

Refugee & Migrant Children's Consortium



Parliamentary Briefing: Statutory Instruments allowing for the use of scientific methods to assess age.

16th October 2023

Introduction

This briefing from the Refugee Council and the Royal College of Paediatrics and Child Health outlines our concerns with the Government's intention to authorise the use of biological methods, including X-ray and MRI scanning, in assessing the age of children seeking asylum.

This briefing is supported by the Refugee and Migrant Children Consortium (RMCC),¹ a coalition of over 80 organisations working together to promote and protect the rights of young refugees and migrants.

This briefing includes a summary of the policy background and implications of two Statutory Instruments (SIs) laid by the Ministry of Justice and Home Office in September and our concerns on the use of biological methods to determine age.

We hope you will be able to voice these concerns when the SIs are debated. **If you have any questions on the contents of this briefing please contact Bruce Warwick, Public Affairs and Campaigns Manager (RCPH). E: Bruce.Warwick@rcpch.ac.uk and Hayden Banks, Senior Public Affairs Advisor (Refugee Council): E: hayden.banks@refugeecouncil.org.uk**

Background to the Statutory Instruments

- Part 4 of the Nationality and Borders Act (NABA) 2022² brought age assessments within the immigration statutory framework. Section 52³ allows the Secretary of State to make regulations specifying biological methods that may be used to determine a person's age, however, she has to seek scientific advice before deciding on the method(s) that is appropriate.

¹ RMCC website: <https://refugeechildrenconsortium.org.uk/>

² Part 4 of the Nationality and Borders Act (NABA) 2022, available at: <https://www.legislation.gov.uk/ukpga/2022/36/part/4/enacted>

³ Section 55 NABA 2022, available at: <https://www.legislation.gov.uk/ukpga/2022/36/section/52/enacted>

- Section 52(7)⁴ of the NABA places a duty on the decision-maker to make a negative credibility finding when a person does not consent to the use of biological methods.
- Significantly, Section 58(2) of the Illegal Migration Act 2023 (IMA)⁵ allows for an automatic assumption of adulthood if the person refuses to consent to a scientific method to determine their age. This will mean many children will wrongly be automatically declared as adults and is contrary to the advice given by the Home Office's own Age Estimation Science Advisory Committee (AESAC) in their recent report.⁶
- The Government laid two draft SIs on 14th September 2023 which, subject to parliamentary approval, would authorise the use of X-rays and MRIs in scientific age assessments.
 - The Ministry of Justice (MoJ) laid a draft SI, *the Justification Decision (Scientific Age Imaging) Regulations 2023*,⁷ to authorise the new use of X-rays. Such justification and approval are requested under the Justification of Practices Involving Ionising Radiation Regulations 2004.⁸
 - In order to take forward the powers under Section 52 NABA 2022, the Home Office (HO) laid a draft SI, *the Immigration (Age Assessments) Regulations 2023*.⁹
- The roll-out of this new framework is expected in 2024, however, the Government still has not explained either who will conduct these medical assessments or what impact the unnecessary access to X-ray and MRI equipment is going to have on the NHS and patients who are waiting for urgent and necessary medical treatments.
- These SIs will be debated by MPs at the Statutory Instrument Committee. **Considering the adverse impact that the use of biological methods is going to have on children as well as the lack of scientific evidence to prove that these methods can provide the age of a person with certainty, we call on parliamentarians to oppose the implementation of these regulations.**

Key concerns with Scientific Age Assessments

The following key concerns surrounding the use of scientific age assessment are yet to be addressed by the Government:

- **Merton process** – there has been no evidence provided that biological methods deliver greater certainty on age determination than the existing Merton process.¹⁰ Indeed, the Home Office's own

⁴ *Ibid.*

⁵ Section 58 IMA 2023, available at: <https://www.legislation.gov.uk/ukpga/2023/37/crossheading/age-assessments-etc/enacted>

⁶ Report available at: <https://www.gov.uk/government/publications/methods-to-assess-the-age-of-unaccompanied-asylum-seeking-children>

⁷ The Justification Decision (Scientific Age Imaging) Regulations 2023, available at: <https://www.legislation.gov.uk/ukdsi/2023/9780348251647>

⁸ The Justification of Practices Involving Ionising Radiation Regulations 2004, available at: <https://www.legislation.gov.uk/uksi/2004/1769>

⁹ The Immigration (Age Assessments) Regulations 2023, available at: <https://www.legislation.gov.uk/ukdsi/2023/9780348251593>

¹⁰ Metron assessment is a type of age assessment which is conducted by a social worker who has the necessary training and experience in this area. It comprises a holistic analysis of a purported child's behaviour, development, their history in their home country as well as taking into account any trauma and child's unique experiences.

advisory committee, AESAC, concluded that *if biological age assessment is implemented it should be used to assess whether the age claimed by UASC is possible*¹¹ and only be used as part of a wider social work assessment. Neither has there been any guidance on what will happen when the process of determining age under Merton assessment and under a biological method arrives at different conclusions. It has also not been explained what shortfalls have been identified in the Merton process and how it could be improved. The leading expert body in this area, the British Association of Social Workers (BASW), stated their strong opposition to the use of biological methods to determine age, stressing that:

*(...) the adoption of biological methods violate long-standing rights in relation to informed medical consent, offer no real advantages in assessing age and produce a procedural quagmire of unallocated responsibilities. In future, failure to comply with a biological assessment could automatically lead to a determination of being aged 18 or over and detention and deportation.*¹²

- **Capacity and consent** – there has been no information provided on addressing a child’s capacity to understand and agree to a medical method of assessing their age and what will happen when a child does not have capacity. If a child seeking asylum is not looked after, and so has no legal guardian, and does not have the capacity to consent it is unclear who would be able to do so on their behalf. Additionally, for consent to be valid, it must not be given under duress. Provisions which will allow the refusal of biological age assessment to negatively impact a child’s asylum claim¹³ are likely to undermine this important principle in medical consent.
 - Indeed, the AESAC ’s report specifies in its recommendations that *no automatic assumptions or consequences should result from refusal to consent*.¹⁴ The Government must explain why it is departing from the AESAC recommendations, echoed by leading medical bodies, e.g. the Royal College of Paediatrics and Child Health (RCPCH), who stated the following:

*(...) informed consent is fundamental to all medical practice, and by definition must be free from duress. This Government policy enforces a slide away from that core principle as it places such significant consequences on the refusal of biological age assessments. This directly opposes both the principles of informed consent and the recommendations set out by the independent body commissioned to look at the policy - the Age Estimation Scientific Advisory Committee (AESAC), with regard to assumptions or consequences stemming from refusal to consent.*¹⁵

- Moreover, there is an agreement amongst professional bodies, that age assessments are a function of the child protection and safeguarding systems. Indeed, UNICEF’s note on age

¹¹ *Op.cit.*

¹² Full BASW statement is available at: <https://www.basw.co.uk/media/news/2023/jul/basw-statement-biological-methods-age-assessment>

¹³ The key issue around the negative impact is associated with a negative credibility finding as well as a risk of placing a child in an adult asylum process, where there are not appropriate safeguards in place.

¹⁴ *Op.cit.*, Recommendation 11, page 7 of the report.

¹⁵ Full RCPCH statement is available at: <https://www.rcpch.ac.uk/news-events/news/rcpch-responds-uk-government-plans-authorise-use-x-rays-age-assessments-children>

assessments in Standard 11 stipulates that age assessments *should only be undertaken by independent and appropriately skilled practitioners*¹⁶ and there will exist a margin of error when these determinations are made, nevertheless, a child should be given a benefit of a doubt consistent with the principle of the best interest. It is difficult to see how the introduction of scientific methods where refusal to undergo the procedure equates to negative credibility finding could be seen as compliant with duties to promote and safeguard the welfare of children.

- **Ethical concerns** – leading medical and professional bodies expressed their concerns about using medical methods for examinations that are not medically necessary and only serve immigration control and enforcement purposes. Such a process will expose children to unnecessary stress and harmful medical examinations and the risk associated with exposure to radiation. The use of biological methods to assess age has long been the subject of debate and professional medical bodies have been unequivocal in their rejection of the use of dental X-rays, bone age and genital examination as being “extremely imprecise” as methods for assessing age. The British Dental Association (BDA) has voiced its opposition to the use of dental x-rays stressing they are inaccurate and unethical.¹⁷ These concerns were echoed by the British Medical Association (BMA)¹⁸, RCPCH,¹⁹ and BASW.²⁰
- **Safeguarding** – it is not clear whether any safeguarding processes are going to be put in place before, during and after medical examination to minimise distress and ensure safeguarding from harm. This is particularly important for this cohort of children, who may have faced significant trauma. It is also not clear whether consideration of the use of biological methods has been made in a wider context of safeguarding and promoting the welfare of children in line with our domestic and international obligations.
- **Age assessments at the port of entry** – based on the wealth of evidence collected by NGOs and LAs, the root of the problem lies with assessments conducted by the Border Force officials at the port of entry. The Government does not publish data on the number of children *incorrectly treated as adults by these officials and subsequently taken into care when referred to a local authority*. This is concerning because the resources are not concentrated in the areas where problems originate. Without understanding the scale of the problem it is impossible to develop a robust policy in this area and scrutinise its impact.
- **Impact on health services** – it is not clear who will conduct medical examinations, how requests are going to be raised, and who will bear the cost. There are also wider issues to consider like the impact on the health service when we are already seeing delays in offering X-ray appointments for patients.
- **International comparisons** - The Government has referred to age assessment practices used by other countries in Europe, however, they failed to mention that an increasing number of legal decisions in

¹⁷ Full BDA statement is available at: <https://bda.org/advice/Documents/BDA-briefing-dental-age-checks-and-Part-4-Nationality-and-Borders-Bill-March-2022.pdf>

¹⁸ Full BMA statement is available at: <https://www.bma.org.uk/media/5434/bma-briefing-nationality-and-borders-bill-consideration-of-amendments-mar2022.pdf>

¹⁹ *Op.cit.*

²⁰ *Op.cit.*

Europe have held that scientific methodology is not sufficiently sound to be relied upon.²¹ The Council of Europe (CoE)²² has also cast doubt on the accuracy of scientific methods in determining age.

Case study

Amir*²³ is from Afghanistan and arrived in the UK with a copy of his Taskira, a common form of Afghan ID, which showed his age as 16. However, this was not accepted by officials, and he was recorded as 22 years old. He objected but was told not to worry, this could be corrected at a later date, and was told it would not make a difference to his treatment.

He was then transferred to adult accommodation, where he found life very difficult. He was scared of the older people and felt uncomfortable around them, especially when they were drinking.

Amir* was visited by the Refugee Council in his hotel and referred to the Local Authority, who agreed to take him into care. He has now had a Merton-compliant age assessment and was found to be 16.

Amir* explained, in his own words, the negative impact that incorrect age determination by the Home Office officials had on him and the risks he faced because there were no safeguards in place to protect him as a child in an adult asylum system.

“When we came here, they let us rest, then they called us one by one for an interview. After two or three hours, they called us again, with an interpreter on the laptop. They asked my name, they asked my age. I said ‘I am 16’, I gave them my Afghanistan date of birth. They converted it wrongly. They wrote it wrong. I had papers and everything.

They just said ‘no, you are not this age.’ They gave me no reason, they just said ‘no you are 22.’ Two or three times I said ‘no’, I said ‘if you don’t believe me, I am 16, I can give you my national ID’. They said ‘this is not your ID.’

The interpreter told me that in this country, they will treat you the same, if you are 16 or 22. I don’t know about this country, they said don’t worry about that, you will correct your age after. I think I will go to the hotel, and then correct this.

I was sad because of the answer from the Home Office. It wasn’t fair. I struggled a lot. There were a lot of people at the hotel and I regretted coming here, but I didn’t have another choice, because my sister lives in the UK. Everyone was trying to get in touch with Migrant Help. They weren’t very helpful.

I looked at the people in the hotel, they were all adults. There were up to 10 beds in one room, I cried every day, every second, I can’t explain. There was one man, I think he was drunk, he threw my bag, and

²¹ ECRE, *Age Assessments in Europe*. Available at: <https://ecre.org/wp-content/uploads/2023/01/Legal-Note-13-FINAL.pdf>

²² CoE, *Age assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration*. Available at: <https://rm.coe.int/age-assessment-council-of-europe-member-states-policies-procedures-and/168074b723>.

²³ The name has been changed to ensure his anonymity.

said get out of my room! For a week there was no bed for me. Lots of them were drinking and doing other things. I don't want other children to experience this.

I heard this country was kind. I didn't expect them to be so unfair. Why did they give me the wrong age? I'm still shocked. It's not just me, it's also happening to lots of other people, even younger than me. It has had a bad effect. Mentally it was difficult to cope with, I suffered.

When I left Afghanistan my father told me to never give up. At my young age I have seen and experienced a lot of suffering. Now I'm studying ESOL. I would like to become a police officer. Young people come here because there is no safety in their countries. If they are treated well, they can work and become useful members of society. I don't want them to suffer as I did. Despite the bad experience, I'm thankful to the British people for giving me safety."