

# **Age Assessment in the Austrian Asylum Procedure – Dealing with Invasive Methods and Inaccurate Results on a Legal Basis**



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## Executive Summary

Unaccompanied minors are among the most vulnerable persons among those who seek protection in another country, which is reflected in the special legal protection offered by European countries to child asylum seekers. Unaccompanied minors are assigned a guardian during the asylum procedure, are placed in special facilities, and are more likely to receive protection than adults.

Many young people claim they are minors but cannot provide documents to substantiate that claim since they often come from countries where birth registration is lacking. If they can provide documents, they are usually not accepted due to high rates of corruption in their countries of origin. States are suspicious that the special protection offered to children might incentivize adults to claim that they are minors. Therefore, states resort to an age assessment procedure that measures chronological age based on biological or psychological factors. These methods often include the use of x-ray to measure bone density. However, x-ray methods expose the applicant to radiation, which is associated with cancer risks. Moreover, the accuracy of the outcome of such methods is highly contested.

Thus, Austria's age assessment framework, consisting of a multiple examination method, which cumulatively applies three x-ray methods and one physical examination of nudity, raises to the following research question, which this thesis will attempt to answer:

*To what extent is Austrian legislation and practice for determining the age of alleged unaccompanied minors arriving in Austria in compliance with the international children's rights framework under the Convention of the Rights of the Child, the International Covenant on Civil and Political Rights, and the 1951 Convention Relating to the Status of Refugees, and with the European standards set out by European Union law and the European Convention of Human Rights?*

In Chapter 1, the author introduces the topic and clarifies that international and European law and jurisprudence do not provide enough structure to identify clear obligations to compare Austria's compliance with those standards. Hence, he proposes a model separating age assessment into three phases: First, the evaluation of evidence, where the authorities decide whether to initiate an age assessment procedure or to declare the person an adult or minor without assessing age. Second, once the authorities have decided that age must be assessed, a method must be chosen, and specific safeguards guide the procedure. Third, after the assessment procedure, the state must decide how to evaluate the outcome of the chosen methods in light of their scientific uncertainty. This three-phase model created by the author allows to cluster international and European standards on age assessment and take a closer look at where Austria is in line or violating its obligations. Moreover, the author clarifies that the often-reiterated *principle* of the 'benefit of the doubt' in cases of age assessment can bear different meanings. Each meaning carries a different obligation for states. Hence, the author renames the *principle* depending on the context for a clearer differentiation of the State's responsibilities related to 'the benefit of the doubt'.

In Chapter 2, the author analyses the international framework, including the Convention of the Rights of the Child and the 1951 Convention Relating to the Status of Refugees, and the jurisprudence of the Committee on the Rights of the Child and the Human Rights Committee. Under the heading '*presumption of minority*' the author evaluates under which circumstances states can declare a person an adult without even initiating age assessment. If states don't presume to be dealing with a minor until proven otherwise all child-specific rights would be denied from the beginning. Hence both committees limit the way in which states should depart from that *principle*. On the other hand, age assessment should not be a routine procedure due to its invasiveness. If the applicant provides documents, they should be seen as genuine, and age assessment omitted. A state should legally challenge documents before

dismissing their evidential value. If age assessment is necessary it should consist of a holistic approach combining medical with psychological methods, like psychological interviews. Wrist x-rays alone should never be used to assess age due to their invasive and inaccurate nature.

In Chapter 3, the author analyses the European framework. The Common European Asylum System provides many rights specifically to children. The '*principle of effectiveness*' of Union law demands not to deny those rights too easily. Hence, if there is *any* indication of dealing with a minor, their age should be at least assessed. On the other hand, age assessment is not necessary, and the applicant should be declared a minor if they provide *any* identification documents. In the absence of such document, an estimation of the first physical and psychological appearance of the applicant and Eurodac data become commonly used means of evidence to decide whether age assessment is necessary. The author argues that both means of evidence are questionable sources of evidence. Moreover, the European Court of Human Rights provides that the wrongful deportation of a child or placing a child in a facility with adults can violate Art 3 ECHR. He establishes that a medical procedure without consent can violate Art 8 ECHR. The right to private life further demands that any invasive medical method is based on a law that is accessible and proportionate to the legitimate aim.

In Chapter 4, the author analysis whether Austrian law and practice on age assessment complies with the standards set out in the previous chapters. Austrian authorities deny young people claiming to be minors the access to an age assessment procedure, declare them as adults, and deport them to another Member State if Eurodac data provides that they were registered as adults in another Member State. Based on the '*principle of effectiveness*' and the fact that Eurodac data is a questionable source of evidence, the author argues that this practice breaches EU law and violates Art 3 ECHR. On the other hand, Austrian authorities order age assessment based on the physical appearance of an applicant even in cases when documents are provided if they do not meet European standards. This practice is at odds with international and European soft law.

Based on medical scholars, Austria claims that a combination of multiple x-rays and a physical examination can provide whether a person is below the age of 18 with a probability bordering on certainty. The author cannot answer conclusively the contested scientific question behind this reasoning. However, the proportionality of using multiple x-ray examinations must be questioned since a vulnerable group of people is exposed multiple times to radiation for an outcome that is contested among medical scholars. Moreover, the use of physical examination of genitalia and conducting each medical examination without consent breaches European and international obligations.

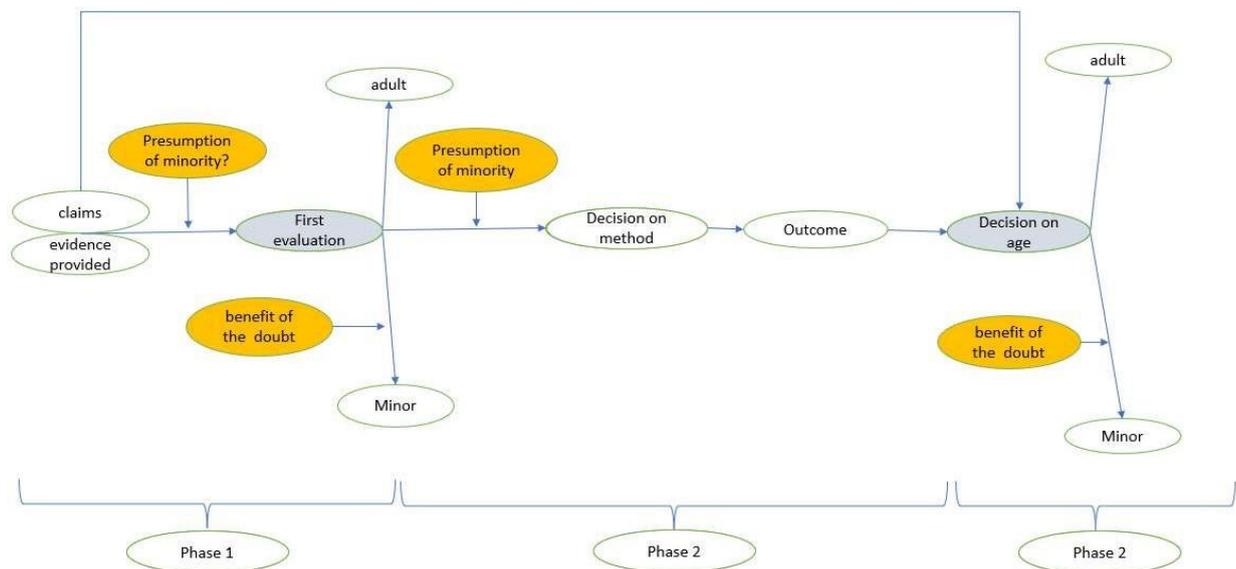
Austrian authorities base the decision on age solely on the medical report. Even though in line with International and European law it neglects the fact the socioeconomic or ethnic differences in the reference group may have influenced the outcome. In some cases, the outcome of a medical report does not even provide a probability that could theoretically eliminate doubts. In such cases declaring a person an adult, as suggested by the Austrian Supreme Administrative Court violates the '*principle of the benefit of the doubt*' as stated in EU hard law and international soft law. Lastly, in Austria, an applicant can only appeal the decision on age together with the decision on international protection. This framework undermines the effectiveness of protection provided for children under EU law.

To conclude, international and European hard laws provide only little guidance on age assessment. Hence, Austria's framework is often in line with them; however, not always. The only way to ensure to comply with international and European standards is to follow the guidance provided by supervising bodies of the binding treaties. Austria should take the lead in Europe amend its practices to those standards. Otherwise, its practices could be challenged in front of international or regional courts supported by the arguments provided by this thesis.

## Overview of main findings

First, the author provides a model dividing problems related to age assessment into three phases. In Phase 1, the evidence is evaluated. In Phase 2, the methods must be chosen, and specific safeguards apply. In Phase 3, the outcome of the methods used must be evaluated in light of the scientific controversies about their accuracy.

Second, the author clarifies that the often-reiterated *principle* of the '*benefit of the doubt*' in cases of age assessment can bear different meanings. Each meaning carries a separate obligation for states. Hence, the author speaks of the '*presumption of minority*' when answering whether a person should be treated as a minor *until* there are conclusive results. The '*presumption of minority*' prevents that all child-specific rights are denied from the beginning without assessing the applicant. The term '*benefit of the doubt*' should only be used when the decision to declare a person a minor is conclusive without further assessment. The '*benefit of the doubt*' in Phase 1 prevents an invasive procedure in Phase 3, the wrong declaration as an adult (see figure below).



Subdividing the age assessment process into three phases and differentiating the obligation derived from the '*benefit of the doubt*' principle allows a more accurate analysis of international and European standards, leading to a more detailed comparison with the Austrian framework.

In Phase 1, the author argues that Member States must grant an applicant the '*presumption of minority*' if there is *any* indication that the applicant is a minor, even if some evidence contradicts. The general '*principle of effectiveness*' of EU law demands such a wide interpretation of the '*presumption of minority*'. Austrian jurisprudence and practice declaring applicants' adults solely based on Eurodance data is at odds with that *principle*.

In Phase 2, Austria's system of multiple age examination methods is at odds with Art 8 ECHR. Exposing vulnerable children numerous times to radiation may not be justified by the aim of migration control due to the scientific uncertainty of the results of the used methods. Moreover, the Austrian authorities do not gather explicit consent even though the European Court of Human Rights stated that consent to medical procedures should be free, voluntary, informed, and documented. Finally, the use of physical examination is at odds with the recommendations made by the Committee of the Right of the Child and EU soft law.

In Phase 3, it cannot be concluded whether a medical report can ascertain with a probability bordering on certainty that the applicant is an adult. However, the Austrian practice of basing the decision only on the report, neglecting any ethnical or socioeconomic differences in the control group, is problematic, however, in line with hard law. Lastly, Austria's framework does not allow to appeal the decision on age prior to the decision on protection. A wrong age decision can undermine the applicant's credibility and predetermine the protection decision. The loss of the legal guardian in the process violates the '*principle of effectiveness*' under Union law.

#### Keywords

Age assessment - Benefit of the doubt - Presumption of minority - Unaccompanied minors - Austria - Children's rights.

## List of abbreviations

**CEAS** Common European Asylum System

**CJEU** Court of Justice of the European Union

**Committee** Committee on the Rights of the Child

**CRC** Convention on the Rights of the Child

**EASO** European Asylum Support Office

**ECHR** European Convention on Human Rights

**ECtHR** European Court of Human Rights

**EU** European Union

**FOIA** Federal Office for Immigration and Asylum

**FOIA-RP** Federal Act on the General Rules of Procedures at the Federal Office for Immigration and Asylum

**ICCPR** International Covenant on Civil and Political Rights

**Refugee Convention** 1951 Convention Relating to the Status

**UAM** Unaccompanied Minor

**UNHCR** United Nations High Commissioner of Refugees

## 1. Introduction

Young migrants arriving in Europe often fall victim to a culture of scepticism. Many of them claim to be minors but cannot provide identity documents. Sometimes, pictures of these young people trickle through to politics and the media and cause public outrage because their appearances do not reflect the expectations of refugee children. 'These don't look like "children" to me', tweeted a member of the British parliament in this regard. Hence, many call for assessing the age of young asylum seekers as a standard procedure.<sup>1</sup>

The question of age is significant. The number of individuals arriving in the European Union applying for protection virtually returned to its pre-covid level by the end of 2021.<sup>2</sup> About a third of arrivals are children, 14 per cent of which are unaccompanied by an adult responsible for them.<sup>3</sup> They are referred to as unaccompanied minors (hereafter UAMs).<sup>4</sup> Austria, reflecting the general EU trend, has thus recorded a total of 5500 UAMs in 2021 applying for asylum.<sup>5</sup>

UAMs are amongst the most vulnerable groups within the refugee population.<sup>6</sup> Hence, they are entitled to special protection under international, European, and national law. The heightened protection includes the appointment of a legal guardian, special accommodation suitable for children, and access to education.<sup>7</sup> Moreover, UAMs have a significantly higher chance of receiving protection than adults and may not be returned to another Member State where they are already registered.<sup>8</sup>

The heightened protection is often seen as an incentive for young asylum seekers to lie about their age.<sup>9</sup> However, most asylum seekers come from countries where birth registration has not been functioning correctly for decades, like Somalia or Afghanistan.<sup>10</sup> They often lack documentation about their identity.<sup>11</sup> Hence, they may not know their age or be able to prove that they are minors. If they can provide identification documents, they often do not suffice to dispel the fears that the young person is lying since they rarely meet European standards and frequently originate from countries with notorious high corruption.<sup>12</sup>

<sup>1</sup> Kenny, M., & Loughry, M. (2018). 'These don't look like children to me': age assessment of unaccompanied and separated children. In Crock, M. & Benson, L., *Protecting Migrant Children: In Search of Best Practice*, 321 -322

<sup>2</sup> UNHCR (2021). Global Trends: Forced Displacement in 2021, 30.

<sup>3</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children\\_in\\_migration\\_-\\_asylum\\_applicants#Unaccompanied\\_minors](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants#Unaccompanied_minors) (last visited 23.06.2022).

<sup>4</sup> Art 2 (l) Directive 2011/95/EU *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* (Qualification Directive).

<sup>5</sup> Austrian Federal Ministry of the Interior (2022). Asyl-Statistik 2021, 18.

<sup>6</sup> Derluyn, I., & Broekaert, E. (2008). Unaccompanied refugee children and adolescents: The glaring contrast between a legal and a psychological perspective. *International Journal of Law and Psychiatry*, 31(4), 327.

<sup>7</sup> Hjern A., Ascher H., Vervliet M., & Derluyn I (2018). Identification: age and identity assessment. In Bhabha, J., Kanics, J. and Senovilla Hernández, D, *Research Handbook on Child Migration*, 281; Pobjoy J. (2017). Situating the Refugee Child in International Law. In *The Child in International Refugee Law*, 17.

<sup>8</sup> Noll, G. (2016). Junk science? Four arguments against the radiological age assessment of unaccompanied minors seeking asylum. *International Journal of Refugee Law*, 28(2) , 235; Art 8 (4); CJEU, MA and others, C-648/11, 6.6.2013; Hruschka, C. (2015). The (reformed) Dublin III Regulation—a tool for enhanced effectiveness and higher standards of protection? *ERA-Forum*, 15(4), 476 – 477.

<sup>9</sup> Parzeller (2014), 29.

<sup>10</sup> Hjern et al. (2018), 282.

<sup>11</sup> Norwegian National Police Immigration Service (2010). Establishing Identity for International Protection: Challenges and Practices National Contribution from Norway, 5.

<sup>12</sup> Norwegian National Police Immigration Service (2010), 5; Hjern et al. (2018), 282.

Thus, when doubts arise about the applicant's claimed age, states often resort to age assessment procedures to attempt to determine whether medical or psychological evidence supports the claimed minority.<sup>13</sup> Medical methods include x-rays of the wrist, teeth, or collarbone, or physical examinations of teeth or signs of sexual maturity. Non-medical methods are mainly psychological interviews. Some states combine different forms of assessment into a holistic approach. After using one or more methods, medical experts conclude from certain physical or psychological factors whether the chronological age of the applicant is above or beneath the age of 18.<sup>14</sup>

All methods currently used are highly contested. First, using x-rays exposes a person to radiation which, is associated with an increased cancer risk. Thus, it is invasive, and its use outside the context of medical treatments is questionable.<sup>15</sup> Second, the accuracy of most methods is contested among medical scholars. Many scholars argue that due to the lack of birth registrations in the countries of origin, it is impossible to compare the biological or psychological data linked to age to an adequate reference group.<sup>16</sup> Hence, the reference groups differ in socioeconomic status and ethnicity from most refugees arriving in Europe.<sup>17</sup>

Nevertheless, Austria assesses age based on three individual medical methods using multiple x-rays and a physical examination of sexual maturity.<sup>18</sup> In 2017 (pre-covid), the country conducted medical age assessment procedures on around 1000 minors, 39% of whom were declared adults afterwards.<sup>19</sup> Austria claims that this method allows to determine whether someone is a minor or an adult with a degree of probability bordering on certainty, implying that the accurate outcome serving the public interest of migration control can justify the invasive exposure to radiation.<sup>20</sup> Austria's use of such contested methods to assess age leads the author to the following research question, which this thesis will attempt to answer:

*To what extent is Austrian legislation and practice for determining the age of alleged unaccompanied minors arriving in Austria in compliance with the international children's rights framework under the Convention of the Rights of the Child, the International Covenant on Civil and Political Rights, and the 1951 Convention Relating to the Status of Refugees, and with the European standards set out by European Union law and the European Convention of Human Rights?*

To answer the research question, the author will examine the obligations regarding age assessment under the international framework (Chapter 2). Subsequently, he will explore the responsibilities under European law (Chapter 3). Finally, the author will explain Austrian law and practice before analysing its compliance with the international and European framework (Chapter 4).

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<sup>13</sup> Noll (2016), 235.

<sup>14</sup> Aynsley-Green, A., Cole, T. J., Crawley, H., Lessof, N., Boag, L. R., & Wallace, R. M. M. (2012). Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control. *British Medical Bulletin*, 102(1), 27-36.

<sup>15</sup> Aynsley-Green et al. (2012), 24-25.

<sup>16</sup> Noll (2016), 238.

<sup>17</sup> Sauer, P. J. J., Nicholson, A., & Neubauer, D. (2016). Age determination in asylum seekers: physicians should not be implicated. *European Journal of Pediatrics*, 175(3), 300; Schmeling, A., Dettmeyer, R., Rudolf, E., Vieth, V. & Geserick, G. (2016). Forensic Age Estimation: Methods, Certainty, and the Law. *Dtsch Arztebl Int*, 113, page 46.

<sup>18</sup> Art 13 (3) Federal Act on the general rules of procedures at the federal office for immigration and asylum (FOIA-RP); Art 2 (2)(25) Austrian Asylum Act 2005

<sup>19</sup> Austrian Parliamentary Query Response, BMI-LR2220/0351-III/5/2018, 22.08.2018, 4-5.

<sup>20</sup> 330 der Beilagen XXIV. GP, Regierungsvorlage, Materialien (explanatory memorandum to the Austrian age assessment laws) 17.

On an international level, this thesis will examine the Convention of the Rights of the Child (hereafter CRC) and its monitoring body, the Committee of the Rights of the Child (hereafter the Committee), which offer protection tailored to children's needs.<sup>21</sup> While the CRC is binding, the General Comments and jurisprudence of the Committee are not.<sup>22</sup> Moreover, the International Covenant on Civil and Political Rights (ICCPR) offers a provision protecting children.<sup>23</sup> Lastly, the 1951 Convention Relating to the Status of Refugees (hereafter Refugee Convention) must be interpreted to provide special protection to UAMs applying for asylum.<sup>24</sup> While the Convention is hard law and as such binding, the work of its monitoring body, the United Nations High Commissioner for Refugees (hereafter the UNHCR), is considered soft law.<sup>25</sup>

On an European level, the thesis will analyse the jurisprudence of the European Court of Human Rights (hereafter ECtHR) who reads a child-specific meaning into provisions of the European Convention of Human Rights (hereafter ECHR) in cases concerning UAMs.<sup>26</sup> The ECHR has a binding character in Austria.<sup>27</sup> Moreover, the EU has established a Common European Asylum System (hereafter CEAS). It offers special protection to minors through various legislative acts.<sup>28</sup> While EU law is binding, the work of the EU institution which provides guidelines on the CEAS, the European Asylum Support Office (hereafter EASO), is considered soft law.<sup>29</sup>

The thesis is based on a desk review of relevant literature and jurisprudence on age assessment in the context of migration and, more generally, of UAMs. It aims at building the groundwork for change in Austrian laws and practice. Due to Austria's somewhat restrictive approach towards migration, in the author's opinion, this can only be achieved through strategic litigation or advocacy for compliance with international standards.<sup>30</sup> Hence, this thesis provides a rather technical analysis of the law and will only explore ethical considerations if in support of a legal argument; however, not as freestanding reasoning because they would exceed the scope of this work.

In the authors opinion the standards set out by those bodies are somewhat unclear. For example, although there is consensus in international and European law that the '*benefit of the doubt*' should go to the person assessed, it is unclear what is exactly meant by that.<sup>31</sup> Does it mean that in doubt, a

<sup>21</sup> Arts, K. (2014). Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges. *Netherlands International Law Review*, 61(3), 268.

<sup>22</sup> Vandenhoe, W., Erdem Türkelli, G., & Lembrechts, S. (2019). *Children's Rights. A Commentary on the Convention on the Rights of the Child and its Protocols*, 22; Austria has not ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en) (last visited 25.06.2022).

<sup>23</sup> Art 24 ICCPR

<sup>24</sup> Pobjoy J. (2021). Refugee Children. In Costello, C., Foster, M., & McAdam, J., *The Oxford handbook of international refugee law.*, 746.

<sup>25</sup> Goodwin-Gill, G. (2020). The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law. *International and Comparative Law Quarterly*, 69(1), 1-2.

<sup>26</sup> E.g., ECtHR, M.S.S. v. Belgium and Greece, 30696/09, 21.01.2011 and Tarakhel v. Switzerland. 29217/12, 04.11.2014.

<sup>27</sup> Albi, A., & Bardutzky, S. (2019). *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, National Reports*, 1274, 1285.

<sup>28</sup> Parzeller, M. (2014). Juristische Aspekte der forensischen Altersdiagnostik. *Rechtsmedizin*, 25(1), 29.

<sup>29</sup> Salvatore, F., Nicolosi, & Fernandez-Rojo D. (2020). Out of control? The case of the European Asylum Support Office. In Scholten, M. & Brenninkmeijer A. (Eds.), *Controlling EU agencies : the rule of law in a multi-jurisdictional legal order*, 179, 190.

<sup>30</sup> Rosenberger, S., Stern, V., & Merhaut, N. (2018). *Protest Movements in Asylum and Deportation*, 29 – 30.

<sup>31</sup> Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State

person should at least undergo an age assessment procedure to avoid declaring them an adult too quickly? Or does it mean that, in doubt, a person should be seen as a minor without undergoing age assessment to avoid an invasive procedure? Or does it mean that a person should be seen as a child *after* an age assessment procedure if the results are inconclusive? To counter the confusion and determine the precise responsibilities of states, the author creates a model that separates their obligations into three phases (figure 1).

### 1.1. A three-phase model for determining obligations related to age assessment

Phase 1: The claim of minority is made, and evidence may be provided to support it. In the first evaluation of evidence, the authorities must decide whether an age assessment procedure is necessary or whether the evidence provided is conclusive enough to treat the person as a minor or adult without further examination. This question is the focus of Phase 1. It is mainly guided by the fact that the assessment procedure may be invasive and should therefore be routine practice.<sup>32</sup>

Phase 2: If Phase 1 concludes that age should be assessed, a state must decide which method to use and how to conduct the assessment. Hence, the focus in Phase 2 lies on the question of which method a state should choose to assess an applicant's age and whether certain safeguards must be in place while conducting the procedure. These questions are not only guided by the invasiveness of the specific procedure but also their inaccuracy. As will be seen, proportionality plays a vital role in Phase 2.

Phase 3: After the age assessment procedure has been conducted, a state must decide whether the applicant is a minor or an adult. The procedure's outcome, the claims, and other evidence can influence the final decision on age. Analysing the balance will be the focus of Phase 3. Naturally, invasiveness does not play any role anymore since the procedure has been already conducted. Hence, the answers will depend, among other things, on the accuracy of the methods applied in Phase 2.

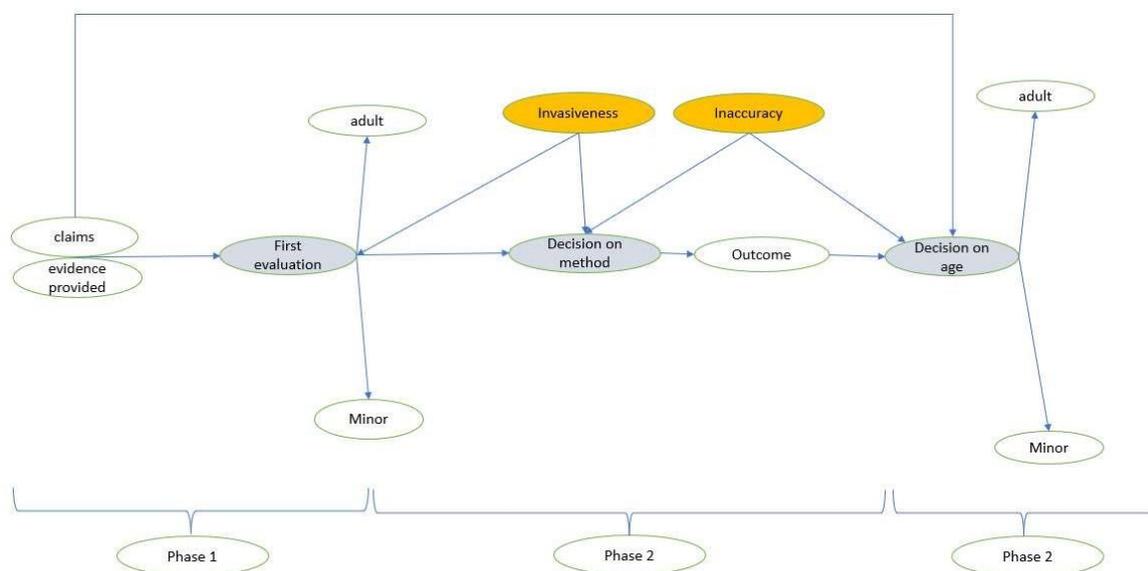


Figure 1

obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, Un Doc. SMW/C/GC/4-CRC/C/GC/23, par 4.; Art 25 (5) Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Procedural Directive); EASO (2018). Practical Guide on age assessment, 23, 43.

<sup>32</sup> Lithuanian Supreme Court, Q. N and G. M., 2-68-3-39174-2013-9, 13.07.2015, Amicus Curiae by the UNHCR, observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum 01.06.2015, par 9 ix.

Regarding the '*benefit of the doubt*' – *principle*, the author offers a distinctive labelling depending on its meaning in each phase. He proposes a terminology to identify the exact obligations in each phase (see figure 2). When answering whether, in doubt, a person should be treated as a minor *until* there are conclusive results, it is preferable to use the term '*presumption of minority*'. The term should indicate that an age assessment procedure is still outstanding and prevent a person from being treated as an adult until proven otherwise. On the other hand, the term '*benefit of the doubt*' should be used when the decision to declare a person a minor is conclusive without further assessment (if no additional evidence emerges). The '*benefit of the doubt*' can apply before the procedure to avoid an invasive age assessment or after the procedure if results are inconclusive.

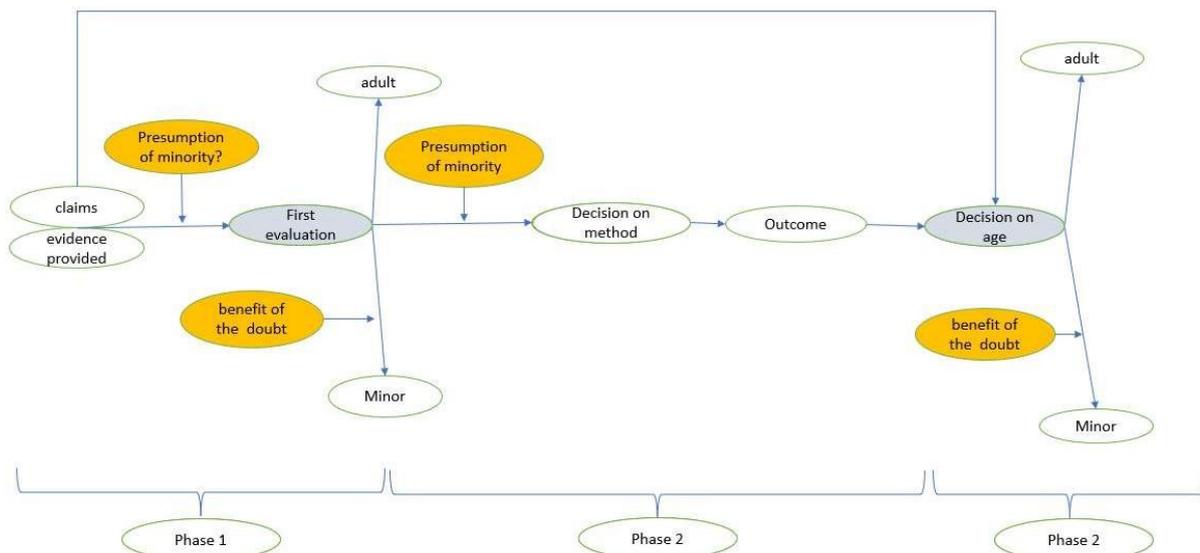


Figure 2

The difference between those *principles* becomes striking in Phase 1, where it must be assessed whether and under which circumstances both *principles* apply: Can a person be declared an adult immediately without even assessing their age, or does the '*presumption of minority*' prevail? Should age be assessed, or does the '*benefit of the doubt*' apply to avoid an unnecessary invasive procedure?

In the author's opinion, differentiating between the '*benefit of the doubt*' and the '*presumption of minority*' is essential. The evidence an applicant must provide to trigger either of those *principles* must be fundamentally different since the personal interests differ. The personal interests of the applicant to have the '*presumption of minority*' until proven otherwise are high. Without that presumption all child-specific rights would be denied without even having the possibility to undergo age assessment. On the other hand, the personal interest of the applicant to have the '*the benefit of doubt*' (in Phase 1) are arguably lower. It is '*only*' to avoid an invasive procedure, not to have all child-specific rights denied. Therefore, the evidence an applicant must provide to trigger the '*benefit of the doubt*' must be higher than to trigger the '*presumption of minority*'. Finding the different evidential thresholds for both *principles* in international and European law is one of the main focuses of this thesis.

## 2. The international framework

### 2.1. The Convention of the Rights of the Child and its monitoring body

The CRC has been ratified almost universally and offers an important international source of protection for children, including asylum seekers. The Committee is the monitoring body of the CRC. It issues recommendations to state parties and gives guidance on interpreting its provisions through its General Comments and individual jurisprudence, called Communication Procedure.<sup>33</sup> Thus, the CRC and the Committee's work build an important source for determining international obligations in cases of age assessment of potential children.

Age assessment is not explicitly mentioned in the CRC. However, the Committee stated repeatedly that the outcome of age assessment determines whether someone is entitled to protection under the CRC.<sup>34</sup> This entitlement includes the right to be protected from arbitrary or unlawful interferences in privacy (Art 16), the right to have the identity respected and preserved (Art 8), the right to have the best interest of the child considered (Art 3), and the right to be heard (Art 12). Moreover, it includes special protection for children that are deprived of their family environment (Art 20), which UAMs are by definition. Additionally, a special provision provides that UAMs seeking protection should receive appropriate protection and humanitarian assistance (Art 22). The next part uses the provided three-phase model to analyse step by step the Committee's views on states' obligations regarding age assessment.

#### 2.1.1. Phase 1: The first evaluation of evidence

##### The 'presumption of minority' - safeguarding children's rights until there are conclusive results

First, in General Comment No. 6, the Committee states that children must be promptly identified upon arrival and have their age determined.<sup>35</sup> In its jurisprudence, the Committee repeatedly establishes that a person claiming to be a minor should be treated as such *during* the assessment and *until* there is reliable evidence of age.<sup>36</sup> It bases this *principle* wrongly on General Comment Nr. 23, which states that '*the benefit of the doubt should be given to the individual being assessed*'.<sup>37</sup> However, the '*benefit of the doubt*' in this context is misleading, since the exact wording also establishes that a person should not be assessed if doubts remain after the first evaluation of evidence.<sup>38</sup> Hence, the author argues that the *principle* establishing that a person should be treated as a minor *until* there are conclusive results should be called '*presumption of minority*'.<sup>39</sup> It should find its basis in General Comment No. 22, which states that '*[a]nyone claiming to be a child should be treated as such*' rather than in General Comment No. 23.<sup>40</sup>

<sup>33</sup> Kalverboer, M., Beltman, D., van Os, C., & Zijlstra, E. (2017). The best interests of the child in cases of migration: Assessing and determining the best interests of the child in migration procedures. *The International Journal of Children's Rights*, 25(1), 116 – 117.

<sup>34</sup> CRC Committee, NBF v. Spain, 11/2017, 27.09.2018, par 12.3; reiterated in AL v. Spain, 16/2017, 31.05.2019, SMA v. Spain, 40/2018, 28.09.2020, and MAB v. Spain, 24/2017, 07.02.2020.

<sup>35</sup> General comment No. 6 of the Committee on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, Un. Doc. CRC/GC/2005/6 (2005), par 31i.

<sup>36</sup> CRC Committee, NBF v. Spain, par 12.3; reiterated in AL v. Spain, SMA v. Spain, and MAB v. Spain.

<sup>37</sup> CRC General Comment No. 23 (2017), par 4.

<sup>38</sup> CRC Committee, NBF v. Spain, par. 12.4.

<sup>39</sup> Council of Europe (2019), Age Assessment for Children in Migration, A human rights-based approach, A guide for policy makers, 11.

<sup>40</sup> Klaassen, M. (2019), Leiden Law School - Leiden Children's Rights Observatory - Case Note 2019/2, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F79%2FD%2F11%2F2017&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F79%2FD%2F11%2F2017&Lang=en) (last visited 28.06.2022); Joint general comment No. 3 (2017) of the Committee on the

Regardless of the terminological impreciseness, a person claiming to be a minor must be treated as such from first contact until there are conclusive results. Hence, the Committee acknowledges what the author calls the '*presumption of minority*'. In the author's opinion, the '*presumption of minority*' is the gateway to applying all provisions under the CRC before and during the age assessment procedure.<sup>41</sup> It prevents a person from being treated as an adult until proven otherwise.

#### The best interest of the child and the right to be heard

Art 3 CRC provides that the best interest of the child must be a primary consideration in all actions concerning the child. The interests of a child must be assessed based on all the interests specific to the child, taking their view into account, and evaluating the impact of each possible decision on these interests, while recognizing the child's socioeconomic background. Those interests constitute 'a' primary consideration, but not the only one.<sup>42</sup> Hence, the state's interest in controlling migration flow by identifying people who falsely try to benefit from special protection offered to children must still be considered.<sup>43</sup> However, in weighing interests, more weight must be assigned to what serves the child best.<sup>44</sup> In the context of age assessment, the child's best interest should be considered when deciding whether to initiate an assessment procedure and when selecting a method.<sup>45</sup>

Closely linked to the best interest of the child is the right to be heard (Art 12 CRC). It provides that every child capable of forming their own view has the right to express those views freely in all matters affecting the child and have their views given due weight in accordance with the age and maturity of the child (par 1). In particular, a child shall have the opportunity to be heard in administrative or judicial proceedings (par 2). Art 12 CRC applies in the context of age assessment since the procedure directly affects the child. Thus, the child must be informed in an appropriate manner how the age assessment will be conducted, how the child's views can impact the outcome, and the consequences of the results. Furthermore, the child needs to be informed about possible remedies.<sup>46</sup> The author argues that doubt about age will only appear in cases of minors close to adulthood. Thus, their views must be given weight like adults.

In accordance with Art 3, 12, and 16 CRC states need to safeguard the child's best interest and the right to be heard through the appointment of a guardian and legal representative as soon as they identify an UAM.<sup>47</sup> Since these safeguards flow from the '*presumption of minority*', they must exist until there are conclusive results that the person is an adult.<sup>48</sup>

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Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, Un. Doc. CMW/C/GC/3-CRC/C/GC/22, par 32h.

<sup>41</sup> CRC Committee, NBF v. Spain, par 12.3; reiterated in AL v. Spain, SMA v. Spain, and MAB v. Spain.

<sup>42</sup> Peleg N. (2018). General Principles. In Kikelly U. & Liefwaard T. (ed.), *International Human Rights of Children*, 142.

<sup>43</sup> Lukits D. & Lukits R. (2014). Grundrechtliche Vorgaben der medizinischen Altersuntersuchung im Asylverfahren. *migralex*, 2014/34, 57.

<sup>44</sup> General comment No. 14 of the Committee on the right of the child to have his or her best interests taken as a primary consideration, UN Doc. CRC/C/GC/14 (2013), par 39.

<sup>45</sup> EASO (2018). Practical Guide on age assessment, Second Edition, 20.

<sup>46</sup> Krappmann, L. (2010). The weight of the child's view (Article 12 of the Convention on the Rights of the Child). *The International Journal of Children's Rights*, 18(4), 510.

<sup>47</sup> CRC General Comment No. 6, par 33 and 36; CRC General Comment No. 22, par 32h; CRC Committee, NBF v. Spain, par 12.8; MB v. Spain, MB v. Spain, 28/2017, 27.10.2020, par. 9.12; AL v. Spain, par. 12.8; JAB v. Spain, 22/2017, 31.05.2019, par 13.7; RYS v. Spain, 76/2019, 04.02.2021, par 8.13.

<sup>48</sup> MBS v. Spain, 26/2017, 02.11.2020, par 9.15; RYS v. Spain, par 8.9.

The Committee makes an exception from the '*the presumption of minority*' in cases of unjustified serious discrepancies in the applicant's claims about age and the absence of any documents. It found no violation in declaring a person an adult without assessing their age in such circumstances.<sup>49</sup> In the authors opinion, it must be emphasized that the decision concerned an applicant who did not provide any reasons why he stated different ages.

#### The '*benefit of the doubt*' - declaring a person a minor without an age assessment procedure

Some methods include x-ray, which exposes a person to a radiation, which is associated with an increased cancer risk.<sup>50</sup> Other methods, like psychological interviews, can pose threats to the privacy and psychological health of an UAM by recalling traumatic events. Furthermore, MRI tubes can trigger claustrophobic fears.<sup>51</sup> Hence, an age assessment should only be ordered when necessary to determine the applicant's age. Otherwise, the child's best interest or the child's right to privacy may be violated.<sup>52</sup> The next part will identify in light of what evidence the Committee considers age assessment as not necessary in favour of the applicant. The question of evidence is crucial since many UAMs cannot provide any documents; hence, their statement is the only evidence to avoid an invasive procedure. Others only provide documents that do not meet European standards.<sup>53</sup>

The Committee clarified repeatedly that age assessment should take place "*in the absence of identity documents or other appropriate evidence*".<sup>54</sup> All documents the applicant provides must be considered genuine unless there is proof of the contrary.<sup>55</sup> If there are doubts about the authenticity of documents, the burden of proof lies with the state to substantiate that they cannot be considered valid.<sup>56</sup> This is even true for documents that neither contain a photograph nor a physical description of the applicant (and therefore could be of another person).<sup>57</sup> Hence, providing any documents related to age puts the burden of proof with the state.

The Committee suggests that one's documents are provided and states want to neglect their evidential value they need to check their authenticity with consular authorities,<sup>58</sup> have them '*officially contested*',<sup>59</sup> or officially '*legal challenge [...] its validity*'.<sup>60</sup> In the author's opinion, in most cases, checking with the consular authorities is not an option since positive actions by the consular authorities towards an applicant may indicate that the applicant re-availed themselves of the protection of the country of origin, which could lead to the denial or loss of the refugee status.<sup>61</sup> The Committee indicated that it would follow the same line of reasoning.<sup>62</sup> Hence, in most cases, there is only the option for states to challenge

<sup>49</sup> CRC Committee, AD v. Spain, 14/2017, 01.02.2019, par 10.4 – 10.5; In par 10.5 the Committee only reasons with the inconsistencies in claims and does not give any value to the fact that an x-ray assessment was conducted, indicating that an age assessment procedure must not take place in such cases.

<sup>50</sup> Aynsley-Green et al. (2012), 24-25.

<sup>51</sup> EASO (2018), 31.

<sup>52</sup> CRC Committee, RYS v. Spain, par 8.8.

<sup>53</sup> Norwegian National Police Immigration Service (2010), 5.

<sup>54</sup> CRC Committee, NBF v. Spain, par 12.4.

<sup>55</sup> CRC General Comment No. 23, par 4.

<sup>56</sup> CRC Committee, AL v. Spain; MAB v. Spain; RYS v. Spain.

<sup>57</sup> CRC Committee, SMA v. Spain.

<sup>58</sup> CRC Committee, AL v. Spain, MAB v. Spain; RYS v. Spain.

<sup>59</sup> CRC Committee, NBF v. Spain, par 9.14.

<sup>60</sup> CRC Committee, MBS v. Spain, par 7.13.

<sup>61</sup> Art 1C (1) Refugee Convention; UNHCR (1992). The Cessation Clauses: Guidelines on Their Application, 2.

<sup>62</sup> CRC Committee, MBS v. Spain, par 9.16: '*even though the author was not an asylum seeker and there was no reason to believe that contacting those authorities would put him at any risk*'.

documents. However, it is unclear whether there are certain procedures a state must follow, or who should have the authority to challenge documents (Is the same authority responsible for the age assessment?). Although all the cases so far concerned the application of evidence *after* the assessment, the author argues that the obligation to check or challenge documents must also apply *before* initiating an assessment procedure because the procedure may become unnecessary in light of the new findings. Hence, if the applicant is consistent with their claims about age, but the authorities have doubt, unchallenged documents lead to the application of the '*benefit of the doubt*'. However, the Committee has not yet given its views on a case where the applicant provided consistent statements but no evidence.

### 2.1.2. Phase 2: The assessment procedure

In cases where '*the benefit of the doubt*' is not applied an age assessment procedure might be initiated. The method must be chosen, and specific safeguards apply during the proceedings.

#### The choice of methods - combining invasiveness and accuracy

The question of choice of method is guided by two elements: their invasiveness and their accuracy. The Committee states that medical methods based on *inter alia*, bone and dental examination analysis may be inaccurate with wide margins of error and can be traumatic. Therefore, states should refrain from using them.<sup>63</sup>

The only method so far explicitly mentioned always to violate the right to dignity, privacy, and bodily integrity protected under Art 16 CRC is the examination of genitalia and sexual maturity.<sup>64</sup> All other cases in front of the Committee only concerned wrist x-rays based on Greulich and Pyle atlas. This atlas contains left-hand radiographs of a reference group and links skeletal age to chronological age. It provides standard deviations from which the normality of a child's skeletal development can be assessed. It was later adopted for the use of age determination in asylum procedures.<sup>65</sup> However, scholars argue that it is unlikely that the findings of the Caucasian control group of the atlas can be extrapolated to African or Asian ethnicities.<sup>66</sup> Hence, the Committee found that an age assessment based solely on that method violates Art 3, 8 and 12 CRC.<sup>67</sup>

More recently, the Committee widened its argumentation to declare the outcome of bone age tests and x-ray methods in general a violation of Art 3, 8, and 12 CRC.<sup>68</sup> However, in the author's opinion, the Committee's line of reasoning cannot be followed. It only refers to its previous decision, which only dealt with that the Greulich and Pyle atlas method on an evidential basis.<sup>69</sup> Thus, a more accurate method

<sup>63</sup> CRC General Comment No. 23, par 4.

<sup>64</sup> CRC Committee, RYS v. Spain, par 8.8.

<sup>65</sup> Bunch, P. M., Altes, T. A., McIlhenny, J., Patrie, J., & Gaskin, C. M. (2017). Skeletal development of the hand and wrist: digital bone age companion—a suitable alternative to the Greulich and Pyle atlas for bone age assessment?. *Skeletal Radiology*, 46(6), 786.

<sup>66</sup> compare CRC Committee AL v. Spain, FN 21: referring to Mansourvar, M., Ismail, M. A., Raj, R. G., Kareem, S. A., Aik, S., Gunalan, R., & Antony, C. D. (2013). The applicability of Greulich and Pyle atlas to assess skeletal age for four ethnic groups. *Journal of Forensic and Legal Medicine*, 22, page 26-29.

<sup>67</sup> CRC Committee NBF v. Spain, par 12.6; AL v. Spain, par 12.6; SMA v. Spain, par 7.9.; MBS v. Spain, par 9.10.

<sup>68</sup> CRC Committee MBS v. Spain, par 9.11; RYS v. Spain, par 8.6.

<sup>69</sup> In MBS v. Spain, par 8 and FN 23 the Committee refers only to NBF v. Spain par 8.1 – 8.6, indicating that the same line of reasoning applies. However, the reasoning provided in NBF v. Spain is based on the submission by the French Ombudsman, which mainly concerns the impreciseness of the Greulich and Pyle atlas. The argument provided by the French Ombudsman against all the other x-ray methods are solely based on their invasiveness.

may justify the use of invasive radiation under the CRC. Moreover, an x-ray can be used in conjunction with other methods in compliance with the CRC since the Committee advocates for a holistic approach to age assessment. Such an approach includes aspects of physical development with psychological development by paediatricians or other professionals who can combine different aspects of development.<sup>70</sup>

The Committee states that an assessment method must be conducted in a scientific, safe, child and gender-sensitive, and fair manner.<sup>71</sup> The author argues that the child's best interest should guide the choice of the available methods in each individual case. What is appropriate for one child might not be suitable for another one. For example, a child with claustrophobic fears should not be placed in an MRI tube. If a child has experienced trauma, it may not be in their best interest to be interviewed thoroughly.<sup>72</sup> Furthermore, the author argues that authorities must consider whether a person has already been exposed to multiple x-rays (e.g., due to age assessment procedure in different countries), because the risk associated with radiation may add up.<sup>73</sup> Since the right to be heard applies before, during, and after proceedings, the child's views must also be considered in the choice of method.<sup>74</sup>

Lastly, after being sufficiently informed about the procedure's necessity and nature, the applicant must give informed consent.<sup>75</sup> The refusal to undergo a medical test cannot be *exclusively* the basis for declaring a person an adult.<sup>76</sup> The phrasing implies that together with other indications, like physical appearance, the refusal could justify declaring a person an adult and consequently undermine their credibility in the asylum procedure.

### 2.1.3. Phase 3: The decision on age after the assessment

#### Interpreting the outcome of the assessment procedure

As established in Phase 1, all documents the applicant provides must be considered genuine if their evidential value is not challenged.<sup>77</sup> Moreover, the right to be heard must also apply *after* the procedures.<sup>78</sup> The author argues that the claimant and their guardian and representative must be given the option to give their views on the outcome of the methods used before a decision on age is made.

General Comment Nr. 6 clarifies that in the '*event of remaining uncertainty*', the individual should be given the '*benefit of the doubt*'.<sup>79</sup> The Committee clarified, that if the outcome is based solely on the Greulich and Pyle atlas, the '*benefit of the doubt*' applies.<sup>80</sup> Whether the '*benefit of the doubt*' would

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The only exception is the reference to the European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)). However, this resolution lacks any scientific data.

<sup>70</sup> CRC General Comment No. 23, par 4; CRC General Comment No 6, par 31i

<sup>71</sup> CRC General Comment No 6, par 31i; MB v. Spain, par. 9.11; AL v. Spain, par. 12.7; JAB. v. Spain, par. 13.6

<sup>72</sup> EASO (2018), 31.

<sup>73</sup> Aynsley-Green et al. (2012), 24-25.

<sup>74</sup> GC 12, para 82.

<sup>75</sup> CRC Committee, NBF vs Spain, par 12.3; reiterated in AL v. Spain, SMA v. Spain, and MAB v. Spain.

<sup>76</sup> CRC Committee, JAB v. Spain, para 13.4.

<sup>77</sup> CRC General Comment No. 23, par 4; CRC Committee, RYS v. Spain NBF v. Spain, par 9.14, MBS v. Spain, par 7.13.

<sup>78</sup> General comment No. 12 of the Committee on the right of the child to be heard, UN Doc. CRC/C/GC/12 (2009), par 82.

<sup>79</sup> CRC General Comment No. 6, par 31i.

<sup>80</sup> CRC Committee, NBF v. Spain, par 12.6; AL v. Spain, par 12.6; SMA v. Spain, par 7.9; MBS v. Spain, par 9.10.

apply in cases other methods are used is uncertain based on the Committee's jurisprudence. Lastly, it is essential that the outcome should be open for appeal.<sup>81</sup>

## 2.2. The 1951 Refugee Convention and the UNHCR

The Refugee Convention protects people who reside outside their home country due to a '*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*'.<sup>82</sup> It provides rights to those falling under this definition, like access to housing, education, and most importantly, the expulsion of their return to the country of origin.<sup>83</sup>

Even though it does not explicitly mention children, the question of age is essential for guaranteeing protection under the Refugee Convention. The Vienna Convention on the Law of Treaties 1969 provides that a treaty must be interpreted in conjunction with any agreement '*which was made between all parties in connection with the conclusion of the treaty*'.<sup>84</sup> Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons constitutes such an agreement and emphasizes the special protection of refugee minors.<sup>85</sup> Furthermore, a treaty must be read together with any other applicable rules of international law.<sup>86</sup> Thus, Refugee Convention must be interpreted by taking into account the specific protection offered to minors by the CRC.

The UNHCR supervises the application of the Refugee Convention and develops and interprets international refugee law.<sup>87</sup> Due to his high legal standing, the guidelines developed by UNHCR are of particular importance in defining an international legal framework for refugees.<sup>88</sup>

### Assessing the UNHCR's views on the three-phases model of age assessment

In Phase 1, the first evaluation of evidence, the UNHCR acknowledges the '*presumption of minority*', stating that an independent guardian must be appointed to advise the child.<sup>89</sup> Age assessment can be ordered in '*doubt of the exact age*'.<sup>90</sup> Hence, the UNCHR provides a wider understanding of when age assessment can be necessary than the Committee who suggests that age assessment should only be ordered when the applicant does not provide any documents, or the state successfully challenged them.<sup>91</sup>

In Phase 2, during the assessment procedure, the same safeguards are provided by the UNHCR as by the Committee. The assessment procedure must be scientific and holistic (including psychological factors), safe, child- and gender sensitive and respect the child's dignity.<sup>92</sup> Demand for legal representation before, during, and after an age assessment procedure can be deducted from the

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CRC General Comment No. 23, par 4.

<sup>82</sup> Art 1A (2).

<sup>83</sup> Pobjoy (2017), 17.

<sup>84</sup> Art 31 (2)(a).

<sup>85</sup> Pobjoy (2017), 19

<sup>86</sup> Art 31 (3)(c).

<sup>87</sup> Art 36 Refugee Convention.

<sup>88</sup> Goodwin-Gill (2020), 1-2.

<sup>89</sup> UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/09/08 (2009), par 75.

<sup>90</sup> UNHCR (2009), par 75.

<sup>91</sup> CRC Committee, NBF v. Spain, par 12.4; MBS v. Spain, par 7.13.

<sup>92</sup> UNHCR (1997). Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, par. 5.11; UNCHR (2009), par 75.

UNHCR's general statement that children are entitled to legal representation in their asylum procedures.<sup>93</sup>

In Phase 3, the decision on age *after* the assessment, the individual must be given the '*benefit of the doubt*'.<sup>94</sup> Any further elaboration on how to evaluate evidence and apply the '*benefit of the doubt*'-principle is, as from the Committee, missing. Importantly the UNCHR states that in cases where the assessment contradicts statements, the credibility of the young person in their asylum procedure should not be undermined as age is not given the same degree of importance universally.<sup>95</sup>

### 2.3. The ICCPR and the Human Rights Committee

Like the CRC, the ICCPR is not concerned with age assessment itself. However, Art 24 (1) ICCPR provides the (rather vague) right of children to measures of protection that are required by their status as a minor. Art 7 concerns the prohibition of torture or cruel, inhuman, or degrading behaviour or punishment. In the case of *OYKA v. Denmark*,<sup>96</sup> the monitoring body of the ICCPR, the Human Rights Committee, was concerned with age assessment. It found a violation of Art 7 and 24 (1) ICCPR in the state's omission of assessing the applicant's age and declaring him an adult.

Consequently, the case concerned whether the '*presumption of minority*' should apply. The young person claimed to be an adult in two Member States and provided for the first time in his appeal that he is a minor. He supported his claim with a Syrian birth certificate and a family book containing contradicting statements. The documents were issued when the Syrian identity system was no longer functioning.<sup>97</sup>

The Human Rights Committee said that Denmark failed to review the applicant's age. It emphasized that the applicant reasonably explained why he declared himself falsely an adult since he stated that he was told to lie about his age because UAM are detained in the receiving countries. According to the Human Rights Committee, the poor choice to lie about age may be linked to the person being a minor. Moreover, as the CRC Committee, the Human Rights Committee calls for the verification of documents in such cases.<sup>98</sup>

### 2.4. Conclusion on the International Framework

Overall, in Phase 1, the Committee and the UNHCR acknowledge the '*presumption of minority*' from first contact if a person claims to be a minor.<sup>99</sup> From this presumption flow all other rights of the CRC, including the appointment of a legal guardian and representative, the right to be heard and the child's best interest.<sup>100</sup> The principle prevents a minor from being treated as an adult until conclusive results exist. The Committee allows an exception to this *rule* in cases of unjustified inconsistent statements.<sup>101</sup> The Human Right Committee adds to this discussion that inconsistencies in statements should be

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<sup>93</sup> Lithuanian Supreme Court, Q. N and G. M., amicus curiae by UNCHR, par 9 iv, referring to UNHCR (2009), par 67.

<sup>94</sup> UNHCR (1997), par 5.11; UNHCR (2009), par 75.

<sup>95</sup> UNHCR (2009), par 75.

<sup>96</sup> Human Rights Committee, *OYKA v. Denmark*, 2770/2016, 30.11.2017 (07.11.2017)

<sup>97</sup> *Idib*, par 8.6 - 8.8.

<sup>98</sup> *Idib*, par 8.11.

<sup>99</sup> CRC Committee, *NBF vs Spain*, par 12.3; reiterated in *AL v. Spain*, *SMA v. Spain*, and *MAB v. Spain*.; UNHCR (2009), par 75.

<sup>100</sup> CRC Committee *NBF v. Spain*, par 12.3.

<sup>101</sup> CRC Committee *AD v. Spain*, par 10.4 - 10.5.

justified when a person claims that they have been told to state a wrong age since the poor decision to lie about age may be linked to the person being a minor.<sup>102</sup>

While the UNHCR does not give much guidance on when it is suggested to initiate an age assessment procedure (only in '*doubt of the exact age*'), the Committee clarifies that this is only to be done in cases where documents are either not provided or successfully challenged.<sup>103</sup> Otherwise, the '*benefit of the doubt*' applies.

In Phase 2, the choice of procedure is guided by invasiveness and accuracy. Physical examination including nudity should never take place.<sup>104</sup> Age assessment solely based on a wrist x-ray after Greulich and Pyle atlas is insufficient due to its inaccuracy.<sup>105</sup> The Committee's decisions leave open whether using solely one x-ray method would justify radiation exposure if it was less contested among medical scholars. In combination with psychological methods, the use of x-ray is in line with international obligation since the UNHCR and the Committee both advocate for a holistic procedure including psychological next to physical factors.<sup>106</sup> Moreover, the best interest of the child must guide the choice of available methods in each case and the child must be heard.<sup>107</sup>

In Phase 3, if the results are inconclusive, the UNHCR and the Committee advocate for applying the *principle* of the '*benefit of the doubt*'. According to the Committee, this principle applies if only the Greulich and Pyle atlas was used to assess age.<sup>108</sup> However, whether the *principle* would also apply to the outcome of other methods is unclear. The decision on age should be open to appeal and not undermine the credibility of the young person in the asylum procedure.<sup>109</sup>

Overall, the General Comments and jurisprudence of the Committee, the Guidelines of the UNHCR and the Jurisprudence of the Human Rights Committee can only be considered as soft law. However, their authority in interpreting the binding CRC, Refugee Convention and ICCPR have been pointed out. Thus, if states want to ensure they are complying with the above-mentioned treaties they should follow the guidance provided by their monitoring bodies.<sup>110</sup>

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<sup>102</sup> Human Rights Committee, OYKA v. Denmark, par 8.11.

<sup>103</sup> UNHCR (2009), par 75; CRC Committee, NBF v. Spain, par 12.4; MBS v. Spain, par 7.13

<sup>104</sup> RYS v. Spain, par 8.8.

<sup>105</sup> CRC Committee, NBF v. Spain, par 12.6; AL v. Spain, par 12.6; SMA v. Spain, par 7.9.; MBS v. Spain, par 9.10.

<sup>106</sup> CRC General Comment No. 23, par 4; General Comment No. 6, par 31i; UNHCR (2017), par. 5.11; UNCHR (2009), par 75.

<sup>107</sup> EASO (2018), 31; CRC General Comment No. 12, para 82.

<sup>108</sup> CRC Committee, NBF v. Spain, par 12.6; AL v. Spain, par 12.6; SMA v. Spain, par 7.9.; MBS v. Spain, par 9.10.

<sup>109</sup> UNHCR (2009), par 75; CRC General Comment No. 23, par 4.

<sup>110</sup> Marmor, A. (2019). Soft Law, Authoritative Advice and Non-binding Agreements. *Oxford Journal of Legal Studies*, 39(3), 525.

### 3. The European framework

#### 3.1. European Union law

Art 24 Charter of Fundamental Rights of the European Union (hereafter CFR)<sup>111</sup> provides the child's right to be heard, the right to protection and care for children, and that the best interests of the child must be a primary consideration in all decisions relating to children. The Treaty of the European Union also emphasises the special protection of children's rights.<sup>112</sup>

The EU established a Common European Asylum System (CEAS) through different legal acts to guarantee equal standards for asylum seekers.<sup>113</sup> It incorporates fully the protection offered by the Refugee Convention and provides specific protection for children.<sup>114</sup> Firstly, under the Reception Directive,<sup>115</sup> this special protection includes that EU Member States must provide immediate procedural benefits and safeguards for unaccompanied children arriving in their territory. The safeguards include the appointment of a legal guardian, suitable accommodations for minors, education, and special health care.<sup>116</sup> Secondly, children are exempted from the general rule of the EU Dublin III Regulation,<sup>117</sup> which provides that a person can be returned to the Member State that they first entered.<sup>118</sup> The Member State in which an UAM applied for protection must determine their protection needs.<sup>119</sup> Thirdly, the EU Family Reunification Directive<sup>120</sup> provides that unaccompanied minors and persons entitled to international protection can bring their nuclear family to the host country.<sup>121</sup>

Moreover, UAMs have a significantly higher chance of being granted international protection in line with the Qualification Directive for the following reasons.<sup>122</sup> Firstly, children are generally more vulnerable than adults. Thus, something that does not amount in well-founded fear or a real risk of harm for adults might do so for children. In such cases, age only serves as an intermediate step to establishing vulnerability. Secondly, some harm is specific to children, like child marriage or underage recruitment.<sup>123</sup> When establishing protection needs on these grounds, age per se is relevant.<sup>124</sup>

Art 25 (5) EU Procedural Directive<sup>125</sup> lays out minimum standards for age assessment that states must follow when legislating the procedure in domestic law. It allows explicitly the use of medical examination '*where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age*'. In cases where doubt remains after the examination, the person shall

<sup>111</sup> Charter of Fundamental Rights of the European Union, 2012, 2012/C 326/02.

<sup>112</sup> Art 3 (3)(5) Consolidated version of the Treaty on European Union, 2008/C 115/01.

<sup>113</sup> [https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en) (last visited 28.06.2022).

<sup>114</sup> Recital 3, Art 9 Qualification Directive; Recital 3 Procedural Directive.

<sup>115</sup> Directive 2013/33/EU *laying down standards for the reception of applicants for international protection* (recast).

<sup>116</sup> Hjerm et al. (2018), 281.

<sup>117</sup> Regulation (EU) No 604/2013 *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*.

<sup>118</sup> Art 7, 18.

<sup>119</sup> Art 8 (4); CJEU, MA and Others; Hruschka, (2015), 476 - 477.

<sup>120</sup> Directive 2003/86/EC *on the right to family reunification*.

<sup>121</sup> Art 4 Family Reunification Directive.

<sup>122</sup> Noll (2016), 235.

<sup>123</sup> Pobjoy (2021), 750.

<sup>124</sup> EASO (2018), 24.

<sup>125</sup> Directive 2013/32/EU *on common procedures for granting and withdrawing international protection*.

be assumed to be a minor. Furthermore, paragraph 6 clarifies that *'[t]he best interests of the child shall be a primary consideration for Member States when implementing this Directive'*.

Two bodies have particular relevance when interpreting provisions of the CEAS. First, the EASO<sup>126</sup> is part of the CEAS and provides, among other things, guidelines and operating manuals on the implementation of EU asylum legislation. Its work is considered soft law.<sup>127</sup> According to Recital 10, Procedural Directive EASO's guidelines should be considered when implementing the Directive. The EASO Guidelines 2018 on age assessment provide guidance how age assessment is to be conducted in line with the child's best interest. Second, the UNHCR's supervisory responsibility regarding the interpretation of the Refugee Convention and the CEAS has pointed it in EU law.<sup>128</sup> The UNHCR interpreted Art 25 (5) Procedural Directive in an amicus curiae to the Lithuanian Supreme Court.<sup>129</sup> Thus, those two sources provide essential guidance when interpreting Art 25 (5) Procedural Directive.

### 3.1.1. Phase 1: The first evaluation of evidence

#### The 'presumption of minority' - safeguarding children's rights until there are conclusive results

The *'presumption of minority'* is not explicitly mentioned in the Procedural Directive. However, the general *'principle of effectiveness'* of Union law, developed by the Court of Justice of the European Union (hereafter CJEU), demands that *'Member States must ensure that the relevant national rules [...] do not make it practically impossible or excessively difficult to exercise rights conferred by Community law'*.<sup>130</sup> The author argues that to comply with the *'principle of effectiveness'*, Member States must grant the *'presumption of minority'* as widely as possible whenever there is *any* indication that they are dealing with a minor.<sup>131</sup> Otherwise, it would be practically impossible for that person to exercise the child-specific rights guaranteed under the CEAS and the CRC. The latter is relevant since the CJEU pointed out that it is necessary for Member States to have regard to the provision of the CRC when interpreting EU law.<sup>132</sup>

Further arguments for the *'presumption of minority'* can be drawn from the Anti-Trafficking Directive,<sup>133</sup> which partly aims at protecting third country nationals who fall victim to human trafficking.<sup>134</sup> It states that if there is reason to believe that the person is a child, minority should be assumed to provide immediate assistance, support, and protection to that person, indicating again an extremely wide use of this *principle*.<sup>135</sup>

Both arguments are in line with the suggestions of the UNCHR and the EASO. The former makes only an exception to the *'presumption of minority'* in *'clearly unreasonable'* cases.<sup>136</sup> The latter if the physical and psychological appearance *'undoubtedly indicate[s] that the applicant is significantly over 18 years*

<sup>126</sup> EASO has been transformed into European Union Agency for Asylum. For a discussion on the change of competencies, see Salvatore et al. (2020), 178 - 181.

<sup>127</sup> Salvatore et al. (2020), 179, 190.

<sup>128</sup> Recital 22 Qualification Directive; Art 29 (1)(c) Procedural Directive.

<sup>129</sup> Lithuanian Supreme Court, Q. N and G. M., amicus curiae by UNCHR.

<sup>130</sup> CJEU, CS Communications, C-424/01, 9. 04. 2003, par 31; CJEU, Jutta Leth, C-420/11, 14. 03. 2013, par 38.

<sup>131</sup> EASO (2018), 20, 21.

<sup>132</sup> CJEU, V.M.A., C-490/20, 14.12.2021, par 63

<sup>133</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>134</sup> Recital 7.

<sup>135</sup> Recital 22, Art 13 (2).

<sup>136</sup> Lithuanian Supreme Court, Q. N and G. M., amicus curiae by UNCHR, par 9 vi; the reference to SCEP (page 12) leads to the conclusion that this applies *until* there are conclusive results.

*old* and in the absence of any contradicting evidence.<sup>137</sup> Hence, it is argued that under the EU framework, the '*presumption of minority*' can only be denied if (i) a person appears to be significantly older than 18 with a probability bordering on certainty and (ii) no other evidence, however weak, substantiates the claim of minority.

Moreover, although again mislabelled as the '*benefit of the doubt*', the EASO acknowledges that the child's best interest flows from the '*presumption of minority*'. It should guide the decision whether to undertake an age assessment procedure and the obligation to appoint a legal guardian and appropriate accommodation under the Reception Directive.<sup>138</sup> Hence, before deciding to initiate an age assessment procedure, an interview to assess the child's best interest should be conducted.<sup>139</sup> Thereafter, age assessment should only be conducted if necessary and useful.<sup>140</sup> In the author's opinion, whether a procedure is necessary will depend on the degree of certainty that the person is a minor. Therefore, the following section will discuss the level of certainty required to initiate an assessment procedure.

#### The '*benefit of the doubt*' - declaring a person a minor without an age assessment procedure

Art 25 (5) Procedural Directive does not elaborate on when exactly it is necessary to initiate age assessment proceedings.<sup>141</sup> However, the EASO states that age assessment is unnecessary if no doubts occur. No doubts occur if the applicant provides documents consistent with their credible claims and made an effort to provide all the information at their disposal.<sup>142</sup> The EASO suggests that the following documents should be seen as credible and eliminate doubts: passport, ID documents, resident cards or travel documents issued by UNHCR, certificates, or religious or civil certificates with any reference to the applicant's age.<sup>143</sup>

Regarding statements, like under the Committee's jurisprudence, credible claims are of utmost importance within the first evaluation of evidence under EU law.<sup>144</sup> According to Art 4 (5) Qualification Directive, statements of an applicant should generally be deemed as credible if they made a genuine effort to substantiate it, available evidence has been submitted, and the applicant provides a satisfactory explanation of why the other elements are missing. Furthermore, the claim should be coherent and plausible.

On the other hand, in absence of credible statements or documents doubts might occur. According to the EASO, such doubts can remain '*simple*', triggering the '*benefit of the doubt*' in favour of the applicant. However, they can also be '*substantiated*', leading to an age assessment procedure. The Member State should evaluate evidence derived from databases, statements of a family members, relatives, or guardians, or from the first estimation of physical appearance to determine the level of doubt. If at least one evidence provided supports the credible claim, doubts remain '*simple*'. However, doubts may be '*substantiated*' if multiple factors contradict the claim or no element supports it.<sup>145</sup>

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<sup>137</sup> EASO (2018), 17.

<sup>138</sup> EASO (2018), 20 -23; Art 23, 24; Art 25 (1) Procedural Directive.

<sup>139</sup> EASO (2018), 20, 21

<sup>140</sup> Ibid, 20, 21.

<sup>141</sup> Abbing, (2011), 14

<sup>142</sup> EASO (2018), 45

<sup>143</sup> EASO (2018), 23

<sup>144</sup> CRC Committee, AD v. Spain, par 10.4 - 10.5.

<sup>145</sup> Ibid

Interestingly, the EASO clarifies that '*substantiated doubts*' cannot be based solely on the first estimation of physical appearance.<sup>146</sup> Hence, the evidential value of physical appearance alone can only be used in favour of the applicant. In the author's opinion, this is the most noteworthy contribution of the EASO to the interpretation of Art 25 (5) Procedural Directive because basing a decision to undergo an invasive procedure solely on appearance can indeed be highly problematic. How biased such estimation was demonstrated in a British left-wing media campaign analysed by McLaughlin (2018). He argues that the western notion of refugee childhood is based on media images. They often portray very young and innocent-looking children by depicting them with teddy bears and contrasting them with a horrific background of war.<sup>147</sup> Such images create '*codes*' among those who see them suggesting what refugee childhood is supposed to look like. Such false '*codes*' preclude an UAM minor from appearing to have resilience and maturity.<sup>148</sup> Furthermore, it was argued that a '*culture of disbelief*' exists when it comes to evaluating foreign documents of UAM.<sup>149</sup> Hence, the author argues that when authority officials encounter a mature and resilient UAM, the encounter disrupts their '*code*' of the innocent notion of refugee children. As justification for that disruption, the official will likely reason that the applicant cannot be a child. Thus, the decision to order an invasive procedure will often be based on false '*codes*' of innocent refugee childhood and a '*culture of disbelief*' regarding foreign documents. The EASO is right when suggesting that this should not be possible.

Moreover, the author argues that using the evidence only when it supports the applicant's claim should also account for evidence derived from the Eurodac database. This database is grounded in the EU Eurodac Regulation,<sup>150</sup> which obliges Member States to save fingerprints and information from asylum applicants. Thus, a person's claim in other Member States can be counterchecked.<sup>151</sup> However, the evidential value of that database must be questioned. A person might be incentivised to declare him or herself an adult in other Member States to avoid triggering special protection and move to another country, to be permitted to work, or because traffickers told them to do so.<sup>152</sup> Moreover, as the Human Rights Committee pointed out, the poor decision to lie about the age may be linked to the person being a minor.<sup>153</sup> Furthermore, the reliability of the data entered into the system by some Member States must be questioned. For example, reports show that Greek authorities often do not register UAMs and try to push them back illegally to the countries they are entering from.<sup>154</sup> Should data provided by such authorities account as reliable evidence? In the authors opinion, no since their trustworthiness is seriously undermined by such reports. For all those reasons, Eurodac data should not provide sufficient reason to order an invasive age assessment procedure. Following the authors reasoning, the '*benefit*

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<sup>146</sup> Ibid

<sup>147</sup> McLaughlin, C. (2018). 'They don't look like children': child asylum-seekers, the Dubs amendment and the politics of childhood. *Journal of Ethnic and Migration Studies*, 44(11), 1758-1760.

<sup>148</sup> Ibid, 1762 - 1763

<sup>149</sup> Aynsley-Green et al. (2012), 17-42.

<sup>150</sup> Regulation (EU) No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice

<sup>151</sup> Abbing (2011), 14; Rudolf, E. (2016.), Der altersdiagnostische Sachverständigenbeweis nach § 42f SGB VIII. *Rechtsmedizin*, 26(6), 526.

<sup>152</sup> UNHCR Austria (2021). Der Kindeswohlvorrang im Asylverfahrenskontext – Rechtliche Grundlagen und Empfehlungen für die Umsetzung in Österreich, 48; see also Separated Children in Europe Program (2010). Statement of Good Practice 4<sup>th</sup> Edition, par D5; EASO (2018), 17, 21; Council of Europe (2019), 11.

<sup>153</sup> Human Rights Committee, OYKA v. Denmark, par 8.11.

<sup>154</sup> Asylum Information Database (2021). Country Report Greece, 34-36.

*of the doubt*' should apply in cases where the first estimation of physical appearance or Eurodac data supports the applicant's claim. On the other hand, if either of those elements contradicts the claim, the '*benefit of the doubt*' should not be denied solely on those grounds.

Lastly, the UNHCR goes seemingly further in its interpretation of Art 25 (5) Procedural Directive. Based on Art 4 (5) Qualification Directive, he argues that credible statements of the applicant do not need further confirmation even when not supported by evidence. Hence, in the context of age assessment credible statements alone should lead to the '*benefit of the doubt*'.<sup>155</sup>

### 3.1.2. Phase 2: The assessment procedure

#### The choice of methods - combining invasiveness and accuracy

Art 25 (5) Procedural directive provides that medical examination must be carried out with respect to the dignity of the individual assessed, should be the least invasive method, and carried out by a professional that allows for a reliable result. Therefore, in line with the Committee's jurisprudence, the EASO suggests that methods requiring nudity should never be conducted due to their invasiveness.<sup>156</sup>

In contrast to the Committee, the EASO does not advocate for a holistic but rather a step-by-step approach to guarantee the least necessary invasion of privacy. Non-medical methods, like psychological assessment or interviews, should be conducted before using medical techniques without radiation.<sup>157</sup> Radiological methods should be the last resort. The dose of radiation must be kept to a minimum.<sup>158</sup> Moreover, the EASO introduces that the '*benefit of the doubt*' should apply during this step-by-step approach. As soon as one result indicate that the person could be a minor, assessment should be stopped in favour of the applicant.<sup>159</sup> If such an approach is in line with Art 25 (5) Procedural Directive is questionable since the provision asks for the least invasive procedure '*to the extent possible, for a reliable result*'. Solely basing a decision on a psychosocial evaluation, even when conducted by an expert, lacks even more scientific evidence than medical methods.<sup>160</sup> However, the EASO guidelines allow to interpret the results in favour of the applicant. Otherwise, medical examinations should be conducted. Hence, Member States could be encouraged to use it. On the other hand, states would not violate the Procedural Directive by introducing more invasive procedures earlier.

#### The requirement of consent as an essential safeguard

The EASO's clarification to adapt a procedure to the child's cultural background and experience seems appropriate in light of Art 3 CRC and Art 24 (2) CFR. Requests of the child to reduce stress must be taken seriously and can include limiting the number of people attending the examination or the presence of a guardian or representative.<sup>161</sup>

While the Committee only suggests informed consent, the EASO elaborates that it must additionally be given freely and voluntarily. It further adds that States should document that they provided the

<sup>155</sup> Lithuanian Supreme Court, Q. N and G. M., amicus curiae by UNCHR, par 9 vii - viii.

<sup>156</sup> EASO (2018), 34; CRC Committee RYS v. Spain, par 8.8.

<sup>157</sup> EASO (2018), 31; CRC General Comment No. 23, par 4; CRC General Comment No. 6, par 31i; UNHCR (2017), par. 5.11; UNCHR (2009), par 75.

<sup>158</sup> EASO (2018), 33, 43-44.

<sup>159</sup> Ibid, 25.

<sup>160</sup> Schmeling, A., Geserick, G., Tsokos, M. (2014). Aktuelle Diskussionen zur Altersdiagnostik bei unbegleiteten minderjährigen Flüchtlingen. *Rechtsmedizin*, 24, page 578.

<sup>161</sup> EASO (2018), 21.

information.<sup>162</sup> As discussed below, the wording indicates this suggestion is based on the jurisprudence of the ECtHR regarding the right to private life<sup>163</sup>. Furthermore, Art 25 (5) Procedural Directive states that a refusal to undergo age assessment cannot be the *sole* reason to reject an application for protection. However, the UNHCR states that the refusal should not influence the protection decision at all.<sup>164</sup> While the EASO does not elaborate on the relation of the refusal to consent and the asylum decision, it does state that the refusal should not lead automatically to the establishment of adulthood.<sup>165</sup>

### 3.1.3. Phase 3: The decision on age after the assessment

#### Interpreting the outcome of the assessment procedure

At 25 (5) Procedural Directive provides that the benefit of the doubt should apply after the assessment procedure. According to the EASO and the UNHCR, the '*benefit of the doubt*' demands that the lowest age of the range of any method should be established as the chronologic age of the applicant since every method has a margin of error.<sup>166</sup> However, in the author's opinion, little is gained from that guidance. An estimated age can only be shown on a probability distribution, which will provide all ranges of age and assign a certain probability to them. Hence, it must be specified under the assumption of what probability the lowest age of the range should be established.

There is no mention of how much weight must be given to the applicant's statements if they are at odds with the results. However, the author argues that the right to be heard (Art 24 CFR, Art 12 CRC) must also apply *after* the assessment procedure.<sup>167</sup> Even though it is acknowledged that there might be incentives for an applicant to falsely claim to be a minor, in the author's opinion, the probability that a statement is wrong must be weighed against the likelihood that the outcome of an assessment procedure is incorrect.<sup>168</sup> Lastly, according to the EASO, the decision should be open to appeal separately from and prior to the decision on international protection.<sup>169</sup>

## 3.2. The European Court of Human Rights

The ECHR does not explicitly mention age assessment. However, a third-party intervention and an interim measure to the ECtHR provide valuable sources for arguments. Moreover, other case law on UAMs regarding Art 3 and 8 ECHR not directly linked to age assessment is relevant and will be used to argue states' obligations.

Art 3 ECHR, the right not to be subjected to torture or inhuman or degrading treatment, sets the obligation on states to protect particularly children from ill treatment.<sup>170</sup> First, the assessment procedure can be degrading in itself. In *Yazgül Yilmaz v. Turkey*, the Court found that the medical and gynaecological examination of a sixteen-year-old girl by authorities without her consent reached the threshold of degrading behaviour.<sup>171</sup>

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<sup>162</sup> Ibid, 27-29.

<sup>163</sup> see chapter 3.2.

<sup>164</sup> UNHCR Austria (2011), 48-49, Separated Children in Europe Programme (2011), par D5.

<sup>165</sup> EASO (2018), 29.

<sup>166</sup> Ibid, 24 - 25, 34; UNHCR Austria (2021), 48.

<sup>167</sup> CRC General Comment No. 12, par 82.

<sup>168</sup> Parzeller (2014), 29; Eurodac Supervision Coordination Group (2009). Second Inspection Report, 24.

<sup>169</sup> EASO (2018), 37.

<sup>170</sup> ECtHR, *R.B. v. Estonia*, 22597/16, 22.09.2021, par 78.

<sup>171</sup> ECtHR, *Yazgül Yilmaz v. Turkey*, 36369/06, 01.02.2001.

Second, placing a minor in a reception facility or detention for adults can violate Art 3 ECHR. In *M.S.S. v. Belgium and Greece*, the Court established that precarious living conditions for UAMs violate Art 3.<sup>172</sup> In *Tarakhel v. Switzerland*, he adds that following Art 3 ECHR, children need special reception conditions to ensure that a situation of stress or anxiety does not confront them.<sup>173</sup> Moreover, in *Dansu and others v. Italy*, the Court granted an interim measure based on the claims that the applicants were placed in precarious adult reception accommodation in breach of Art 3 ECHR after their age had been assessed with the Greulich and Pyle method. The Court decided that the young persons should reside in a special reception facility for children.<sup>174</sup> Thus, he indicated that a wrongful placement of a minor in a facility for adults might breach Art 3 ECHR. Further, the author argues that the Court recognizes the '*presumption of minority*' since, in the light of inconclusive evidence, he provided them with protection until final conclusions about their age can be drawn.

Third, wrongful deportations can breach Art 3 ECHR. It is well established that an expulsion to the country of origin where a person faces torture or inhumane or degrading treatment violates Art 3.<sup>175</sup> The wrongful assumption that a person does not need child-specific could lead to such a wrongful deportation. Moreover, in *Tarekhel v. Switzerland*, the Court stated that a state must ensure that the receiver country provides adequate living conditions for children in the case of returns under the Dublin Regulation.<sup>176</sup> In *M.S.S. v. Belgium*, he pointed out that states must make sure that the receiver country affords sufficient guarantees that a person is not being deported to their country of origin without evaluating the risks they would face.<sup>177</sup>

Art 8, the right to private and family life, encompasses the physical and psychological integrity and the physical and social identity of a person.<sup>178</sup> Invasive methods or the placement in inappropriate reception facilities that do not reach the threshold of the severity of Art 3 ECHR may be subject to physical or moral integrity under Art 8.<sup>179</sup>

First, the Court only finds a violation of Art 8 ECHR concerning medical procedures in the absence of content. However, without consent, '*any medical intervention*' would violate Art 8 ECHR, regardless of its intensity.<sup>180</sup> Explicitly he ruled that chest x-rays (*Acmanne v. Belguim*)<sup>181</sup> and gynaecological examination without touching genitalia (*Juhnke v. Turkey*)<sup>182</sup> violate Art 8 if no consent was given by the child. In the latter judgment, he clarified that consent must be given free, informed, and expressed. Furthermore, it must be possible to conclude '*with certainty that any consent given by the applicant was free and informed*'.<sup>183</sup> Hence, the author argues that states must document a person's consent to an age assessment procedure.

<sup>172</sup> ECtHR, *M.S.S. v. Belgium and Greece*, par 254, 263 - 264.

<sup>173</sup> ECtHR, *Tarakhel v. Switzerland*.

<sup>174</sup> ECtHR, *Dansu and others v. Italy*, 16030/17, 20.03.2017;

<https://www.asylumlawdatabase.eu/en/content/ecthr-communicated-cases-mt-v-france-and-dansu-and-others-v-italy> (last visited 28.06.2022)

<sup>175</sup> De Weck, F. (2016) *Non-Refoulement under the European Convention on Human Rights and the un Convention Against Torture*, 17-21.

<sup>176</sup> ECtHR, *Tarakhel v. Switzerland*, par 122.

<sup>177</sup> ECtHR, *M.S.S. v. Belgium and Greece*, par 342

<sup>178</sup> ECtHR, *Denisov v. Ukraine*, 76639/11, 25.09.2018, par 95.

<sup>179</sup> ECtHR *Raninen v. Finland*, 20972/92, 16.12.1997, par 63.

<sup>180</sup> Lukits & Lukits (2014), 56.

<sup>181</sup> ECtHR, *Acmanne v. Belguim*, 10435/83, 10.12.1984.

<sup>182</sup> ECtHR, *Junhnke v. Turkey*, 52515/99, 13.05.2008.

<sup>183</sup> *Ibid*, par 9, 76- 77.

Second, failing to hear a child in a judicial proceeding or appoint a legal guardian can violate Art 8 ECHR. In *C. v. Croatia*, the Court ruled that the failure to hear the child and appoint a guardian at litem in a custody proceeding violates the child's best interest, hence Art 8 ECHR.<sup>184</sup> In *Rahimi v. Greece*, the Court pointed out that without a guardian, a child might not be able to exercise their procedural rights.<sup>185</sup>

Third, it is well established that intervention in someone's private life must always be in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society.<sup>186</sup> The latter includes a test of whether the interference is proportionate in the light of the aim pursued.<sup>187</sup> '*In accordance with the law*' requires an invasive measure to be clear, foreseeable, and adequately accessible.<sup>188</sup> In *Khan v. the United Kingdom*, the Court ruled that a surveillance measure based on non-binding guidelines that are not publicly accessible is not in accordance with the law and breaches Art 8 ECHR.<sup>189</sup> The author argues that basing the choice of age assessment methods on internal guidelines constitutes the same violation.

Fourth, the proportionality of an age assessment procedure must be questioned. In *Connors v. the United Kingdom*, the Court stated that interference in the right to private life must be proportionate to a legitimate aim.<sup>190</sup> In light of the invasive effects such methods have on children, especially given the heightened vulnerability of UAMs, and the severe criticism about the preciseness of assessment methods amongst medical experts it is argued that an x-ray procedure to estimate age is not proportionate to the aim of migration control.<sup>191</sup>

### 3.3. Conclusion on the European standards

Overall, the Art 25 (5) Procedural Directive does not provide any guidance on the '*presumption of minority*' or the '*benefit of the doubt*' during Phase 1. However, as argued, the '*principle of effectiveness*' and the Anti-Trafficking Directive both demand (in line with the EASO and UNHCR) a wide interpretation of the '*presumption of minority*'. Accordingly, it should only be denied if a person appears to be, with a probability bordering on certainty, significantly older than 18 and no other evidence, however weak, substantiates the claim of minority.<sup>192</sup> Moreover, an interim measure of the ECtHR shows that denying that presumption can even violate Art 3 ECHR if it leads to inadequate placement of a child.<sup>193</sup>

In line with the Committee, the EASO and the UNCHR state that in cases an applicant provides credible statements supported by documents, it is not necessary to initiate an age assessment procedure.<sup>194</sup> However, in the absence of documents, the EASO clarifies that any evidence supporting the credible

<sup>184</sup> ECtHR, *C v. Croatia*, 80117/17, 08.10.2020, par 77-82.

<sup>185</sup> ECtHR, *Rahimi v. Greece*, 8687/08, 5.04.2011, par 88-94,120.

<sup>186</sup> See, e.g., ECtHR, *Vavřička and Others v. the Czech Republic*, 47621/13, 08.04.2021, par 265 - 275 with further references.

<sup>187</sup> *Ibid*, par 290.

<sup>188</sup> ECtHR, *Silver and Others v. the United Kingdom*, 5947/72, 25.03.1983, par 87.

<sup>189</sup> ECtHR, *Khan v. the United Kingdom*, 35394/97, 12.05.2000, par 27-28.

<sup>190</sup> ECtHR, *Connors v. the United Kingdom*, 66746/01, 27.05.2004, par 81-84.

<sup>191</sup> ECtHR, *Darboe and Camara v. Italy*, 5797/17, 14.02.2017, Written Submission on Behalf of the Aire Centre (Advice on individual Rights in Europe), the Dutch Council of Refugee (DCR) and the European Council on Refugees and Exiles (ECRE), Interveners, 5.07.2017, par 9-12.

<sup>192</sup> Recital 22, Art 13 (2) Anti-Trafficking Directive; UNHCR (2015), par 9 vi; EASO (2018), 17; CJEU, CS Communications par 31.

<sup>193</sup> ECtHR, *Dansu and others v. Italy*.

<sup>194</sup> UNHCR (2015), par 9 vii - viii; EASO (2018), 23.

claim, like the first estimation of physical appearance or Eurodac data, is sufficient to trigger the '*benefit of the doubt*' in favour of the applicant. On the other hand, the first estimation of appearance should not be the sole ground for ordering an age assessment procedure.<sup>195</sup> In the author's opinion, this is crucial since the wrong image of refugee childhood portrayed by the media would lead to many unnecessary invasive procedures.<sup>196</sup> However, the author argues that neither should an invasive procedure be ordered solely based on Eurodac data because it is an equally questionable source of evidence.<sup>197</sup>

In Phase 2, the Procedural directive explicitly allows medical procedures; however, it should be the least invasive procedure '*to the extent possible, for a reliable result*'. In contrast to the Committee, the EASO does not advocate for a holistic but rather a step-by-step approach to guarantee the least necessary invasion of privacy. Non-medical methods, like psychological assessment or interviews, should be conducted before using medical techniques without radiation.<sup>198</sup> In light of the inaccuracy of psychological methods, states are allowed to introduce medical methods earlier.<sup>199</sup> In line with the Committee's jurisprudence, the EASO states that methods requiring nudity should never be conducted due to their invasiveness.<sup>200</sup> However, the ECtHR only finds violations of Art 3 and 8 ECHR in cases of lacking consent.<sup>201</sup> In line with the ECtHR, the EASO established that consent to age assessment procedures must be given free, informed, and expressed. Furthermore, it is argued that states are obliged to document that consent.<sup>202</sup>

Moreover, Art 8 ECHR demands that invasive measures are clear, foreseeable, and adequately accessible.<sup>203</sup> Hence, it is argued that the choice of methods cannot be based on internal guidelines. Furthermore, x-ray measures may not be proportional under Art 8 in light of the vulnerability of UAMs and the severe criticism of the accuracy of the methods.<sup>204</sup> Solely basing the decision on age on the outcome of Greulich and Pyle atlas is never proportional.<sup>205</sup> Otherwise, proportionality must be assessed method by method based on the latest scientific evidence.

In Phase 3, the assessment procedure, the principle of the '*benefit of the doubt*' applies according to EU hard law. However, it remains unclear how to interpret this *principle*. Guidance is lacking in soft and hard law on exact scientific standards of tests, the control group, and under the assumption of what probability it should be concluded that no doubt remains. Lastly, soft law provides that the decision must be open to appeal separately and prior to the decision on protection.<sup>206</sup>

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<sup>195</sup> EASO (2018), 23.

<sup>196</sup> McLaughlin (2018), 1758-1763.

<sup>197</sup> UNHCR (2021), 48.

<sup>198</sup> EASO (2018), 31; CRC General Comment No. 23, par 4; CRC General Comment No. 6, par 31i; UNHCR (2017), par 5.11; UNCHR (2009), par 75.

<sup>199</sup> Schmeling, (2014), 578.

<sup>200</sup> EASO (2018), 34; CRC Committee RYS v. Spain, par 8.8.

<sup>201</sup> Lukits & Lukits (2014), 56.

<sup>202</sup> ECtHR, Junhne v. Turkey, par 9, 76- 77; EASO (2018), 27-29.

<sup>203</sup> ECtHR, Silver and Others v. the United Kingdom, par 87.

<sup>204</sup> ECtHR, Darboe and Camara v. Italy, Interveners, par 9-12.

<sup>205</sup> CRC Committee NBF v. Spain, par 12.6; AL v. Spain, par 12.6; SMA v. Spain, par 7.9.; MBS v. Spain, par 9.10.

<sup>206</sup> EASO (2018), 37.

## 4. The compliance of Austrian law and practice with international and European standards

### 4.1. The relationship between Austrian and international and European law

Austria has ratified the CRC in 1992. It was, however, adopted by parliament with the reservation of giving it no domestic legal effect.<sup>207</sup> Moreover, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure has not been ratified.<sup>208</sup> Hence, an individual complaint against Austria for a violation of the rights under the CRC cannot be submitted to the Committee.<sup>209</sup> Nevertheless, Austria has the international obligation to ‘*take all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the*’ CRC (Art 4 CRC).

Moreover, the jurisprudence of the Committee, even though not binding, is a relevant source of interpretation in Austria. First, in 2011 Austria passed a bill placing six child rights provisions, inspired by the CRC, into domestic constitutional law, including the right to development, the right to special protection in the absence of parental care, the best interest of the child, and the right to be heard.<sup>210</sup> It is clear from the similar wording to the compatible CRC provisions and the explanatory memorandum that those provisions find their basis in the CRC and acknowledge Art 24 CFR.<sup>211</sup> Furthermore, Austrian domestic law must be interpreted in the light of its international obligations.<sup>212</sup> Hence the domestic child rights provisions will be best interpreted if given the meaning the Committee assigns to its CRC counterparts. Second, the ECtHR has regard for Committee’s views.<sup>213</sup> The views of the ECtHR are of utmost importance since the ECHR is seen as a basic principle of the Austrian constitution.<sup>214</sup> Thus, the jurisprudence of the Committee and the ECtHR are an essential source of interpretation when reflecting on whether Austrian law and practice are in line with international and European Standards.

Moreover, the Austrian age assessment system must comply with the CEAS and the CFR, as both are hard law. According to Art 6 (1) Treaty of the European Union, the CFR is part of EU primary law. Therefore, it is domestically applicable if a Member State is implementing Union law.<sup>215</sup> In *Akerberg Fransson*, the CJEU clarified that this is the case if Member States act in the scope of Union law.<sup>216</sup> Age assessment falls under Union law since Art 25 (5) Procedural Directive explicitly regulates it. Furthermore, the applicability of child-specific provisions under the Dublin III Regulation, Reception-, Qualification-, and Family reunification Directive will depend on the outcome of the age assessment.<sup>217</sup> While the Dublin III Regulation is directly applicable in Austria, the Directives must be adopted into domestic provisions.<sup>218</sup>

<sup>207</sup> Übereinkommen über die Rechte des Kindes, StF: BGBl. Nr. 7/1993 idF BGBl. Nr. 437/1993

<sup>208</sup> [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en) (last visited 28.06.2020).

<sup>209</sup> Lukits & Lukits (2014), 57 - 58.

<sup>210</sup> Bundesverfassungsgesetz über die Rechte von Kindern StF: BGBl. I Nr. 4/2011.

<sup>211</sup> Explanatory Memorandum to the Bundesverfassungsgesetz über die Rechte von Kindern, 935/A XXIV. GP, 1

<sup>212</sup> Austrian Supreme Administrative Court, 535/59, 28.02.1962 and 493/63, 20.02.1964.

<sup>213</sup> the Court regularly reads ‘*the best interest of the child*’ into Art 8 ECHR, see e.g., ECtHR, *Nunez v. Norway*, 55597/09, 28.6.2011.

<sup>214</sup> Albi & Bardutzky (2019), 1274, 1285.

<sup>215</sup> Art 51 (1) CFR

<sup>216</sup> CJEU, *Åklagaren v Hans Åkerberg Fransson*, C-617/10, 26.02.2013, par 20.

<sup>217</sup> Lukits & Lukits (2014), 59.

<sup>218</sup> Bußjäger, P. & Heißl, G. (2008). Probleme in der Umsetzung von EU-Naturschutzrecht in Österreich. *Natur + Recht*, 30(6), 382-385.

## 4.2. An analysis of Austria's age assessment framework

According to Austrian domestic law, UAMs are granted more comprehensive care than adults. They are provided with a legal guardian, who must be present at every hearing.<sup>219</sup> UAMs are placed in special accommodation, receive education, pocket money, and special assistance in questions of cooperation with authorities, and, if necessary, socio-educational or psychological support.<sup>220</sup> Moreover, only minors can apply for family reunification with their parents.<sup>221</sup>

Three domestic provisions build the basis for age assessment procedures. Art 13 (3) Federal Act on the general rules of procedures at the federal office for immigration and asylum (FOIA-RP) provides the Federal Office for Immigration and Asylum (FOIA) may order a multiple age examination method. The authority should particularly use x-ray examinations, to determine age, in cases where the person does not manage to prove a doubtful minority. Such proof can only be unobjectionable documents or other appropriate and equivalent means of evidence. Any examination must be done with the least possible level of intervention. The cooperation in radiological examinations cannot be enforced. If reasonable doubts remain after the age assessment procedure, it is to be assumed - in favour of the person - that they are a minor. Art 2 (2)(25) Austrian Asylum Act 2005 defines the multiple examination method as a state-of-the-art model to determine the age based on three individual medical examinations (especially physical, dental, and x-ray). The exact procedure is laid out by internal decrees of the FOIA, which are publicly not accessible.<sup>222</sup>

### 4.2.1. Phase 1: The first evaluation of evidence

#### The 'presumption of minority' - safeguarding children's rights until there are conclusive results

The 'presumption of minority' is not explicitly mentioned in domestic law. However, a recent comprehensive report on UAMs provided by the Independent Commission for the Protection of Children's Rights in Matters of Asylum and Aliens Law<sup>223</sup> shows that in cases of first doubts about a person's age, they are immediately placed in facility specialized in dealing with UAMs.<sup>224</sup> Furthermore, the person will be interviewed in the presence of a legal advisor functioning as a legal guardian.<sup>225</sup> Hence, in practice, the authorities presume at first that they are dealing with a minor. Be that as it may, in the author's opinion, the 'presumption of minority' should be explicitly mentioned in the law to emphasize to authority officials that they must assume to be dealing with a child as soon as the claim of minority is made. Therefore, they would be more aware of the heightened vulnerability of the applicant.

While the 'presumption of minority' is quickly established in Austria, it can be very easily denied once the first evidence is evaluated. While basing a decision on age solely on the applicant's appearance was declared unlawful by courts, the Austrian Supreme Administrative Court opens the door for

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<sup>219</sup> Art 10 (3), 49 (3) FOIA-PR.

<sup>220</sup> Art 6 (1)(3), Art 7 Agreement between the Federal Government and the Länder pursuant to Art. 15a of the Federal Constitution on joint measures for temporary basic care for foreigners in need of assistance and protection.

<sup>221</sup> Art 34, 35 Austrian Asylum Act 2005.

<sup>222</sup> Austrian Parliamentary Query Response (2018), 1 - 2.

<sup>223</sup> Kindeswohlkommission (Austrian Child Welfare Commission).

<sup>224</sup> Bericht der unabhängigen Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht (Report of the Independent Commission for the Protection of the Rights and Welfare of the Child in matters of Asylum and Aliens Law), 13.07.2021, par 550.

<sup>225</sup> Austrian Child Welfare Commission (2021), Annex II, 10 - 11.

authorities to argue on many other grounds that the '*presumption of minority*' does not apply.<sup>226</sup> He ruled that age assessment can be omitted to the applicant's disadvantage if their claims are manifestly incorrect or based on comprehensibly presented circumstances.<sup>227</sup> One could argue that is in line with the Committee, which denied the '*presumption of minority*' in a case of serious discrepancies in claims.<sup>228</sup> However, the Committee's jurisprudence is limited to *unjustified* discrepancies. As the Human Rights Committee pointed out, such discrepancies can easily be justified if a person states that they were told to lie about age.<sup>229</sup> Moreover, as argued, the '*principle of effectiveness*' and the Anti-Trafficking Directive both demand (in line with the EASO and UNHCR) a wide interpretation of the '*presumption of minority*'. Accordingly, it should only be denied if a person appears to be, with a probability bordering on certainty, significantly older than 18 and no other evidence, however weak, substantiates the claim of minority.<sup>230</sup> The decision by the Austrian Supreme Administrative Court seems to neglect those arguments.

Another decision of the Austrian Supreme Administrative Court is even more problematic in this regard. It states that contradicting data derived from Eurodac can justify the assumption that the applicant is an adult because, as a rule, asylum seekers would provide information that came closest to the truth during their first contact with the authorities. He elaborates that it is not objectively comprehensible that UAMs declare themselves as adults since underage asylum seekers enjoy advantages in the procedure.<sup>231</sup> Indeed, in practice, the authorities may base their decision to declare someone an adult solely on Eurodac and deport them to the 'responsible' Member State.<sup>232</sup> However, the Austrian court neglects that Eurodac data is a questionable source of evidence since there are many incentives to UAMs to declare themselves of age.<sup>233</sup> Furthermore, he ignores that the Human Rights Committee stated that the poor choice to lie about age might be linked to a person being a minor.<sup>234</sup> Hence, Eurodac data can never justify to depart from the '*presumption of minority*' and its wide understanding in light of the '*principle of effectiveness*' and the Anti-Trafficking Directive. Deportation to another Member State solely based on Eurodac data could thus violate Art 3 ECHR if the minor does not receive appropriate accommodation for children.<sup>235</sup>

Since the '*presumption of minority*' is not mentioned in the law, there is no provision explicitly providing that the child's best interest should guide the decision to undertake age assessment. Neither does the law explicitly require the child to be heard *before* the procedure. The right to be heard could be deducted from Art 13 (3) FOIA-RP, which provides that in cases of doubt, the applicant must be given the opportunity to prove their claim through unobjectionable documents or other appropriate and equivalent means of evidence. However, a hearing before an age assessment procedure serves not only the purpose of eliminating doubt. In line with Art 3 CRC and Art 24 (2) CFR, it must be assessed whether age assessment is in the child's best interest.<sup>236</sup> Hence, the Austrian provision is not sufficient for the hearing of a child in compliance with international and European standards.

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<sup>226</sup> Austrian Supreme Administrative Court, 2007/01/0631, 28. 06. 2011,

<sup>227</sup> Austrian Supreme Administrative Court, 2016/01/0267, 28.03.2017, par 15.

<sup>228</sup> CRC Committee, AD v. Spain, par 10.4 - 10.5.

<sup>229</sup> Human Rights Committee, OYKA v. Denmark, par 8.11.

<sup>230</sup> Recital 22, Art 13 (2) Anti-Trafficking Directive; UNHCR (2015), par 9 vi; EASO (2018), 17; CJEU, CS Communications, par 31.

<sup>231</sup> Austrian Supreme Administrative Court, 2014/20/0045, 25.05.2015, par 2.2.2. - 2.2.3.

<sup>232</sup> Lukits & Lukits (2011), 20.

<sup>233</sup> UNHCR Austria (2021), 48; see also Separated Children in Europe Program (2010), par D5; EASO (2018), 21; Council of Europe (2019), 11.

<sup>234</sup> Human Rights Committee, OYKA v. Denmark, par 8.11.

<sup>235</sup> ECtHR, M.S.S. v. Belgium and Greece, par 342.

<sup>236</sup> EASO (2018), 22, 39.

In practice, according to a report by the Federal Ministry of the Interior in 2021, the applicant will be interviewed if there are any doubts about their age. However, an interview may be omitted if it is already clear that a medical age assessment is required or an interview cannot be conducted within a reasonable time.<sup>237</sup> Austrian practice is, like the law, at odds with Art 3,12 CRC and Art 24 (2) CFR since a child has the right to be heard in *every* case of age assessment to determine their best interest.<sup>238</sup>

The ‘benefit of the doubt’ - declaring a person a minor without an age assessment procedure

The explanatory memorandum to Art 13 (3) FOIA-RP provides that medical age assessment should only be ordered in cases of doubt; however, not if it is evident that the person concerned is still or no longer a minor.<sup>239</sup> Interpreting Art 13 (3), it becomes clear that the authorities can base first doubts about the claim of minority on the physical appearance of the applicant, inconsistent statements, or contradicting other evidence, like Eurodac information. Once doubts exist, they can only be eliminated by providing unobjectionable documents or other appropriate and equivalent means of evidence. The explanatory memorandum clarifies that this does not put the burden of proof on the applicant.<sup>240</sup>

However, in the author’s opinion, the burden of proof shifts to the applicant to provide documents similar to European standards since existing doubts can only be eliminated by unobjectionable documents or evidence of similar means. According to the Austrian Supreme Administrative Court, an Afghan birth certificate (*‘Tazkira’*) is not an unobjectionable document, especially when admitted that it was issued based on the estimation of that person’s age. Neither are statements of relatives.<sup>241</sup> The ruling shows the means of evidence an applicant must provide once their age is in doubt is exceptionally high. This is problematic since most protection seekers come from countries where it is not possible to provide such documents.<sup>242</sup> Hence, even if the applicant offers some documents to substantiate their consistent statements and witness statements support the claim, age assessment can still be initiated if the authorities base their doubts solely on the applicant’s appearance *or* Eurodac data.<sup>243</sup>

Even though in line with the Procedural Directive, which does not give any guidance on this, it is at odds with soft law since no *‘benefit of the doubt’* applies before ordering an invasive procedure. According to the EASO, the *‘benefit of the doubt’* should apply if *any* evidence (including physical appearance, data from a database, or statements of a guardian or relative) supports the claim (simple doubts).<sup>244</sup> However, in Austria, it seems to be the other way round. If *any* evidence contradicts the claim, an age assessment procedure can be ordered even if some evidence supports the applicant’s claim. As argued, physical appearance and Eurodac data are questionable sources of evidence. The former is influenced by a wrong perception of refugee childhood, the latter by many incentives children may have to about their age. An invasive procedure should never be initiated solely on those grounds.<sup>245</sup>

<sup>237</sup> Austrian Child Welfare Commission (2021), Annex II, 10 - 11.

<sup>238</sup> CRC General Comment No. 14, par 43

<sup>239</sup> Explanatory memorandum to the Austrian age assessment laws, 18.

<sup>240</sup> Strasser V. S. (2016). Die verfahrensrechtliche Qualifikation der medizinischen »Altersfeststellung« im Asylverfahren, *FABL*, 2/2016-I, 43 – 44.

<sup>241</sup> Austrian Supreme Administrative Court, 2016/01/0267, par 15

<sup>242</sup> Norwegian National Police Immigration Service (2010), 5.

<sup>243</sup> Austrian Child Welfare Commission (2021), Annex II, 10, 11.

<sup>244</sup> EASO (2018), 23.

<sup>245</sup> See chapter 3.1.1. under the ‘benefit of the doubt’

Moreover, the Committee provides that all documents should be considered valid unless there is proof of the contrary.<sup>246</sup> States should only order an age assessment procedure in cases where documents are either not provided or successfully challenged.<sup>247</sup> Otherwise, the '*benefit of the doubt*' applies. However, the wording of the Austrian law ('*unobjectionable documents*') suggests that the invalidity of documents is the starting point for evaluating them. A system to challenge documents is not in place. The Austrian Supreme Administrative Court neglects the Committee's General Comment No. 23 when stating that a 'Tazkira' cannot be seen as a valid document. The Austrian Constitutional Court ruled that the authenticity of a document may not be doubted for the sole reason that it is provided only in copy. Instead, the authorities must request the party submit the original to examine this document in more detail regarding its authenticity using forensic examination.<sup>248</sup> However, practice shows that officials do not wait until those documents are sent from the country of origin but order immediately an age assessment to speed up the procedure.<sup>249</sup> Hence, Austrian practice is at odds with the Committee's suggestion to consider documents valid.

#### 4.2.2. Phase 2: The assessment procedure

##### The choice of methods - combining invasiveness and accuracy

According to Austrian law, an age assessment must consist of a state-of-the-art multiple examination method based on three individual medical examinations (especially physical, dental, and x-ray).<sup>250</sup> The explanatory memorandum to those provisions provides that the recommendations of the Interdisciplinary Working Group for Forensic Age Diagnostics of the German Society of Forensic Medicine build the basis for the Austrian system. It should include a wrist x-ray, an x-ray of the teeth, and a physical examination. According to the German Society of Forensic Medicine recommendations and the explanatory memorandum age estimation based on this model can ascertain whether someone is over or under 18 with a degree of probability bordering on certainty.<sup>251</sup> Furthermore, according to the recommendations, the physical examination should include an examination of sexual maturity.<sup>252</sup>

In practice, age estimation consists of a two-step procedure. First, in contrast to the legal framework, the bone maturity in the wrist is measured based on Greulich and Pyle atlas in a pre-screening. If the measurement shows that the applicant is a minor, they are seen as a child without further assessment. Second, if the wrist x-ray indicates that the person is an adult, the authorities will initiate a multifactorial age diagnosis.<sup>253</sup> It consists of an x-ray of the dentition in addition to the physical examination. Furthermore, the authorities will order an x-ray of the collarbone, adding a fourth medical examination in practice. Based on the outcomes of those methods, the lowest chronological age possible in light of the findings is assigned to the applicant.<sup>254</sup>

Even though in line with the wording of the Procedural Directive, Austrian's choice of methods is at odds with recommendations by the EASO, the UNHCR, the Committee's jurisprudence, and Art 8 ECHR. First, Austria does not consider psychosocial and cognitive aspects of the juvenile's development, which

<sup>246</sup> General Comment No. 23, par 4.

<sup>247</sup> UNHCR (2009), par 75; CRC Committee NBF v. Spain, par 12.4; MBS v. Spain, par 7.13.

<sup>248</sup> Austrian Constitutional Court, 1558/11, 07.03.2012, 34; Strasser (2016), 46.

<sup>249</sup> Lukits & Lukits (2011), 20.

<sup>250</sup> Art 13 (3) FOIA-RP; Art 2 (2)(25) Austrian Asylum Act 2005.

<sup>251</sup> Explanatory memorandum to the Austrian age assessment laws, 17.

<sup>252</sup> <https://www.dgrm.de/forensische-altersdiagnostik/empfehlungen> (last visited 27.06.2022).

<sup>253</sup> Austrian Child Welfare Commission (2021), par 551.

<sup>254</sup> Austrian Parliamentary Query Response (2018), 2.

contradicts the guidelines of the UNHCR, the EASO, and the Committee's General Comments No. 6 and 23 calling for the establishment of holistic procedures including psychological factors next to medical methods.<sup>255</sup> Second, Austria examines the sexual maturity of young people physically. The EASO and the Committee explicitly stated that the examination, including nudity and examination of the genitalia, should never be conducted.<sup>256</sup> On the other hand, the ECtHR found violations in medical procedures only in cases where consent was lacking (discussion on consent see below).<sup>257</sup>

Third, Austria uses radiation methods. Art 25 (5) Procedural Directive demands that states choose the least invasive method. The wording of Art 13 (3) FOIA-RP indicates that the *principle* of the 'least possible interference' only applies to the chosen method exercised, e.g., keeping the radiation exposure to a minimum. However, according to the explanatory work of the FOIA-PR, proportionality must also be observed in the choice of method.<sup>258</sup> Thus, Art 13 (3) FOIA-RP is in line with the wording of Art 25 (5) Procedural Directive.

However, the EASO interprets this provision as states needing to use psychological methods before conducting x-rays. The use of radiation should be the last resort. Once a method indicates that a person is a minor, the age assessment proceedings should be stopped in favour of the applicant.<sup>259</sup> Austria starts with an x-ray before using two more radiation methods. Thus, in Austria, radiation is not the last but the first and the only resort apart from a physical examination.

Even though starting the age assessment procedure using the Greulich and Pyle atlas is at odds with soft law, it seems in line with hard law. It acknowledges the *principle* of the 'least possible interference' in Art 25 (5) Procedural Directive since it exposes a person to significantly less radiation before turning to a more invasive collarbone x-ray.<sup>260</sup> Furthermore, Austria uses the method only as a pre-screening and interprets the results only in favour of the applicant. Therefore, declaring a person an adult solely based on the outcome of Greulich and Pyle is not possible under the Austrian framework. Based on the interpretation only in favour of the applicant, the author argues that the use of Greulich and Pyle as a pre-screening method is proportionate in the light of Art 8 ECHR. This is in line with the Committee who linked the violations it found regarding that method to its inaccurate outcome rather than solely to its invasiveness.<sup>261</sup>

However, the author argues that the use of *multiple* x-ray measures is not proportional under Art 8 ECHR considering the vulnerability of UAMs and the severe criticism of the accuracy of methods.<sup>262</sup> The explanatory memorandum to Art 13 (3) FOIA-RP argues that given the effects of feigned minors, such examinations are in the public interest to maintain orderly enforcement of the asylum system. They outweigh the individual's interest in not undergoing x-ray examinations, especially considering each method's very low radiation exposure. It elaborates that the exposure to radiation during a wrist or teeth x-ray is significantly lower than natural radiation exposure during a year.<sup>263</sup> Therefore, migration control

<sup>255</sup> Austrian Child Welfare Commission (2021), par 551; UNHCR (2017), par. 5.11; UNCHR (2009), par 75; CRC General Comment No. 6, par 31; CRC General Comment No. 23, par 4.

<sup>256</sup> CRC Committee, RYS v. Spain, par 8.8; EASO (2018), 34.

<sup>257</sup> ECtHR, Acmanne v. Belguim; ECtHR, Junhnke v. Turkey.

<sup>258</sup> Lukits D. & Lukits R. (2013). Die medizinische Altersuntersuchung im österreichischen Asylrecht. *migralex* (FN 1, EF-Z 2013/129), 01.09.2013, 200.

<sup>259</sup> EASO (2018), 31.

<sup>260</sup> Schmeling et al., 46.

<sup>261</sup> CRC General Comment No. 23 (2017), par 4; CRC Committee JAB v. Spain; AL v. Spain; MT v. Spain; SMA v. Spain; MAB v. Spain; MB v. Spain; MBS v. Spain.

<sup>262</sup> ECtHR, Darboe and Camara v. Italy, Interveners, par 9-12.

<sup>263</sup> Explanatory memorandum to the Austrian age assessment laws, 17-18.

is a legitimate aim. This thesis cannot conclusively state how well Austria's multiple examination methods can serve the aim of migration control since the accuracy of the methods is highly contested among medical scholars (see discussion below).<sup>264</sup>

On the other hand, Austria exposes a person to radiation multiple times and neglects that the child might have been exposed to similar proceedings in other countries. Moreover, the exposure during a collarbone x-ray is particularly high.<sup>265</sup> In the light of the invasive effects of multiple methods, the heightened vulnerability of UAMs and the disagreement amongst scientific scholars on the accuracy of those methods, it is argued that multiple x-ray exposures are not proportional to achieving the aim of migration control. Especially since the child's best interest demands that more weight must be assigned to what serves the child best.<sup>266</sup>

Moreover, a state must consider the child's personal circumstances in each case and assess their best interest before concluding that a procedure is proportionate in the particular case.<sup>267</sup> Even though the explanatory memorandum states that every decision on method should have regard to personal circumstances, practice shows that considering the child's best interest is often omitted since the applicant is not heard.<sup>268</sup> Hence, in practice Austria violates Art 8 ECHR (and Art 3 and 12 CRC).

Lastly, the choices of methods are only laid out by internal decrees of the FOIA, which are publicly not accessible.<sup>269</sup> The ECtHR requires that every interference is in accordance with the law, which means that the law must be of a certain quality and accessible.<sup>270</sup> It is argued that the interference with someone's private life through invasive age assessment procedures based on non-accessible decrees is not in accordance with the law and thus violates Art 8 ECHR.<sup>271</sup>

#### The requirement of consent as an essential safeguard

Art 25 (5) Procedural Directive, on the other hand, demands that a UAM is informed about the medical exam, the consequences of the procedure, and the consequences of not consenting to it in a language they understand. After that, the applicant and/or the representative must consent to the examination. Art 13 (3) FOIA-RP only regulates that the state cannot enforce cooperation in a radiological examination using coercion. The Austrian framework departs from the Directive and is at odds with the jurisprudence of the ECtHR and international and European soft law.

The Procedural Directive demands consent, while Austria only prohibits the enforcement of medical methods using coercion. The ECtHR states that consent to medical procedures must be free, voluntary, and informed. It must be possible to conclude '*with certainty that any consent given by the applicant was free and informed*'.<sup>272</sup> Hence it is argued that Austria is under the obligation to document consent.<sup>273</sup> However, even though children are informed in practice about the procedure and consequences of their refusal, an explicit, free, voluntarily, and documented consent is lacking in Austria's law and practice. Hence, Austria's laws and practices are at odds with Art 25 (5) Procedural Directive and Art 8 ECHR.

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<sup>264</sup> Chapter 4.2.3.

<sup>265</sup> Schmeling et al. (2016), 46.

<sup>266</sup> CRC General Comment No. 14, par 39.

<sup>267</sup> EASO (2018), 22, 39.

<sup>268</sup> Explanatory memorandum to the Austrian age assessment laws, 17-18.

<sup>269</sup> Austrian Parliamentary Query Response (2018), 1-2.

<sup>270</sup> ECtHR, *Silver and Others v. the United Kingdom*, par 87.

<sup>271</sup> ECtHR, *Khan v. the United Kingdom*, par 27-28.

<sup>272</sup> ECtHR, *Junhke v. Turkey*, par 9, 76-77.

<sup>273</sup> EASO (2018), 26-29.

The difference between consent and prohibition of enforcement becomes particularly striking in the Austrian framework. According to Austrian law, an applicant's overall credibility is only undermined if they do not participate in a procedure they are obliged to follow. If consent was a prerequisite to an age assessment procedure, a person would not be obliged to participate, and thus, their credibility could not be undermined due to a refusal. However, since a person is obliged to participate, the refusal will negatively influence the applicant's credibility.<sup>274</sup> Hence, the refusal will influence the decision on adulthood and asylum significantly. While the Procedural Directive provides that the refusal to undergo age assessment can play a part in conjunction with other elements in determining the overall credibility of a person, the UNHCR states that the refusal should not influence the protection decision at all.<sup>275</sup>

Lastly, other safeguards, like the cultural and gender-sensitive implementation of procedures could neither be found in legislation or practice, nor that such principles were violated. However, according to the Committee, UNHCR and EASO, such a procedure must be adapted to a person's gender and cultural needs.<sup>276</sup> Those safeguards are lacking, at least, in Austrian law.

#### 4.2.3. Phase 3: The decision on age after the assessment

##### Interpreting the outcome of the assessment procedure

The Austrian law only provides that if *reasonable doubts* remain after the age diagnosis, it is to be assumed in favour of the person that they are a minor. The word *reasonable* is not reflected in the Procedural Directive nor any in any guidance provided by the Committee, UNHCR, or EASO dealing with the '*benefit of the doubt*' after an assessment examination. Hence, Austria's stricter regulation of applying this *principle* is at odds with international and European standards.

In practice, the competent officer determines whether the juvenile is a minor or an adult as a procedural order based on medical expert reports.<sup>277</sup> The explanatory memorandum to Art 13 FOIA-RP reasons that basing the decision solely on the medical report is in line with the '*benefit of doubt*' *principle* since the multiple age assessment method can estimate whether a person is over the age of 18 with a degree of probability bordering on certainty.<sup>278</sup>

However, whether this is true is a highly contested question among medical scholars. Many academics argue that age assessment methods based on bone density are unreliable because the reference groups provide a higher socioeconomic status and ethnic differences than most refugees arriving in Europe.<sup>279</sup> Others argue that the ossification of the bones depends mostly on socioeconomic status, not ethnicity. Therefore, taking a reference population with a higher socioeconomic status than the person assessed could only underestimate age. Hence, a wrist x-ray can indicate with a high probability whether someone is still a minor.<sup>280</sup> On the other hand, medical scholars state that dental development '*cannot be used to differentiate between ages below or above 18 years*'<sup>281</sup> and that an x-ray of the

<sup>274</sup> Art 13 (1)(5) FOIA-RP; See also Austrian Supreme Administrative Court, 2005/01/0463, 16.04.2007 who stated that a refusal to undergo age assessment must be taken into account in the assessment of evidence; or the explanatory memorandum to the Austrian age assessment laws, 18.

<sup>275</sup> UNHCR Austria (2011), 48-49; Separated Children in Europe Programme (2011), Rn D5.

<sup>276</sup> CRC General Comment No. 6, par 31; EASO (2018), 21; UNHCR (2017), par. 5.11; UNCHR (2009), par 75.

<sup>277</sup> Austrian Child Welfare Commission (2021), par 550.

<sup>278</sup> Explanatory memorandum to the Austrian age assessment laws, 17.

<sup>279</sup> Sauer et al. (2016), 300.

<sup>280</sup> Schmelting et al. (2016), 46.

<sup>281</sup> Sauer et al. (2016), 300.

clavicle is not suitable to determine whether someone is of age since the complete closure occurs somewhat between 15 and 30 years of age.<sup>282</sup> However, a German group of forensic scientists argue that combining those examinations makes it possible to determine age with a probability bordering on certainty. They advocate that this is possible by taking in every exam the age of the youngest person in the reference group showing the same signs of maturation as the applicant. Of those three assessed minimum ages, the highest is assigned to the applicant in the overall outcome report.<sup>283</sup>

Due to the contradicting medical literature this thesis cannot conclude whether the Austrian framework of age assessment provides accurate results. However, even in the absence of scientific certainty, some conclusions can be drawn. First, using a wrist x-ray in the first screening phase and only interpreting the outcome in favour of the applicant does justice to the '*benefit of doubt*' principle. Hence, it is not at odds with the Committee's jurisprudence on those methods.<sup>284</sup> Second, basing the decision on age only on the outcome of the multifactorial age assessment without considering any other elements is, in the author's opinion, problematic. It is, however, not at odds with international and European law since neither of them provide sufficient guidance on scientific standards for age assessments. However, the author argues that it is essential to elaborate in the outcome report on the parameters (e.g., socioeconomic status or ethnicity) that could influence the findings and what scientific evidence is still missing.<sup>285</sup> Such parameter should be considered and the probability that a statement is wrong should be weighed against the probability that the outcome of an assessment procedure is incorrect.<sup>286</sup>

#### Expert results that do not even provide certainty on paper - at odds with the '*benefit of the doubt*'

In some cases, the outcome of the medical report only provides with a simple probability (not bordering on certainty) that a person is an adult. The Federal Ministry of the Interior reported that in such cases, the '*benefit of the doubt*' goes to the person assessed.<sup>287</sup> Interestingly, the Austrian Supreme Administrative Court ruled differently. He stated that in a case where the expert opinion only assumes with simple probability that a person is a minor, it still overwrites statements of witnesses because expert opinions can only be questioned on the same professional level. Hence, declaring a person an adult on such an expert report without hearing witnesses did not violate the claimant's rights.<sup>288</sup> In the author's opinion, the ruling fails to acknowledge the '*benefit of the doubt*' principle as stated in every European and international standard. A simple likelihood provided by the medical report can never be enough to eliminate doubts, even more so if witnesses can testify that the applicant is a minor.

#### The significant impact of a decision on age on an asylum procedure

Credibility lies at the core of refugee status determination procedures. Research has shown that the lack of credibility is the most common ground for denying protection, including in the protection of children.<sup>289</sup> According to the Procedural Directive, the *lack of consent* should not be the sole reason for denying someone protection. However, it does not state that the *outcome* of an assessment procedure should not be the sole reason for denying protection, let alone that it should not influence the decision

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<sup>282</sup> Hjern (2018), 293.

<sup>283</sup> Schmeling et al. (2016), 46

<sup>284</sup> CRC Committee NBF v. Spain, par 12.6; AL v. Spain, par 12.6; SMA v. Spain, par 7.9.; MBS v. Spain, par 9.10.

<sup>285</sup> Schmeling et al. (2016), 47.

<sup>286</sup> Eurodac Supervision Coordination Group (2009), 24.

<sup>287</sup> Austrian Child Welfare Commission (2021), Annex II, 10 -11.

<sup>288</sup> Austrian Supreme Administrative Court, 2016/01/0267, par 17.

<sup>289</sup> Kumin J. (2018). Credibility: the challenge of establishing credibility in child asylum cases. In Bhabha, J., Kanics, J. & Senovilla Hernández, D., *Research Handbook on Child Migration*, 294

on protection. However, in the author's opinion, this would be crucial since the effective protection under the Refugee Convention and Qualification Directive may otherwise be easily undermined. There are many reasons a person may falsely claim to be off or underage as pointed out by the Human Rights Committee.<sup>290</sup> Furthermore, the UNHCR stated that if the assessment contradicts statements, the credibility of the young child should not be undermined generally for the asylum procedure as age is not given the same degree of importance universally.<sup>291</sup>

Officials and judges must base their decision on objective grounds and be impartial. However, there is no way to entirely eliminate subjectivity from such a procedure.<sup>292</sup> From the viewpoint of an Austrian decision maker in the protection matter, a medical method 'proved' with a degree of probability bordering on certainty that the person is an adult. No standard deviation or socio-economic differences to the reference group are provided in the decision on age they receive. Therefore, the decision maker will most probably think that the applicant lied. The fact that the applicant's appearance does not meet the expectation of innocent refugee childhood as portrayed by the media may support that thought.<sup>293</sup> Furthermore, the Austrian Supreme Administrative Court ruling that there are incentives to lie about age, supports the decision maker in their belief.<sup>294</sup>

It is argued that the decision on age may bias the decision maker before questioning the person about their grounds of protection. The files and the first appearance can already lead to the assumptions that the applicant is a liar before questioning them. This assumption could even lead to negative emotions towards the applicant if the official or judge thinks they are trying to take advantage of the innocent notion of childhood. It is notorious how important first impressions are and how hard it is to disprove them. Hence, the author argues that a decision maker might question a person (subconsciously) differently and be more prone to find contradictions than consistency in statements. Therefore, the outcome of an age assessment procedure will significantly affect the outcome of the asylum procedure even if decision makers might not be aware of that. While a law that forbids age assessment to be considered in evaluating credibility could not eliminate those subjective presumptions entirely, it would at least be a starting point to grant effective protection under the Refugee Convention and Qualification Directive.

#### The lack of possibility to appeal the decision - irreversible consequences

The decision on age is only a procedural order in Austria. Hence, it cannot be appealed by itself, but only with the decision on protection.<sup>295</sup> The Procedural Directive does not provide that a separate appeal prior to the decision on protection against the decision on age should be possible. In the author's opinion, the lack of possibility to challenge the decision on age before the decision on protection still breaches EU law. A procedural order declaring the applicant of age will end the '*presumption of minority*', which triggers the release of the legal guardian and the placement of the applicant in an adult accommodation facility. Suppose a person is declared an adult wrongly. The child will be left without a guardian who would have otherwise received the decision and communicated with a legal representative to appeal it. Thus, it may be practically impossible for a child to regain child-specific protection under the CEAS without a guardian supporting them in the appeal process. Therefore, the

<sup>290</sup> Kumin (2018), 296; Human Rights Committee, OYKA v. Denmark, par 8.11.

<sup>291</sup> UNHCR (2009), par 75.

<sup>292</sup> Kumin (2018), 300.

<sup>293</sup> McLaughlin (2018), 1758-1763

<sup>294</sup> Austrian Supreme Administrative Court, 2014/20/0045, par 2.2.2.-2.2.3.

<sup>295</sup> Pernsteiner (2018), 164.

'*principle of effectiveness*' of Union law may be violated.<sup>296</sup> Moreover, the EASO suggests that an appeal against a decision on age can be made prior to and separate from the protection decision.<sup>297</sup>

A possible solution, that does not change the nature of the decision, could be to extend the '*presumption of minority*' until the decision on protection has become final.<sup>298</sup> However, as argued, the decision on protection is mostly based on credibility, which the outcome of age assessment can influence. Hence, the false assessment could lead to a negative protection decision that the person would not have received if there had been a possibility to challenge the decision on age before.<sup>299</sup> Moreover, the argument that the Austrian system allow to change the age if new evidence comes to light during the procedure is, in the authors opinion, redundant.<sup>300</sup> Domestic jurisprudence provides that the authorities must wait anyways to order an assessment procedure if the applicant can provide original documents in a reasonable time.<sup>301</sup> Hence, if Austrian practice would comply with its jurisprudence, there is no need to wait for further evidence once a decision on age is made.

### 4.3. Conclusion on the Austrian framework

In Phase 1, Austria acknowledges the '*presumption of minority*' but quickly denies it after the first evaluation of evidence.<sup>302</sup> Discrepancies in claims or even contradicting Eurodac data lead to the establishment of adulthood without age assessment,<sup>303</sup> neglecting that children have many incentives to lie about their age.<sup>304</sup> Denying the '*presumption of minority*' on such thin grounds violates the '*principle of effectiveness*' under Union law and the Anti-Trafficking Directive. Deportations to another Member State based on Eurodac data may violate Art 3 ECHR if the person is a minor but the reception state does not provide special care for them.<sup>305</sup>

The Austrian framework does not provide the '*benefit of the doubt*' principle prior to age assessment to avoid an unnecessary procedure. Once there is any indication that the applicant is not a minor, the young person bears a heavy burden of proof and must provide identity documents equal to Austrian standards.<sup>306</sup> Even though this is not at odds with the Procedural Directive, the denial of '*the benefit of the doubt*' before age assessment contradicts EASO's detailed suggestions.<sup>307</sup>

In Phase 2, Austria operates with a two-phase system. First, a wrist x-ray is conducted and interpreted only in favour of the applicant. Then, If the method shows that the person is an adult, the authorities will order two further x-rays and one physical examination.<sup>308</sup> The use of physical examination is at odds with the recommendations by the Committee and the EASO.<sup>309</sup> Moreover, Art 8 ECHR demands that

<sup>296</sup> CJEU, CS Communications, par 31; CJEU, Jutta Leth, par 38.

<sup>297</sup> EASO (2018), 37.

<sup>298</sup> Strasser (2016), 45.

<sup>299</sup> EASO (2018), 63

<sup>300</sup> Strasser (2016), 44; see also the decisions of the Austrian Constitutional Court, 19850/2014, 03.03.2014, and Austrian Supreme Administrative Court, 2016/19/0007,25.02.2016: Both found that the lack of possibility to appeal the decision on age prior to the decision on protection does not pose a deficit of legal protection.

<sup>301</sup> Austrian Constitutional Court, 1558/11; Strasser (2016), 46.

<sup>302</sup> Austrian Child Welfare Commission (2021), par 550.

<sup>303</sup> Austrian Supreme Administrative Court, 2016/01/0267, par 15; Austrian Supreme Administrative Court, 2014/20/0045, par 2.2.2. - 2.2.3.; Lukits & Lukits (2011), 20.

<sup>304</sup> UNHCR (2021), 48; EASO (2018), 17; Human Rights Committee, OYKA v. Denmark, par 8.11.

<sup>305</sup> ECtHR, M.S.S. v. Belguim and Greece, par 342.

<sup>306</sup> Austrian Supreme Administrative Court, 2016/01/0267, par 15.

<sup>307</sup> EASO (2018), 23.

<sup>308</sup> Austrian Parliamentary Query Response (2018), 2.

<sup>309</sup> EASO (2018), 26-29; CRC Committee RYS v. Spain, par 8.8.

consent to the procedures is free, voluntary, and informed, and states document it.<sup>310</sup> Austria does not comply since domestic law only prohibits using coercion to enforce medical methods.<sup>311</sup>

While the sole use of medical methods is in line with the Procedural Directive, the EASO, the UNHCR, and Committee suggest that psychological factors should be included next to medical methods.<sup>312</sup> The use of the Greulich and Pyle atlas as a pre-screening complies with Art 8 ECHR due to its lower radiation exposure and the fact that the results are only interpreted in the applicant's favour. However, the use of multiple x-ray examinations is at odds with the *principle* of proportionality under Art 8 ECHR in light of the heightened vulnerability of UAMs and the disagreement amongst scientific scholars on the accuracy of those methods.<sup>313</sup> Moreover, the procedures are based on non-accessible internal decrees of the authorities, which is at odds with the requirement that an interference in Art 8 ECHR has to be in accordance with (accessible) law.<sup>314</sup> Furthermore, the Austrian practice of not hearing a child in every case to determine whether age assessment is necessary and the methods to use violates Art 3 and 12 CRC, Art 24 (3) CFR and Art 8 ECHR.<sup>315</sup>

In Phase 3, Austria reasons that the benefit of the doubt principle is incorporated in the medical report on age since the methods used could determine whether a person is over 18 with a degree of probability bordering on certainty.<sup>316</sup> While this can neither be affirmed nor disputed in light of scientific disagreement on this matter, basing the decision solely on the report without considering factors that might influence the outcome, like ethnicity or socioeconomic status, is problematic.<sup>317</sup> The Austrian Supreme Administrative Court ruled that basing a decision on age solely on a medical report which provides only with simple probability that a person is an adult is within the law.<sup>318</sup> The jurisprudence is at odds with the *principle* of the '*benefit of the doubt*' stated in the Procedural Directive.

A decision which declares a person an adult will significantly influence the asylum decision.<sup>319</sup> Hence, a wrong decision on age can undermine the effectiveness of the Refugee Convention and Qualification Directive. The author argues that a provision should indicate to decision makers that a decision on age should not affect the overall credibility of the applicant since the outcomes might be inaccurate. Another solution would be to grant an appeal against the decision on age prior and separate to the asylum procedure as suggested by the EASO.<sup>320</sup> However, Austria only decides on age with a procedural order which can only be appealed with the decision on asylum itself.<sup>321</sup> Even though in line with the Procedural Directive, this is problematic. The consequences of the decision on age enter into force immediately, and the applicant loses, among other things, their legal guardian. Hence, the author argues that this framework breaches the '*principle of effectiveness*' of Union law since it may be practically impossible for a child to regain child-specific protection under the CEAS without the support of a guardian.<sup>322</sup>

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<sup>310</sup> ECtHR, Junhnke v. Turkey, par 9, 76-77.

<sup>311</sup> Art 13 (3) FOIA-RP.

<sup>312</sup> UNHCR (2017), par. 5.11; UNCHR (2009), par 75; CRC General Comment No. 23, par 31i.

<sup>313</sup> ECtHR, Darboe and Camara v. Italy, Interveners, par 9-12.

<sup>314</sup> ECtHR, Khan v. the United Kingdom, par 27-28.

<sup>315</sup> Austrian Child Welfare Commission (2021), 10 - 11; CRC General Comment No. 14, par 43.

<sup>316</sup> Explanatory memorandum to the Austrian age assessment laws, 17

<sup>317</sup> Schmeling et al. (2016), 46; EASO (2018), 34.

<sup>318</sup> Austrian Supreme Administrative Court, 2016/01/0267, par 17.

<sup>319</sup> Kumin. (2018), 300.

<sup>320</sup> EASO (2018), 37.

<sup>321</sup> Pernsteiner (2018), 164.

<sup>322</sup> CJEU, CS Communications, par 31; ECJ, Jutta Leth, par 38.

## 5. Conclusion

Many people seeking protection in Europe cannot provide any identity documents or only documents that do not meet European standards.<sup>323</sup> When they claim to be minors, states are often suspicious whether they are dealing with children or adults who want to benefit from the advantages offered to children within protection procedures. To serve the public interest of migration control and determine whether child-specific safeguards must apply states conduct age assessment procedures.<sup>324</sup> Austria uses physical examinations and x-ray methods to estimate whether a person is above or below 18.<sup>325</sup> Hence, this thesis tried to answer the question:

*To what extent is Austrian legislation and practice for determining the age of alleged unaccompanied minors arriving in Austria in compliance with the international children's rights framework under the Convention of the Rights of the Child, the International Covenant on Civil and Political Rights, and the 1951 Convention Relating to the Status of Refugees, and with the European standards set out by European Union law and the European Convention of Human Rights?*

The author provided a model dividing problems related to age assessment into three phases (figure 3). In Phase 1, the evidence is evaluated. The question whether the person should be given the 'presumption of minority' was discussed, meaning that they are treated as a minor *until* there are conclusive results. Furthermore, it was asked if the 'benefit of the doubt' applies, meaning that an age assessment procedure is avoided in favour of the applicant. In Phase 2, the choice of methods and specific safeguards like consent were discussed. In Phase 3, the outcome of the methods was evaluated and questioned under which circumstances the 'benefit of the doubt' applies.

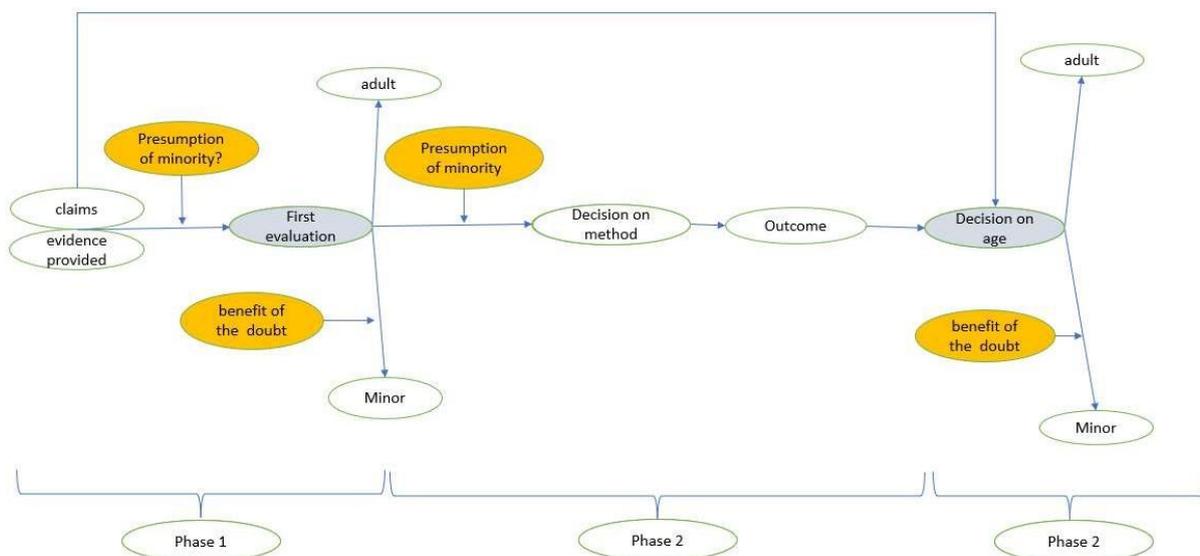


Figure 3

From analysing Phase 1, it can be concluded that the 'presumption of minority' is often wrongly labelled as 'benefit of the doubt'.<sup>326</sup> However, international, and European obligations clarify that a person should be treated as a minor *until* conclusive results exist. The 'principle of effectiveness' under Union law and

<sup>323</sup> Norwegian National Police Immigration Service (2010), 5.

<sup>324</sup> Noll (2016), 235.

<sup>325</sup> Art 13 (3) FOIA-RP; Art 2 (2)(25) Austrian Asylum Act 2005.

<sup>326</sup> CRC Committee, NBF vs Spain, par 12.3; reiterated in AL v. Spain, SMA v. Spain, and MAB v. Spain.; UNHCR (2009), par 75.

the Anti-Trafficking Directive demand that exceptions can only occur in cases where the applicant is an adult with a probability bordering on certainty. Austria violates the '*presumption of minority*' by declaring applicants' adults solely based on Eurodac data.<sup>327</sup>

In Phase 2, Austria's system of multiple age examinations is at odds with Art 8 ECHR. Exposing vulnerable children numerous times to radiation is not justified by the aim of migration control due to the scientific uncertainty of the results.<sup>328</sup> Furthermore, the exact invasive procedure is inaccessible since it is only provided by internal decrees. However, Art 8 ECHR demands that an infringement of privacy is in accordance with (accessible) law.<sup>329</sup> Moreover, Austrian authorities do not gather explicit consent even though the ECtHR stated that consent into medical procedures must be free, voluntary, informed, and documented.<sup>330</sup> The use of physical examination is further at odds with the recommendations by the Committee and the EASO.<sup>331</sup>

In Phase 3, it cannot be concluded whether the medical report can ascertain with a probability bordering on certainty that the applicant is of age and thus, eliminate doubts.<sup>332</sup> However, denying a person the '*benefit of the doubt*' even if the medical report only provides '*simple probability*' violates Art 25 Procedural Directive.<sup>333</sup> Moreover, the decision on age should be open to appeal prior to the decision on protection.<sup>334</sup>

The international and European standards on age assessment are often unclear, especially in hard law. Art 25 (5) Procedural Directive does not provide the '*presumption of minority*' nor the '*benefit of the doubt*' in Phase 1. It outsources the question of the evaluation of evidence to Member States, which opens the door for questionable practices, like rejecting documents or basing decisions on physical appearance or Eurodac data. Those practices can undermine the effective child-specific protection under EU law, the CRC, and ICCPR since all those rights cease to apply if age is determined wrongly. Since the number of refugees, including children, will significantly increase, it is crucial to amend Art 25 (5) Procedural Directive to guarantee children's rights to the massive number of expected UAMs.<sup>335</sup> The EASO's recommendations are not enough since they are mostly not followed by states, as can be seen on the example of Austria.

Moreover, the Committee and the Human Rights Committee should provide more guidance on the proportionality of different methods and elaborate on scientific standards of age assessment method. Moreover, while the approach of challenging documents before dismissing them as evidence is welcoming, it should be elaborated how a challenging mechanism can be established. Otherwise, authorities might just '*challenge*' documents internally based on questionable expertise.

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<sup>327</sup> Austrian Child Welfare Commission (2021), 550, Annex II, 10 - 11; Austrian Supreme Administrative Court, 2007/01/0631 and 2016/01/0267, par 15; CRC Committee, AD v. Spain, par 10.4 - 10.5; Human Rights Committee, OYKA v. Denmark, par 8.11; Recital 22, Art 13 (2) Anti-Trafficking Directive; UNHCR (2015), par 9 vi; EASO (2018), 17; CJEU, CS Communications, par 31.

<sup>328</sup> ECtHR, Darboe and Camara v. Italy, Interveners, par 9-12.

<sup>329</sup> ECtHR, Khan v. the United Kingdom, par 27-28.

<sup>330</sup> 13 (3) FOIA-RP; ECtHR, Junhnke v. Turkey, par 9, 76 - 77.

<sup>331</sup> EASO (2018), 26-29; CRC Committee, RYS v. Spain, par 8.8.

<sup>332</sup> Explanatory memorandum to the Austrian age assessment laws, 17.

<sup>333</sup> Austrian Supreme Administrative Court, 2016/01/0267, par 17.

<sup>334</sup> EASO (2018), 37.

<sup>335</sup> Institute for Economics & Peace (2011). Ecological Threat Report, 3-5.

To conclude, international and European *hard* laws provide only little guidance on age assessment. Hence, Austria's framework is often in line with them; however, not always. The only way to ensure compliance with international obligations is to follow the guidance provided by the supervising bodies of the treaties.<sup>336</sup> This thesis has provided arguments that could be used in support of litigation before international or regional courts to secure such compliance. In any case, it is about time that Austria takes the lead in Europe to end such questionable practices and ensure that children in search for protection are treated with dignity and have their fundamental rights safeguarded.

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<sup>336</sup> Marmor, A. (2019). Soft Law, Authoritative Advice and Non-binding Agreements. *Oxford Journal of Legal Studies*, 39(3), 525.

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