC, FRA/EC), and the application of the ‘presumption of minority’ principle (e.g. CRC Committee, EP, EESC, EASO).
- The use of medical examinations *as a last resort* (PACE), i.e. a medical examination is only necessary when no identity documents or other evidence can be produced (CRC Committee), “following general statements or other relevant indications” (APD), “when other age assessment methods have been exhausted” (EP), or only when non-medical methods leave doubt (EASO).
- Medical methods based on *bone analysis and dental analysis* are considered inaccurate (CRC Committee). Bone testing has been found to violate the Revised European Social Charter, because it is inappropriate and unreliable (ECSR). CoE Member States have been called upon to stop using bone testing (EESC), or only use it as a last resort (CHR; PACE).
- The need to take into account *documents* when assessing the age (e.g. CRC Committee, EESC, EASO: ‘any existing evidence’); official documentation confirming a person’s identity should be taken as true (CRC Committee).

4. The impact of the age assessment on one’s private life

Unaccompanied minors enjoy various additional substantive and procedural rights, reflecting the vulnerable situation in which they may find themselves. If, following an age assessment, a person is wrongly assessed to be above 18, they are unjustifiably excluded from the enjoyment of these rights. This includes, but is not limited to, the application of the best interests of the child principle. Therefore, this section non-exhaustively discusses the impact of age assessments on various dimensions of the private life of the person, as guaranteed by Article 8 ECHR. This includes residence procedures, psychological wellbeing of the person concerned and other life domains.

4.1. Impact on residence procedures

Unaccompanied minors benefit from additional rights during the asylum procedure. To start, when determining which country is responsible for examining the application for international protection, the Dublin III Regulation includes additional procedural guarantees for (unaccompanied) minors.⁵⁶ Moreover, the first criterion that must be applied to determine the responsible Member State, relates to the situation of unaccompanied minors with family members or relatives in the EU.⁵⁷ If Belgium is the responsible Member State, unaccompanied minors continue to enjoy special procedural guarantees, as is required by EU law.⁵⁸ For instance, the asylum interview is carried out by specialized protection officers,⁵⁹ who have been additionally trained with regard to interviewing children and who apply a particular interview method.⁶⁰ From a substantive perspective, child-specific acts of persecution will be considered.⁶¹ By contrast, when an applicant for international protection continues to claim to be a child, after having been deemed above 18 pursuant to an age assessment test, this usually negatively impacts the assessment of their credibility.⁶² Improper age assessments can also significantly affect the other available residence procedures. Indeed, in Belgium, unaccompanied minors benefit from a specific residence procedure, which aims at finding a “durable solution” in the

⁵⁵ FRA 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”, *Publications Office of the European Union*, p. 101.

⁵⁶ Article 6 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) (hereinafter: Dublin III Regulation).

⁵⁷ Article 8 Dublin III Regulation.

⁵⁸ E.g. Article 21 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)

⁵⁹ Article 2 Royal Decree of 11 July 2003 regulating the functioning and administration of justice for the Commissioner General for Refugees and Stateless Persons. See also Article 14.

⁶⁰ A. DE WILDE, “Niet-begeleide minderjarige vreemdelingen in de praktijk van het Commissariaat-generaal voor de Vluchtelingen en de Staatlozen” in E. Desmet, J. Verhellen, & S. Bouckaert (Eds.), *Rechten van niet-begeleide minderjarige vreemdelingen in België: die Keure*, p. 190-194.

⁶¹ Article 48/3 §2 (f) Law on the entry, residence and removal of aliens, *Moniteur Belge* 31 December 1980, 14.584 (hereinafter: Belgian Aliens Act).

⁶² See e.g. Council of Alien Law Litigation 10 October 2018, no. 210744; Council of Alien Law Litigation 23 February 2021, no. 249708.

best interests of the unaccompanied minor.⁶³ Accordingly, when an alleged unaccompanied minor is proclaimed an adult, he/she is automatically deprived from the possibility to obtain a residence permit in Belgium on the basis of the durable solution procedure, as well as from any other benefits related to this procedure.

Furthermore, specific rules for family reunification apply to unaccompanied minors - who by their very definition are separated from their family. As such, unaccompanied minor refugees⁶⁴ are entitled to family reunification with their parents in Belgium.⁶⁵ Although this right to family reunification ceases⁶⁶ to apply as soon as the unaccompanied minor turns 18⁶⁶ and its scope of application is limited (only parents), it offers an essential possibility for unaccompanied minor refugees to live with their parents in Belgium. Moreover, despite the fact that no similar right to family reunification exists for siblings, in practice the Immigration Office will grant the vast majority of humanitarian visa applications submitted by minor siblings of unaccompanied minors residing in Belgium.⁶⁷

Consequently, improper age assessment may have a serious impact on the unaccompanied persons involved and their chances to be reunited with family.

4.2. Psychological impact

A study of Hjern et al.⁶⁸ has documented how the age assessment process in Belgium strongly impacts the psychological wellbeing of unaccompanied minors. Young people need to invest in aspects that were never important in their lives before, such as (exact) age; they feel hopeless during the process because the only thing they can do is wait, but feel even more helpless when their declared age is contested and there is nothing they feel they can do about this decision (and its consequences on their daily life). These feelings of powerlessness are highly detrimental for children's mental health and development. For some, this process leads to feelings of anger and frustration, others lose all motivation in investing in their future in the new country. Overall, not being believed and feeling treated unfairly strongly threatens unaccompanied minors' feelings of belonging in the host country, challenging later integration processes in the host society.

4.3. Impact on other life domains

Furthermore, unaccompanied minors also benefit from several social and medical rights, due to their increased vulnerability and their age. Firstly, the Belgian authorities have the obligation to provide reception conditions which are adapted to the specific needs of unaccompanied minors.⁶⁹ Secondly, as explained in *Section 1*, an unaccompanied minor will always be accompanied by a legal guardian. The guardian represents the unaccompanied minor in all administrative or judicial proceedings, assists him in the different residence procedures, appoints a lawyer, takes care of him by ensuring he benefits all the rights he's entitled to (education, necessary medical and or/psychological care, appropriate reception, etc.), helps him trace his family members, builds a relationship of trust with him and manages his assets.⁷⁰ Moreover, all minors have a right to free legal assistance by a lawyer, independently of their residence status or family situation, whereas an adult will need to prove he does not have sufficient means.⁷¹ As soon as the person turns 18 or is assessed as not being a minor, the guardian's and lawyer's mission will end. Thirdly, unaccompanied minors have a right to medical insurance, which covers all their medical costs, provided a legal guardian has been appointed and the unaccompanied minor has been to school for three consecutive months.⁷² The right to medical insurance for adults is much more restricted, and depends on their residence status, employment or studies and family links.⁷³ Fourthly, unaccompanied minors have a right to social aid based solely on their status of

⁶³ Article 61/14, 2° Belgian Aliens Act.

⁶⁴ Or minors who have been accorded subsidiary protection status.

⁶⁵ Article 10, §1, °7 Belgian Aliens Act.

⁶⁶ However, minors who reach the age of 18 during the asylum procedure retain the right to family reunification, provided that the application is made within a reasonable time, in principle within three months of the date on which the minor concerned was recognized as a refugee (CJEU 12 April 2018, nr. C-550/16, A and S/Staatssecretaris van Veiligheid en Justitie).

⁶⁷ See: <<https://www.agii.be/thema/vreemdelingenrecht-internationaal-privaatrecht/verblijfsrecht-uitwijzing-reizen/humanitair-visum#:~:text=Er%20is%20geen%20maximum%20termijn,begeleide%20minderjarige%20met%20internationale%20bescherming>>.

⁶⁸ A. HIERN, H. ASCHER, M. VERVLIEET and I. DERLUYN, "Identification: age and identity assessment" in J. BHABHA, J. KANICS and D. SENOVILLA HERNÁNDEZ (eds.), *Research Handbook on Migration and Childhood*, Cheltenham/ Northampton, Edwar Elgar Publishing, 2018.

⁶⁹ Article 36 Act of 12 January 2007 on the reception of asylum seekers and certain other categories of foreigners, *Moniteur Belge* 7 May 2007, 24.027 and Article 7 Royal Ordinance of 9 April 2007 on the system and working rules on centers for the observation and orientation for unaccompanied minors, *Moniteur Belge* 7 May 2007, 24.043.

⁷⁰ Article 9-12 Guardianship Act.

⁷¹ Article 508/13/1 Civil Procedure Code of 10 Octobre 1986, *Moniteur Belge* 31 October 1986, 11.360.

⁷² Article 32, 22° Act of 14 July 1994 on the obligatory insurance for medical care and allowances, *Moniteur Belge* 27 August 1994, 21.524 (hereinafter: Medical Insurance Act).

⁷³ Article 32, 124, 128quater and 128quinquies Medical Insurance Act.

unaccompanied minor, whereas adults only have this right if they have legal residence in Belgium.⁷⁴ Finally, unaccompanied minors of course also have a right to education, independently of their residence status.⁷⁵ Consequently, minors who have incorrectly been assessed as being older than 18 lose an important number of social and medical benefits.

5. The State's obligations under the ECHR regarding age assessment

For the reasons developed above (see *Sections 2 and 3*), the Court is respectfully invited to recognize that an exclusive focus on *medical* age testing is incompatible with the State's obligations under the right to respect for private life (Article 8 ECHR), alone or in conjunction with the prohibition of discrimination (Article 14 ECHR). It is submitted that such position would be consistent with the Court's prior case law under these provisions.

5.1. Article 8 ECHR

The Court has repeatedly stated that unaccompanied minors – because of their young age and their migration status – must be considered as falling within the category of the most vulnerable persons in society and that for this reason the State must take adequate measures to provide them with protection and care as part of their positive obligations under the Convention.⁷⁶ The specific protection measures for unaccompanied minors (e.g. guardianship arrangements) introduced by States, including Belgium, can be considered as a means to discharge their special protective obligations vis-à-vis unaccompanied minors. Given the crucial importance of age assessment for a migrant to be considered as entitled to protection as an unaccompanied minor, it is important that such assessment takes place in a child-sensitive and human rights-based manner.⁷⁷

Under the Convention, an age assessment can be considered as interfering with Article 8 ECHR in light of its impact on the private life of the person concerned (see *Section 4*).⁷⁸ The intrusive manner in which age assessments are often conducted may in itself interfere with the right to respect for private life, which also encompasses the protection of a person's physical integrity.⁷⁹ According to the Court's case law, any compulsory medical intervention, even if it is of minor importance, must be considered as an interference with the right to respect for private life.⁸⁰ It is submitted that it is not substantial whether the person concerned has formally consented to such medical intervention, since such consent is not necessarily given freely, taking into account the pressure of the circumstances in which the persons concerned find themselves.⁸¹

Since age assessment procedures fall within the scope of Article 8 ECHR, they must comply with this provision's implicit procedural requirements. According to the Court's case law, "the decision-making process leading to measures of interference" must be "fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."⁸² According to the Court, "[t]he extent of the State's margin of appreciation thus depends on the quality of the decision-making process."⁸³

This implies, firstly, that decisions falling within the scope of Article 8 must be based on "sufficiently reliable and conclusive evidence".⁸⁴ Also the EU Court of Justice has held that it is only suitable to seek expert evidence in migration matters "if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community".⁸⁵ According to the EU Court of Justice, the proportionality of the interference with the right to respect for private life, presented by the expert evidence, must be assessed in light of "the benefit that it may possibly represent for the assessment of the [relevant] facts and circumstances."⁸⁶ In other words, not only the decision reached, but also the method used itself may be considered disproportionate where the reliability of such

⁷⁴ Article 57 Organic Act of 8 July 1976 on Public Centers for General Welfare. Although there is no legal framework for this specific right for unaccompanied minors, this follows from the jurisprudence (see Judgments of the Labour Court of Ghent of 2 September 2013, the Labour Tribunal of Brussels of 25 July 2013, referred to in the judgment of the Labor Tribunal of Ghent of 24 January 2014, at p. 11, available at https://www.agii.be/sites/default/files/20140124_arbrb_gent_0.pdf). This jurisprudence has been confirmed by the competent Federal Authority on social integration, <https://www.mi-is.be/nl/fag/kan-eeen-minderjarige-die-door-de-dienst-voogdij-van-de-fod-justitie-geidentificeerd-als-niet>).

⁷⁵ This is a fundamental right, recognized in the Belgian Constitution (Article 24, §3, 1st Alinea).

⁷⁶ E.g.: ECtHR 12 October 2006, nr. 13178/03, Mubilanzila Mayeka and Kaniki Mitunga/Belgium, §55.

⁷⁷ Council of Europe Children's Rights Division, "Age Assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration", *Council of Europe Publishing*, 2017, p. 8.

⁷⁸ FRA, "Handbook on European law relating to the rights of the child", *Publications Office of the European Union*, 2015, p. 167.

⁷⁹ E.g. ECtHR (Gr. Ch.) 8 April 2021, ns. 47621/13 and 5 others, Vavříčka and Others/Czech Republic, §261.

⁸⁰ E.g. ECtHR (inadm.) 5 January 2006, nr. 32352/02, Schmidt/Germany.

⁸¹ See *mutatis mutandis*: CJEU 25 January 2018, nr. C/473/16, F./Bevándorlási és Állampolgársági Hivatal, §53.

⁸² E.g. ECtHR (Gr. Ch.) 18 January 2001, nr. 27238/95, Chapman/United Kingdom, §92.

⁸³ E.g. ECtHR 27 March 2008, nr. 44009/05, Shtukaturov/Russia, §89.

⁸⁴ See *mutatis mutandis*: ECtHR 22 November 2012, nr. 23419/07, Sýkora/Czech Republic, §103.

⁸⁵ CJEU 25 January 2018, nr. C/473/16, F./Bevándorlási és Állampolgársági Hivatal, §58.

⁸⁶ *Ibid.*, §59.

method is insufficiently established.⁸⁷ **It is submitted that the results from skeletal and dental age assessment cannot in themselves be considered as such “sufficiently reliable and conclusive evidence”, in light of the scientific evidence available regarding the considerable inaccuracy of these methods (see Section 2). In any event, other probative elements (e.g. documents) must always be taken into account.**

Secondly, any erroneous age assessment may result in a failure to provide unaccompanied minors with the requisite protection and care they are entitled to under the Convention on account of their particularly vulnerable situation. Therefore, if there is a reason to assume that a person whose age is unknown may be a child, the principle of presumption of minority should apply which demands that such person must be given the benefit of the doubt.⁸⁸ The Court has already recognized that a similar benefit of the doubt must apply with regard to asylum seekers – owing to the special situation in which they often find themselves – “when it comes to assessing the credibility of their statements and the documents submitted in support thereof”.⁸⁹ It is submitted that migrants claiming to be a child also find themselves in a “special situation” which is comparable to the situation of asylum seekers seeking to substantiate their asylum application. **The Court is therefore invited to oblige relevant domestic authorities to give the benefit of the doubt to migrants claiming to be a minor.**

Thirdly, **age assessment procedures must be conducted in a manner which is in accordance with the best interests of the child.** The Court has repeatedly emphasized that “in all decisions concerning children, their best interests must be paramount.”⁹⁰ It is submitted that, when interpreting the scope of Article 8’s procedural obligations from the viewpoint of the best interests principle, the Court should draw inspiration from the work of the UN Committee on the Rights of the Child, which has emphasized the need for fair, reliable and unintrusive age assessment methods. **More generally, the Court is invited to take into account the consensus among international human rights bodies on the need to only use medical examinations as a last resort (in particular with regards to bone and dental analysis on account of their unreliability) and to also take into account documents (see Section 3).**

5.2. Article 14

Article 14 ECHR protects against discrimination in the enjoyment of other Convention rights. It not only protects against direct discrimination – i.e. ‘treating differently, without an objective and reasonable justification, persons in relevantly similar situations’⁹¹ – but also against indirect discrimination. According to the Court’s case law, indirect discrimination can be considered as a situation in which a general policy or measure has “disproportionately prejudicial effects on a particular group” – even in the absence of discriminatory intent – if such policy or measure has no “objective and reasonable” justification.⁹² In *Biao v. Denmark*, the Court held that, where such policy or measure has disproportional prejudicial effects on persons belonging to a particular ethnic group, “it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 of the Convention taken in conjunction with Article 8.”⁹³

As demonstrated by the case of *D.H. and Others v. the Czech Republic*, this is particularly relevant where there is a risk that testing methods used to determine one’s access to the enjoyment of Convention rights (in casu, access to adequate education) may be ethnically biased. According to the Court, there is a need for procedural safeguards that ensure that in deciding on such access, the particularities and special characteristics of the group concerned (in casu, Roma children) are adequately taken into account.⁹⁴ Where there is a danger that the testing methods are biased, and the results are not analyzed in light of the particularities and special characteristics of the persons concerned, “the tests in question cannot serve as justification for the impugned difference in treatment”.⁹⁵ Mutatis mutandis, where age assessment methods are used to determine whether a person is a minor for the purpose of granting protection status as an unaccompanied minor, due account must be taken of the risk that certain groups of migrants may, on the basis of their ethnic origin (e.g., non-White), more likely be inaccurately assessed as being adult (see Section 2).

The Court is respectfully invited to recognize that an exclusive focus on medical testing does not comply with the requirement under Article 14 ECHR that safeguards must be in place in order to ensure that the particularities and special characteristics of migrants on account of their ethnic origin are adequately taken into account.

⁸⁷ *A contrario*, the higher the reliability of the methods used, the more likely it is to pass the proportionality hurdle, see *mutatis mutandis* ECtHR 29 January 2019, nr. 62257/15, Mifsud/Malta, §70, regarding the use of DNA testing in the context of a paternity dispute.

⁸⁸ Council of Europe Children’s Rights Division, *supra* note 79, p. 11.

⁸⁹ E.g.: ECtHR 20 July 2010, nr. 23505/09, N/Sweden, §53.

⁹⁰ E.g.: ECtHR (Gr. Ch.) 6 July 2010, nr. 41615/07, Neulinger and Shuruk/Switzerland, §135.

⁹¹ ECtHR (Gr. Ch.) 13 November 2007, nr. 57325/00, D.H. and Others/Czech Republic, §175.

⁹² ECtHR (Gr. Ch.) 24 May 2016, nr. 38590/10, Biao/Denmark, §91.

⁹³ *Ibid.*, §114.

⁹⁴ ECtHR (Gr. Ch.) 13 November 2007, nr. 57325/00, D.H. and Others/Czech Republic, §§201 and 207.

⁹⁵ *Ibid.*, §201.