

ILPA Comments on Assessing Age Asylum Process Guidance version 5 of 5 November 2009

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups. ILPA's research includes extensive research on age assessment, resulting in the publication *When is a child not a child*, the Advisory Group for which included a Home Office representative.

The Assessment of Age: General

Questions of disputes over the ages of children under immigration control continue to cause extensive difficulties in the asylum, immigration, criminal justice and local authority systems.

Current age assessment processes are inadequate as detailed in ILPA's Report *When is A Child Not a Child?*¹ and acknowledged by the UN Committee on the Rights of the Child in its Conclusions². If a child is not recognised as a child they will not be recognised as a person entitled to the protection of the UN Convention on the Rights of the Child or the provisions of national law.

Age assessment is not an exact science, as the senior judiciary have repeatedly acknowledged, including in recent judgments such as that of the Supreme Court in the case of *R(A) v Croydon; R(M) v Lambeth* [2009] UKSC 8 and as is set out in the December 2009 guidance on assessing age from the Royal College of Paediatrics and Child Health

“Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted...”

The current Process Guidance acknowledges this at part 2.1. ILPA members continue to see cases where all the evidence is compatible with a child's being a child, as they say that they are but evidence other than the testimony of the child is also compatible with their being over 18. These are treated as age disputes. They should not be. ILPA is opposed to the UK Border Agency's practice of treating some applicants whose age is disputed differently from others, on the basis that their appearance “strongly suggests” they are significantly over 18. The application of this

¹ May 2007

² Op. cit. paragraph 71(1)(c).

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test to date has failed to protect children. The process of dispute and its contentious resolution is harmful to children. The first and most essential step is to confine age disputes to a minimum of cases, not have it as the first thing on the agenda when a child presents to immigration control. All too often the dispute appears to arise as a result of UK Border Agency officials mere assessment of a child's physical appearance. These officials are not qualified to arrive at such decisions. There is also grave concern at local authority practice in this area. We recall the Recommendation of the UN Committee on the Rights of the Child that the UK should give the benefit of the doubt in age-disputed cases of unaccompanied minors seeking asylum, and seek experts' guidance on how to determine age.³

The Government's age assessment working group met for the last time in August 2008. To date we are aware neither of the outcome of the Working Group nor the Government's plans in this area. Groups such as the Child Trafficking Advice and Information Line Advisory Group, which includes UK Border Agency representatives, not least because the line is part-funded by the Home Office, have repeatedly⁴ sought updates and merely been told that work is continuing.

One subject deliberated by the Government's working group was the question of X-rays as a tool for assessing age. ILPA considers that the use of X-rays for non-therapeutic purposes is unlawful and draw your attention to the Opinion of then Nicholas Blake QC (now the Hon Mr Justice Blake) and Charlotte Kilroy that:

*"No individual, and in particular no child, can lawfully be 'subjected' to a medical examination. This would be an assault."*⁵

Against this backdrop it is essential that guidance is of the highest standard and accessible to UK Border Agency staff, including in its being easy to read and use. We suggest that it is important that the guidance draw on relevant parts of the s.55 guidance rather than simply cross-refer to them. Although it may not always be the case, it should be assumed that the case owner is reading the age assessment guidance without cross-referring to other documents.

Paragraph by paragraph comments (following the numbering in the instruction)

Introduction

We suggest that rather than start from the position of looking at cases where there is 'a lack of definitive documentary evidence' the instruction start from the question of determining age and address documentary evidence along with other considerations. It would be useful to make reference to the Royal College of Paediatrics and Child Health guidelines on the assessment of age⁶ here and throughout the guidance.

³ UN Committee On The Rights Of The Child, Forty-Ninth Session, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4, 3 October 2008 at www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf at paragraph 71.

⁴ See minutes *passim*.

⁵ 7 November 2007

⁶ December 2009

1.1 Staff in the Asylum Screening Unit and frontline staff in enforcement may come across people in situations where those people would benefit from special protection at the outset if identified as a child. These staff may have no role to play in securing an age assessment but need guidance on what to do if it is claimed that the person with whom they are dealing is a child, or to assess what evidence is available to them to be aware that a person before them who is claiming to be an adult may be a child. Similarly with, for example, Home Office Presenting Officers. See e.g. section 2.3 which states that the Agency has had regard to the need to safeguard and promote the welfare of children in cases where the determination is that the evidence 'strongly suggests' that the person is over 18 because 'UKBA has had regard to the need to safeguard and promote the welfare of children when making the initial age assessment at the screening stage, giving the applicant the benefit of the doubt'. The guidance does not provide information that would allow us to be confident that this has indeed been done.

Background

2.1/2.2 The UK Border Agency's current position: to divide those who say that they are children into children, adults and the doubtful, using the 'strongly suggests' test is reasonable on paper but does not in ILPA members' experience always work in practice. Persons who are later found to be children, including when documentary evidence such as original birth certificates are produced and accepted by the Agency, have been put in the category of those whose physical/appearance /demeanor 'strongly suggests' that they are over 18 years old. Such children may have been subject to detention in immigration removal centres and other treatment as adults. Statistics produced to the detention users group for the meeting on 26 October 2009 illustrate that mistakes are made.

If contrary to the position we take the distinction is preferred then, given that it has proved inadequate in the past, the wording in this paragraph must be changed and strengthened.

The tenor of these paragraphs is not always helpful. For example 2.1 second paragraph 'be treated as is (typo for 'if) they were children' could usefully be rewritten 'should be treated as children'. Such an approach would better promote the safeguarding and the promotion of the welfare of the children affected.

The statement of the child is evidence of their age and, as detailed above, the first thing that needs to happen is that the Agency desist from launching into an age assessment where there is no reason to dispute the age that the child says s/he is. Given that age assessment is not an exact science there is no point in putting someone through the distressing process of age assessment where this will ultimately be inconclusive. There are many cases in which the appropriate response to the applicant is to accept that they are a child, and this should be highlighted in this part of the guidance.

2.2 Caseowners should review decisions to treat people as adults if they receive evidence about this. Qualifying the statement with reference to 'significant additional

evidence' is unhelpful and does not describe what happens when new evidence is received.

The wording 'safeguards that have been put in place to ensure that the application is processed fairly until that happens' is unfortunate as it may give the impression that the application is not processed fairly thereafter.

2.3 This section is grudging in tone. Further, in large part the section is no more than a statement that the process guidance is compliant with the section 55 duty. Either such an assertion is correct or it is not, and making the assertion cannot make it true. However, such statements give the sense that the audience for the guidance (i.e. those UK Border Agency staff expected to implement the guidance) are encouraged to think that the guidance has taken care of their need to have regard to the section 55 duty in each individual case. Similar statements are made elsewhere in this guidance, and these should be removed. It is important that descriptions of the new duty play their own part in safeguarding and promoting the welfare of children to give effect to the statutory duty.

The section on caselaw needs to be updated in the light of the recent decision of the Supreme Court in *R(A) v Croydon; R(M) v Lambeth* [2009] UKSC 8. The Merton judgment (*B v Merton London Borough Council* [2003] EWHC 1689) is only one judgment among the significant caselaw in this area and it would be more helpful to talk of a lawful assessment and note the judgments, including but not limited to *Merton*, that have set out the meaning of lawfulness in this area, many of which are reviewed by the Supreme Court in the case of *A & M* and include that case sub nom *A and WK* in lower courts, *R (T) v. Enfield* [2004] EWHC 2297 (Admin), and *I and O* [2005] EWHC 1025 (Admin).

3.3/3.4 It would be helpful here to cross-refer to parts of the guidance on the substantive steps to be undertaken

Sharing information with local authorities

4.1 It is important to make reference to questions of consent and confidentiality at the outset.

The decision of the Supreme Court in *R(A) v Croydon; R(M) v Lambeth* [2009] UKSC 8 has implications for the procedures outlined here since it holds out the prospect of the local authority and the UK Border Agency electing to allow the courts to determine whose assessment is correct.

4.2 We fail to see why the position taken by the local authority should be relevant in the way suggested to the immigration decision to grant discretionary leave to remain. To leave a child in limbo is not acting in a way that safeguards them and promotes their welfare. If the UK Border Agency forms its own independent view that the person is a child and there are no adequate reception arrangements available to them on return then to fail to apply its own discretionary leave policy because of the position of the local authority would be unlawful.

In accordance with Article 12 of the UN Convention on the Rights of the Child, and the provisions of domestic law and policy on the child's right to be heard, as well as basic principle of fairness, *audi alteram partem*, it is essential if the UK Border Agency wishes to dispute the decision that a person is a child taken by a local authority, to put to the child the reasons for taking issue with the decision of the local authority.

4.4 This paragraph overstates the case and should be reworded to indicate that it is necessary to determine whether the authentication of the document is satisfactory to the UK Border Agency.

4.5 The reference to local authorities not feeling able to share the full copy of the age assessment should be retained. It will be necessary to update the paragraph if a new protocol and pro forma are forthcoming. As noted above, it is not in all cases necessary to conduct a detailed assessment of age as the local authority may quite properly accept the child's account of his or her age. In such cases there will not be detailed information to disclose. Local Authorities are bound by requirements of consent and confidentiality and it would not be helpful to write guidance that ignores these, as it will not work in practice besides risking being unlawful.

Other Evidence of Age

5.1 It would be useful to identify here that travel documents may show a person to be older than they are. UK and other countries' immigration procedures may make it difficult for a child to travel, especially unaccompanied, and therefore false ages may be shown on documents to facilitate travel.

5.2 Some 30% of the world's children do not have birth certificates.⁷ For those that do, to demand other 'genuine official documentation' before it is accepted is to set the bar too high. How many children will have a military card for example? There may be other corroboration, including the child's own account, that means that not to accept the birth certificate is to create an age dispute where there is no need for one. It is accurate to state, as set out in the Nationality Instructions⁸, that a birth certificate is evidence of an event not of identity but where there is no reason to dispute that the child is presenting his/her own birth certificate it should be accepted.

5.5 Express reference should be made to the December 2009 guidance on assessing age produced by the Royal College of Paediatrics and Child Health in this paragraph and a link provided. This does not obviate the need to cite from the guidance within the body of the process guidance as is done in the current instruction. The reference to *A v London Borough of Croydon & SSHD; WK v SSHD & Kent County Council [2009] EWHC 939* requires updating.

5.6 ILPA opposes the use of x-rays for non-therapeutic purposes for the reasons set out above and considers that reliance upon them by the UK Border Agency can only encourage this disreputable practice.

⁷ See UNICEF on Deficient Birth Registration in Developing Countries, Population Development Review, Vol. 24, No 3, 1998

⁸ e.g. Volume I at 4.4.5 (Acquisition by Birth)

Section 6 Weighing up conflicting evidence of age

6.1 See comments on the reference to 'Merton' above.

6.3 It should be set out that where two conflicting local authority assessments, both of acceptable and equivalent quality are received, the person whose age is disputed should be treated as a child and age that accords most nearly with the child's account should be preferred, or, where s/he does not know how old s/he is, the lower age should be preferred in the interests of safeguarding and promoting the welfare of the child.

Section 7 Screening

7.1 We disagree strongly with the statement

In all cases children and claimants who say they are children should be asked for documentary evidence to help establish their age.

This is to create age disputes where there should be none, contrary to the recommendations of the UN Committee on the Rights of the Child and to the arguments presented above. It is acceptable to ask children and others if they possess documentary evidence but this should not be done with a view to disputing at the outset what they have said about their age.

See comments above on 'strongly disputes' and why this does not work.

The statement 'Should be informed in a sensitive way' leaves rather too much to chance.

All assessments should be carried out in accordance with the best interests of the child and where this cannot be done then the screening must not proceed. This should be made explicit on the face of the guidance.

7.2. We are concerned at the phrase

'appears inconsistent with his or her claimed age'

for the reasons set out above. The language used in this section differs from what is currently used on the IS97M.

7. 6 See comments above on 'strongly suggests'. All those whose age is in dispute should be accompanied by a responsible adult if the UK Border Agency wishes to proceed pending resolution of the dispute.

7.7 See comments on 'strongly suggests' above.

Section 8 Routing and accommodation

8.1 See our comments above on 'strongly suggests'. This distinction should not be used. . If this recommendation is not accepted, it should always be communicated to those handling a case where it has been determined that appearance strongly suggests that the person is over 18 that age is in dispute. This increases the prospects of mistakes been identified at a later stage and of safeguarding being higher on the list of priorities of those dealing with the case.

8.2 The wording

Careful handling at this point will ensure that UKBA has fulfilled its duty to have a regard to the need to safeguard the welfare of the child.

is wrong (it should state 'have regard' not 'have a regard') but is furthermore unfortunate in that it suggests that discharge of the duty is a matter separate from protecting the child. The primary concern must always be to ensure that the child is safeguarded and their welfare promoted. This is further example of the concern expressed (above) in the comments on section 2.3.

8.3 See comments above on 'strongly supports'.

Section 9

9.1. We disagree and consider that the claimed date of birth should be displayed on Application Registration Cards. As set out elsewhere in the instruction, the child must, so that they are safeguarded, be treated as a child until such time as the dispute is resolved and to indicate the claimed date of birth (if essential with 'claims to be' beside it) is an important part of this. It is not acceptable to display a date of birth that the child disputes and puts the child at risk, including in certain circumstances at risk of serious harm. It is also a source of great distress to a child falsely to be labelled, and the children and young people's accounts in *When is a child not a child?* bear eloquent testimony to this.

Nor is it helpful to use the 1st January date where only the year is known, without indicating clearly that this is a convention and not an actual date of birth. Where the month of birth is known this should be indicated but it would be preferable, not least for the avoidance of mistakes by other agencies, to give the year only where this is all that is known.

Section 10.

10.1 The statement

"While the policy contained in this instruction has certain in-built safeguards and is therefore compliant with section 55 of the Borders, Citizenship and Immigration Act 2009"

is glib. The guidance is about how caseowners should act and it is what they do that will determine whether the Agency acts in accordance with its duties under s 55. For the reasons set out herein, we are unpersuaded that the guidance on its face is so compliant, but even if it were a statement such as this one is unhelpful. See comments on 2.3 above.

We doubt that a general reference to s 55 is sufficient and consider that relevant principles from s 55 should be cited throughout the guidance.

10.2 Should read 'to the applicant's legal representative or, if the applicant is not represented, to the applicant'. Where a legal representative is on record, communication should be through the legal representative.

10.3 It should be set out clearly here that the claim needs to be considered according to the instruction on processing claims from children. In no other circumstances would it be acceptable to proceed to a decision while a Local Authority age assessment was pending.

10.4 Should read 'on the applicant's legal representative or, if the applicant is not represented, on the applicant'. Where a legal representative is on record, communication should be through the legal representative.

Section 12

12.1 We suggest that if a matter as fundamental as whether the applicant is an adult or a child is changed then a refusal decision should always be withdrawn. A grant need not as it may be clear that the person is a refugee or in need of humanitarian protection whether an adult or child. In cases where a refusal is withdrawn and the person is now 18 a decision should be substituted that the person was a child at the time of the application and the assessment of the claim as at the original date (i.e. a claim as a child) should be made. See *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12.

Section 13 Appeal

13.1 A cross- reference to the Asylum Instructions on Appeal Bundling, and Appeal Hearings is wholly inadequate. The preparation of a case in the case of a child and the conduct of the hearing require specific preparation and careful handling. This instruction may not be the place to do it, but those instructions need careful reference to the handling of children's cases.

13.3 See comments on 4.5. In ILPA members' experience children and young people are not always, or even routinely, given copies of their age assessments and this should be done. Please see comments above (on section 4.5) and avoid reference to 'full age assessment'.

We do not understand why this section makes no reference to the circumstances in which it would be appropriate to seek an adjournment. If new evidence is being presented that the appellant is a child this will need to be considered, and will affect the way in which the appeal is presented, in many cases whether or not the age is accepted (for example if there is evidence of immaturity and emotional or intellectual development that is below the stated chronological age). This section fails to deal adequately or at all with what the person presenting the case should do when presented with information at the hearing (or immediately before) that casts doubt upon the Secretary of State's view that the young person is an adult. It also fails, directly or by cross reference, to set out how the principle that in cases of dispute a person should be treated as a child until the dispute is resolved will inform conduct of the hearing. It is not acceptable that an adjournment request is not made in circumstances in which, if the immigration judge finds that the appellant is a child, the UK Border Agency's intention is to revisit that finding against evidence of which it was aware but declined to seek an opportunity to present (see section 4.2).

The statement

“These matters should usually be investigated through sensitive cross-examination.” provides no guidance.

There are cases where it is found (including where it is accepted by the UK Border Agency) that the person is a child at the appeal stage or even later. The case of *AA (Afghanistan)* was in part about the UK Border Agency’s failure to follow its own procedures and policies in interviewing children. This section should therefore include a statement that those preparing and conducting appeal hearings should make sure that all policies and procedures applicable to children have been followed and be prepared to provide evidence of this in court. It should also include a statement that if any of the policies and procedures applicable to children have not been followed the extent of this should be brought to the attention of the tribunal or court by the UK Border Agency, whether or not the matter has been identified by the appellant or his/her representative or by the immigration judge. This is in line with *AA(Afghanistan)* in which it was stated (paragraph 28 of the judgment):

“The Secretary of State should draw relevant parts of his policy to the adjudicator’s attention. Merely because those policy documents are publicly available in print or on a website is not enough: where issues of persecution are involved a decision to return a person or not to his country of origin should not depend on the diligence of that person’s representatives. Of course, at the hearing before the adjudicator the Secretary of State’s presenting officer was contending that the appellant was not a minor. But he was aware that the contrary was being asserted by the appellant and therefore that the adjudicator might make such a finding. Issues of persecution might therefore have to be dealt with on a factual basis.”

The wording in this section that

“If the appellant is not accommodated by a local authority the results of the assessment should of course be clear”

is inaccurate and misleading. This is inappropriate speculation. That the appellant was not accommodated by the Local Authority may be because the appellant was treated as an adult but it may be for all manner of other reasons including that the child was not in need of accommodation or chose not to be accommodated or the Local Authority disputed responsibility with another Local Authority or because an unlawful age assessment was left unchallenged. The instruction as drafted risks encouraging the UK Border Agency representative to make assertions not substantiated by evidence and it should therefore be changed.

13.4 Given that this is the guidance on age assessment we suggest that a fuller explanation is required in this paragraph.

13.5. Information requests must reflect obligations relating to consent and confidentiality. This is not made clear from this paragraph. See comments above on the reference to ‘Merton’ without more.

14. Implementing the immigration judge’s decision

14.1 The determination of a critical finding of fact such as age cannot lightly be second guessed by the UK Border Agency subsequent to the its determination by the immigration judge, and not ordinarily on evidence that could or should have been produced before the immigration judge, see *Daniae* [1997] EWHC 301 (Admin) and

subsequent authority: findings of fact made by the immigration judge, while not strictly binding in the way that the determination reached on those findings is binding (subject to appeal), are matters to which the Secretary of State is bound to have regard to then and cannot go behind them save that they were reached on an irrational or unlawful basis or that there is fresh material available (material that was or should have been available, by way of adjournment, is at least arguably not fresh when it is not sought to be produced until later in order to dispute the finding of facts made). The implications of the decision of the Supreme Court *R(A) v Croydon; R(M) v Lambeth* [2009] UKSC 8 for these situations may become clearer in the light of subsequent cases.

14.2 The statement

Where the local authority refuses to reconsider their original decision or they decide to maintain their original view following a further age assessment, the issue of accommodation and support must be carefully considered.

Fails to state what should be done. It is all very well here and elsewhere in the instruction to make reference to consulting a senior caseworker, but as we understand it this is the only guidance available to the senior caseworker him/herself on the point and it should be of use to and provide guidance to him/her.

We have not commented on the process map or on the joint working protocol, which is under review.

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