

The Nationality and Borders Bill

The Commissioner's position on age assessment proposals

8 February 2022



Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government.

Introduction

We are of the view that the age assessment components within the Nationality and Borders Bill ('the Bill') are incompatible with the rights of children contained in the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC).

Use of scientific methods

In May 2021, the Children's Commissioners for Northern Ireland, Scotland and Wales jointly responded to a consultation on the Home Office's Immigration Plan.¹ At the time, we noted that the Government's proposals constituted a major shift in practice. In particular, we set out our concerns relating to the proposal to use "new scientific methods" to assess age "swiftly".

The Bill includes multiple references to the use of 'scientific methods' as a routine component of age assessment procedures. It would also grant exceptional powers to the Secretary of State in their determination.² This would mark a significant deviation from current policy, which does not recommend the use of medical examination for the sole purposes of determining the age of a child within the UK.

There are no tried and tested medical assessment models that we are aware of that would be able to perform the sort of assessment being suggested in the Bill. The fact that there is no detail beyond what is contained in the Immigration Plan or the Explanatory Notes accompanying the Bill only serves to confirm this.

We would be very concerned at the introduction of invasive or intrusive physical or medical examinations for children and young people, particularly as there is no clear consensus or reliable methodology for this. Any medical assessments undertaken on children directly engage child's rights to privacy and bodily integrity under Article 8 of

¹ <https://www.cypcs.org.uk/resources/consultation-response-home-office-immigration-plan/>

² See Clause 51, HL Bill 82 (as brought from the Commons). Available at: <https://bills.parliament.uk/publications/44307/documents/1132>

the ECHR. The potential for re-traumatisation throughout the age assessment process further risks violation of rights to recovery under the UNCRC (Article 29).

Current ‘scientific methods’ adopted in other nations are widely condemned by human rights bodies as insufficiently accurate.³ Notably, there was a Swedish case in 2019 involving analysis of wisdom teeth and knee joints, leading to conflicting conclusions on the young person’s likely age. On appeal, with further examination and on production of some personal documents and a second medical opinion, it was determined that the young person was a minor. This case highlighted the controversial and mixed nature of the various medical approaches, and the unnecessary use of scans when, as in this case, a variety of social evidence was able to establish age more reliably.⁴ X rays of joints are used in some countries but there are children’s rights issues around exposure to radiation unnecessarily, as well as similar concerns to the Sweden case about the uncertain nature of any such results.

In General Comment 24, the UN Committee on the Rights of the Child say that in situations where there is doubt as to a child’s age: “*States should refrain from using only medical methods based on, inter alia, bone and dental analysis, which is often inaccurate, due to wide margins of error, and can also be traumatic. The least invasive method of assessment should be applied. In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt.*”

The Bill also implies the possibility of using genetic material for the purposes of age assessment. Epigenetic methods have yet to be used widely for the purposes of age assessment and further engage the child’s rights to privacy as they are not clearly and fully covered by existing data protection legislation. The novelty of these methods raises concerns about their accuracy, particularly when further research is needed into the impacts of trauma on their results.

Age assessment practices within the UK must continue to conform with international human rights standards, and with Merton standards of assessment, as defined in case law relating to *R(B) v Merton*⁵. This approach requires a multitude of factors to be accounted for during age assessment procedures, with emphasis placed on the role of social work and psycho-social evaluation in determining age. This approach does not recommend the use of ‘scientific methods.’ The proposed centralisation of age assessment procedures risks moving away from a Merton compliant approach if it does not continue to consult individuals who are directly involved in the child’s life as part of routine practice. This proposal would stand in contradiction of current Home Office policy regarding age assessments, without providing evidence of increased accuracy or due consideration to the potential for re-traumatisation.

³ UNHCR, Updated Observations on the Nationality and Borders Bill, as amended (January 2022). Available here: <https://www.unhcr.org/61e7f9b44>

⁴ See also Mostad P., and Tamsen, F., Error rates for unvalidated medical age assessment procedures, *International Journal of Legal Medicine* 133(2), 2019, pp. 613–623, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6373353/>

⁵ [2003] EWHC 1689 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2003/1689.html>

In Scotland, national Age Assessment Practice Guidance was developed as a requirement of the implementation of the Trafficking and Exploitation (Scotland) Act 2015. This is grounded in a human rights based approach and builds on the existing caselaw, including *Merton* and places responsibility for age assessment with the local authority. We note the involvement of the Home Office in the development of this guidance.

Presumption of minor age

Current Home Office guidance indicates the need to treat someone as a child unless they very strongly appear to be above 25. The Bill would reduce the age threshold from 25 to 18. The effect of this proposal would be that more individuals would be subject to age assessment. We are concerned that this will lead to an increase in the number of unaccompanied child refugees that are incorrectly classified as adults and denied support to which they are entitled.

Most unaccompanied child refugees arriving in Europe are between the ages of 15 and 17 and have experienced significant trauma prior to their arrival. This Bill fails to consider external factors which may impact a child's physical presentation upon arrival in the UK, increasing the risks of incorrectly classifying a child as an adult. The UNHCR has expressed concerns that children who are assessed as adults under these circumstances may not have sufficient capacity and support to appeal this decision, or awareness of their right to request an age assessment be completed.⁶

Damage to credibility

Under the Bill, non-compliance with the 'the 'scientific method' element of age assessment procedures will create a presumption of damage to the individual's credibility.⁷ We are concerned that this is a potential breach of the protection against discrimination in the ECHR (Article 14 in conjunction with Article 2, the right to life). A decision not to undergo medical assessments which interfere with the child's ECHR Article 8 rights to privacy and bodily integrity, and which may pose a physical and psychological risk of harm, should remain at the discretion of the individual without prejudicing final verdicts of age assessment. Any use of 'scientific methods' should only ever be considered as one part of a multidisciplinary, holistic assessment, and where it is in line with the child's human rights.

Social work and devolution

Work in this area largely falls into social work practice, and this *is* a devolved area. Social workers may require to determine a child's age for a number of reasons not directly related to immigration. In Wales, social work practice is underpinned in legislation by a statutory duty for public bodies to have due regard to the United Nations Convention on the Rights of the Child (UNCRC) in exercising their functions. Whilst it has not yet received Royal Assent, the UNCRC (Incorporation) (Scotland) Bill will introduce similar requirements for public authorities in their everyday practice

⁶ UNHCR, Observations on the Nationality and Borders Bill, Bill 141 (22 October 2021). Available at: <https://www.unhcr.org/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021>

⁷ Clause 51(7), HL Bill 82 (as brought from the Commons)

which will include social work and housing. We are disappointed that the Human Rights Memorandum only provides a very brief examination of the impact of the Bill on UNCRC rights, and does not explain how children's rights have been considered in developing the proposals. In addition, we would expect to see details as to how the context and individual legal positions in the devolved nations will be involved and taken into consideration in developing proposals further.