

IMMIGRATION APPEALS BOARD

Division I

AA 10/23

M [REDACTED] K [REDACTED]

VS.

THE AGENCY FOR THE WELFARE OF ASYLUM SEEKERS

Date: 16 May 2023

1. Preliminary

The Board noted the appellant's claims:

That, the appellant, of Bangladeshi national, disembarked in Malta on 18 November 2022.

That, on 6 December 2022, the appellant was taken before the Immigration Appeals Board for the review of the appellant's detention and that during the above mentioned hearing, the Board noted the appellant declared to be a minor and concluded that a legal guardian was to be appointed by the Agency for the Welfare of Asylum.

That, notwithstanding the above, the Board declared that the detention was legal and therefore, the appellant remained in detention with adults.

That, he was not referred to the Agency of AWAS and was only referred to AWAS on 10th January 2023 by external parties over a month after the above mentioned Board held the hearing.

That, on 10th January 2023, an interim measure was filed before the European Court of Human Rights in relation to the detention of the alleged minor with adults and of the living conditions not suitable for minors.

That, on 11th January 2023, the European Court of Human Rights, in the interest of the parties and the proper conduct of proceedings before it, requested the Government of Malta to ensure that the appellant's conditions are compatible with Article 3 of the Convention and the status as unaccompanied minors.

That, on the 12th January 2023, the appellant was taken for his age assessment interview under detention conditions at China House.

That, on 18 January 2023, AWAS declared that the appellant is of 21 years old and that he was born on 28 November 2002 notwithstanding the fact that during phase 1 of the age assessment, that is, the psychological social assessment tool, all of the experts unanimously concluded that the appellant should be given the benefit of the doubt and that the appellant was considered a minor. The appellant filed the appeal of age assessment decision before the

Immigration Board in terms of article 25A (7) of the Immigration Act, Chapter 217 of the Laws of Malta.

2. Facts

First of all, the Board referred to the verbal dated 6th December 2022 and noted that the Immigration Appeals Board Division II, when examining the legality of detention, had noted who needs medical assistance and had informed detention services with these requests.

The Board had also noted that some individuals were minors and therefore ordered that a legal guardian be appointed by AWAS.

In the circumstances of such direction, this Board finds it hard to believe that if an illegal immigrant actually claimed and alleged he was a minor, that the Board would have ignored him and that the probability is that the statement that detention was legal was a simple *lapsus* due to the fact that there were so many alleged illegal immigrants being heard on that same day. Moreover, the Board also notes that three lawyers were present for this sitting as well as the interpreter so it was definitively facilitated and the immigrants had all the assistance that they required. It was in fact one month after of the review of the sitting of the legality of detention that the present appellant's lawyer emailed AWAS (Doc. 3) and informed them about the claim that the appellant is a minor. The Board is certain that all immigrants were offered legal assistance before the previous Board and in fact, as already stated, three lawyers were present at the sitting. The Board, anyway was not even presented with such decision so will not go further into these merits.

This Board, whilst appreciating the report, Doc. 4, presented to the Malta Government on the visit to Malta carried out by the European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from the 17-22 September 2020 acknowledges also the significant challenges the Maltese authorities are facing and continue to face on a daily basis with large number of illegal immigrants trying to enter Malta. Of course, this Board fully believes that this problem is to be addressed and requires **A COORDINATED EUROPEAN APPROACH AND SUPPORT FROM THE EU AND ITS MEMBER STATES**. It is very well easy to say that more staff is required when all the countries post COVID have increased difficulties to find such staff. Moreover, regarding inhuman and degrading conditions of detentions, this Board refers to our subsidiary legislation 420.06 of the Laws of Malta and article 16 (1) of the same subsidiary legislation which is in fact referred to in the lawyer's final submissions presented to this Board on 3 April 2023. The Board here reiterates that first of all, there were absolutely no claims on degrading and inhuman treatment or degrading conditions before this Board.

That, when the appellant appeared before this Board, he was already separated from the adults' area.

The Board observes that when the case was put before it, it was informed by the appellant's lawyer that this was an age assessment appeal and the submissions requesting the Board to reject the first assessment in violation of the procedural guarantees the appellant was entitled to is stated ONLY in the final submissions.

The procedural safeguards indicated in the final submissions were:

1. Lack of independent representation during the age assessment proceedings;

2. Individuals placed in detention with adults;
3. Lack of child friendly environment during the age assessment procedure.

The Board is disappointed that these allegations were not brought up during the first sitting so that this Board could have addressed them in further depth. Instead, such allegation of procedural safeguard was brought up in the submissions filed in the very last sitting. Therefore, the Board will determine this case on what was presented before it.

The Board was never presented with a formal letter of appeal in this case but presented with an email from AWAS dated 17th January 2023. That the appellant was informed on that same day of his age assessment result and would like to appeal. The case was in fact immediately appointed before Division II on the 26th January 2023 where the appellant's lawyer then raised an objection and requested that that Board could not hear this appeal due to "*conflict of interest since it was the same Board that decided the legality of the detention.*" This case was therefore put before the present Board and was appointed immediately as soon as it was informed. To note that in this case the Board was first informed that the appellant had withdrew his case, but it then was informed that the appellant wished to continue and thus, the first sitting was appointed straight after on 20th February 2023

3. Considerations resulting from research

First of all, being considered a major immigrant with no documents by the administration and not an "unaccompanied child" may have serious consequences as the 'child' will not benefit from the protective regime afforded to child asylum-seekers limiting the recourse to detention. An incorrect age assessment could result in children being wrongfully detained.

Under the system set out by the Dublin Regulation - the European legislation determining the country responsible for an asylum application - the age of an individual as assessed by a Member State and recorded into the European databases can be taken for granted by any other Member State, thus harmonizing downwards the flaws and margin of error of the results obtained therein, with life threatening consequences and sometimes, **unlike in Malta**, no appeal is possible.

"Considerations relating to security or immigration control tend to routinely outweigh the child's best interests in many national contexts" said Nils Muilnieks, Commissioner for Human Rights of the Council of Europe.¹ Migrant children should not be faced with mistrust and unnecessary examinations when they first encounter authorities, after challenging journeys to get to Europe. Disputes over age bring into question the child's past and identity in a way that goes beyond the asylum process, at a time when they are facing numerous factors of vulnerability.

Member States are free to choose the method used to scrutinize the age of an individual.

In order to establish a minor's age, in fact, some European Union Member States impose medical examinations such as dental examinations, wrist carpal x-rays and X-rays of various bones of the body to determine bone maturity. To a lesser degree, collar bone and hip x-rays as well as physical development assessments are also used. Forensic doctors attempt to

¹ Commissioner of Human Rights of the Council Of Europe, Protecting Children's Rights- Europe should do more, November, 2014

determine the age of the person using different methods **but with one constant: a margin of error of at least 2 years.**

Yet, there is an absence of consensus amongst dental experts concerning these examinations' reliability and validity. They are thought to be giving a confidence interval of over two years around the estimated age 20.²

The UK Royal College of Paediatrics and Child Health study "The Health of Refugee Children - Guidelines for Paediatricians" on age assessment is considered as a reference. It is extremely skeptical regarding the use of bone testing and dental mineralisation with the aim of determining age: "*age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side.*" (..) "**Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted**". The UK Royal College of Paediatrics and Child Health concludes that "*there is not an absolute correlation between dental and physical age of children, but estimates of a child's physical age from his or her dental development are accurate to within +/-two years for 95% of the population and form the basis of most forensic estimates of age.*"

The vast majority of health professional organisations consider that chronological age cannot be precisely assessed by medical methods. The French Academy of Medicine and the French High Public Health Council also concluded that results obtained from a medical age assessment cannot be relied upon to assess the chronological age of an individual because of the high margin of error inherent in any of the existing tools.

In the context of its Action Plan on unaccompanied minors (2010-2014), the European Commission asked the European Asylum Support Office (EASO) to produce a comprehensive mapping of the scientific literature and national legal frameworks on the matter, which was released in December 2013. According to them, the United Kingdom is the only EU Member State that stopped performing medical age assessments altogether.

In the UK, bone testing is not required anymore for judicial settlement of age disputes. The *B v Merton*³ set the guidelines applicable to assess a disputed age: a medical report was found to be unnecessary. **The UK Supreme Court later clarified the situation in *A v. Croydon*⁴ since medical reports have a margin of error of two years, they cannot be considered as conclusive.**

Moreover, the collarbone x-ray is considered to be efficient only to determine whether or not an individual is over or below the age of twenty-one, (21).

In fact no medical examinations were carried out in this case, to which this Board totally agrees, given the margin for error that exists that leads to inconclusive results.

The procedure relative to sexual maturity examination has a wide margin of error. According to the EASO, "*assessing age on the basis of physical traits is the least precise*". Certainly the most intrusive method of them all, it is at odds with respect to the privacy and dignity of the

² Kullman, L. Accuracy of two dental and one skeletal age estimation method in Swedish Adolescents 1995

³ 2003, UK High Court (England and Wales) July, 14

⁴ 2009, UK Supreme Court

person as it requires invasive physical examinations. The Board is also in agreement with this.

Another procedure used, is the physical development assessment, the process of comparing a child's physical development to that of children of similar age from a representative sample of the population (also called "anthropometrical measurement").

However, according to the UK Royal College of Paediatrics and Child Health, *"it is virtually impossible to deduce the age of an individual from anthropometric measures."*⁵

This Board also agrees with this as it is its opinion that such indications are subjective and varied from one culture to the other as well as from one person to another.

The UK Royal College of Paediatrics and Child Health had estimated that there is currently no reliable method available which can determine the exact age of person: many factors influence the onset of puberty and the whole process of skeletal maturation.⁶

It is therefore clear that evidence of age, should only be taken into consideration with all the evidence presented. A holistic approach must be followed.

De facto, age is being determined by social workers trained in that regard, during an interview conducted as part of the asylum procedure.

In fact the problem is that sometimes social workers are not trained well with regards to different cultures so their assessments could also be defective.

Although informal assessments are not as harmful to children, they are often very inaccurate. For instance, in April 2010 in the UK, the local Government Ombudsman found that an unaccompanied 15-year-old girl who was an asylum-seeker was denied care after being age-assessed by untrained social workers in Liverpool.

The Board believes that if there is a lack of training carried out relative to various cultures one cannot give an accurate conclusion and that training from this perspective is now inevitable and absolutely crucial.

The Board was informed that the social workers in Malta are trained. However, the Board observes that determining an age is not an easy task.

The Board also refers to the three sources for procedural safeguards in EU law:

- 1. Directive 2005/85/EC;**
- 2. The Qualification Directive; and to a lesser extent,**
- 3. The European Charter of Fundamental Rights.**

The Asylum Procedure Directive deals explicitly with the issue of age assessment for unaccompanied minors. Regardless of the regulative form it might take, children are entitled to protection, and this protection should never depend on administrative status or procedures.

⁵ Royal College of Paediatrics and Child Health. The Health of Refugee Children- Guidelines for Paedricians, 1999

⁶ The Royal College of Paediatrics and Child Health. The Health of Refugee Children- Guidelines for Paediatricians , 1999. Vide also Fundamental Rights Agency, Guidelines on Separated, Asylum Seeking Children in EU member states, April, 2010

Article 25 of the Directive on common procedures for granting or withdrawing international protection ("Asylum Procedures Directives") authorises the use of medical examination in order to determine the age of an unaccompanied minor in European Law. It does not specifically deal with the different existing methods, but lays down rights and safeguards for the child, primarily:

- **To be provided legal and procedural information free of charge**
- **Immediate access to a qualified, independent representative and/or guardian**, who acts in the child's best interests, safeguards the general well-being and exercises the legal capacity;
- **To have a representative appointed**. There must exist the appointment of a representative in order to assist and represent an unaccompanied minor in procedures, with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary.
- **Personal interview(s) conducted by a qualified professional**
- **A presumption of minority**
The Board, in fact, unanimously agrees *that if there is a **chance** that the individual is a minor, he or she should be treated as such. If doubts remain once the results of the tests are known and margins of error are taken into account, then the minority of the child should be presumed. The benefit of the doubt shall be applied as broadly as possible in the case of unaccompanied children, who are less likely to have documentary evidence.*
- **The use of the least invasive method**. The least invasive method to ensure the highest level of protection of one's dignity when undergoing a medical examination should be used especially bearing in mind their doubtful added value. In this regard, Malta is most certainly following this principle. The European Parliament resolution of 12th September 2013 on the situation of unaccompanied minors in the EU⁵⁴ calls for additional measures to ensure that unaccompanied minors are not subjected to "unsuitable and intrusive" medical tests "which may cause trauma" to determine their age. They further note that these tests come with "large margins of error" and should not be used to accurately determine age. The resolution also underscores the need for an option to challenge the results of age assessments and that medical examinations should only be conducted by respecting the integrity of the individual.
- **Informed consent** - prior to the undertaking of an age assessment, the child and his/her representative should be informed of the procedure awaiting the child, its risks, and the consequences that may arise from the conclusions or a refusal to proceed, in a language and a way that the child and his/her representative can understand. **Informed consent** and the **right to refuse** medical examinations (the Board has been informed by AWAS that this is standard procedure).
- The fact that no decision of non-minority can be based solely on a refusal to undergo medical examination.

- **The protection of the best interests of the child.**

The Board is totally in agreement that priority should be the best interests of the child which is also one of the four general principles of the Convention on the Rights of the Child.

The Board also observes that the above principles are followed.

The Board believes that to ensure the highest degree of protection of the rights of the child during age assessment, it is necessary to approach every step from the perspective of the best interests of the child, including his or her own particular circumstances. International standards on the treatment of unaccompanied minors deriving from the UNCRC have been identified by the Committee on the Rights of the Child in General Comment No. 6 (2005) "Treatment of **unaccompanied children outside their country of origin**". Accordingly, **"the assessment must be conducted in a scientific, safe, child and gender-sensitive fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt so that if there is a possibility that the individual is a child, she or he should be treated as such"**.

The Council of Europe Commissioner for Human Rights is one of the most active on the matter. In 2011, the former Commissioner, Thomas Hammarberg, pleaded for the necessity of a multidisciplinary approach when assessing age and to trust and respect children. He also emphasised that *"X-rays can never determine exact age"* because of a margin of error of two to three years. He defended that children should have the benefit of the doubt, and that no decision should be taken merely on the basis of bone testing. He explained at great length the reasons that make these methods unreliable, quoting the College of Radiologists of London that qualified as "unjustified" a radiograph examination for age examination purpose, due to the lack of consideration given to the geographical descent factor and socio-economic situation of the child.

The Parliamentary Assembly of the Council of Europe (PACE), in its resolution 1810/2011 (Unaccompanied children in Europe: issues of arrival, stay and return), outlines a number of safeguards concerning age assessment: they should only be carried out if a reasonable doubt exists; by an independent authority; with the informed consent of the child or the guardian; and must be based on a multidisciplinary approach; using the less intrusive methods compliant with medical ethical standards. The outcome of this process should be subject to appeal, and the doubt in favour of the child (presumption of minority).

The Office of the UN High Commissioner for Refugees (UNHCR) issued guidelines on protection and care of refugee children in 1994 that deal with age assessment. The UNHCR recalls the unreliability of such tests, that must however be carried out in a safe manner, respectful of human dignity, with the presumption of minority. In their guidelines on policies and procedure on dealing with unaccompanied children (1997), the UNHCR advised, inter alia, to take into account the psychological maturity and the margin of error inherent to age assessment. Further guidelines are also issued by EASO regularly.

The Fundamental Rights Agency of the European Union (FRA) issued guidelines on separated, asylum-seeking children in EU Member States in April 2010. Age assessment techniques are criticised as well: *"Scientific research has shown that age assessment through medical examination is not always exact"* - EASO.

The Board, therefore, also greatly considered the age assessment from a fundamental rights perspective.

A number of fundamental rights, which were respected by this Board, enshrined by the CRC and the Charter of Fundamental Rights of the European Union (CFR) are of particular relevance in the age assessment process.

- The best interests of the child (Article 3 CRC and Article 24 CFR)

The Board considered, first and foremost, the best interests of the appellant.

This principle is deeply rooted in the European human rights and asylum legislation and the international legal framework.

In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. (Article 24 CFR)

This must be primarily considered in all actions concerning children. They are therefore to be applicable from the moment that it is considered that the applicant may be below eighteen years of age, throughout the assessment of the age if such assessment is necessary and until conclusive results indicate that the applicant is an adult.

- Right to non-discrimination (Article 2 CRC and Article 21 CFR)

The Board at no time discriminated against the appellant and neither did it see that appellant suffered from discrimination against him during the age-assessment process conducted by AWAS.

Every person should be treated with objectivity and be individually considered. It is crucial to avoid preconceived ideas about certain nationalities, ethnicities, etc. when assessing.

4. Further considerations

The Board went through all the documents presented in the file, and heard the appellants views, and especially the psychological social age assessment report which was carried out on the 12th January 2023. His date of birth here was indicated as 28th June 2006 and according to the data in such assessment report, the dates matched throughout the interview. He stated that his family had sent him a birth certificate.

It seemed that the age assessment report was based on the results of a bone test taken by Dr. Andre Gatt who certified it on 16th January 2023 and suggested that he was over 18 years old. Here, the Board comments due to the research here above included, medical professionals themselves have confirmed that such tests are not able to determine the age of a person with sufficient precision since they disregard, environmental, socio-economic and ethnographic factors that can play an important role in the bone and dental growth. Moreover, medical professionals have also confirmed that these methods are particularly unreliable for persons between 15 and 20 years of age. A holistic approach has to be taken .

The Board, thus, refers to the conclusion of the assessor who specifically stated the following words “I recommend that he is a minor and I agree to the date of birth provided [REDACTED] 2006.” She further stated “After mentioning all the above that due to the physical appearance, the alleged minor should be given the benefit of the doubt.” “I am suggesting in my professional opinion that M [REDACTED] is closed as a minor.” All this was stated on pages 11-13 of the age assessment.

Therefore, it seems that this case was concluded to the contrary based on a ‘medical result’ where it is clear from the research stated that medical results have marginal errors and a holistic approach must be taken,

The Board here also refers to the documents originally produced by the appellant’s lawyer and translated, basically:

1. The vaccine card which stated that his date of birth was [REDACTED] 2006;
2. The birth certificate which gave the same date of birth;
3. The school certificate which however here indicated that his date of birth was 1st May 2006 instead of [REDACTED] 2006.

Notwithstanding all this, it seems that his date of birth, at least there is an agreement on the year, was 2006 and the age assessment team themselves had concluded that the appellant was a minor.

The Board is of the opinion that AWAS has wrongly issued a decision based on the result of medical professionals when it has been deemed through research that this is not precise and in fact, one has to look at this from a holistic point of view and consider all the documentation produced.

5. Decide

In this regard, therefore, the Board, after seeing the evidence produced, concludes that this appellant is a minor. However, the Board also orders that the PIO is to take into its possession the three documents presented and is to examine their authenticity.

Avv. Juliana Scerri Ferrante
Chairperson

Avv. Martha Mifsud
Board Member

Avv. Mario Mifsud
Board Member

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