

UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum –

Case No. CIK-1938/2014 – Lithuanian Supreme Court

I. UNHCR’s authority, interest and experience in intervening regarding refugees and asylum-seekers

1. UNHCR has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problems of refugees.¹ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention Relating to the Status of Refugees (“1951 Refugee Convention”) and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).³
2. UNHCR’s supervisory responsibility is exercised in part by the issuance of guidelines and policy positions on matters of international refugee law, including the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection.⁴ UNHCR also regularly acts as an *amicus curiae* intervener before national and regional courts and provides information to decision-makers and courts of law concerning the proper interpretation and application of provisions of international refugee law instruments.
3. UNHCR’s supervisory responsibility has been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (“TFEU”),⁵ as well as in Declaration

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (“UNHCR Statute”).

² UNHCR Statute, paragraph 8(a).

³ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of [the 1951] Convention”. UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁴ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

⁵ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>.

17 to the Treaty of Amsterdam, which provides that ‘consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy’.⁶ Secondary European Union legislation also emphasizes the role of UNHCR. For instance, Recital 22 of the Qualification Directive (recast) states that consultations with UNHCR ‘may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention’.⁷ The supervisory responsibility of UNHCR is specifically articulated in Article 29(1)(c) of the Asylum Procedures Directive (recast).⁸

4. These observations do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.⁹
5. In Lithuania, UNHCR’s competence to provide advice to Lithuanian courts is set out in Article 91(4) of the *Law on the Legal Status of Aliens in the Republic of Lithuania*. It states “[i]n the course of examination of an asylum application, representatives of the Office of the UNHCR may submit their opinions on certain asylum applications to the competent institutions and agencies as well as courts of the Republic of Lithuania.”¹⁰

II. Applicable principles and standards on age assessments

6. Where separated or unaccompanied children seek asylum, they are fully entitled to the rights in the 1951 Refugee Convention, notably the immunity from penalties for an irregular entry or presence (Article 31) and the principle of *non-refoulement* (Article 33).
7. The 1989 Convention on the Rights of the Child (“CRC”)¹¹ also provides a comprehensive framework for the responsibilities of State parties to all children within their jurisdiction, including asylum-seeking and refugee children. The CRC provides a range of rights which are fundamental for the protection, survival and

⁶ European Union, Declaration on Article 73k of the Treaty establishing the European Community [OJ C340/134, 10.11.1997], available at: <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0134040034>.

⁷ European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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), 20 December 2011, OJ L 337, Recital 22, available at: <http://www.refworld.org/docid/4f197df02.html>.

⁸ European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, L 180/60, <http://www.refworld.org/docid/51d29b224.html>. (“Recast APD”) Article 29(1)(c) obliges Member States to allow UNHCR ‘to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure’.

⁹ UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, available at: <http://www.refworld.org/docid/3ae6b3902.html>.

¹⁰ Republic of Lithuania, *Law on the Legal Status of Aliens*, No IX-2206, consolidated version of 16 04 2015, available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=243642&p_query=&p_tr2=

¹¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

development of the child, and sets out a number of principles that should guide at all times the protection of children, including:

- The **best interests of the child** shall be a primary consideration in all actions concerning children, including asylum-seeking and refugee children and also applicable to age assessments (Article 3 in conjunction with Article 22);
- There shall be **no discrimination** on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2);
- Each child has a **fundamental right to life, survival and development** to the maximum extent possible (Article 6);
- Children must be assured **the right to express their views freely**, and their views must be given “due weight” in accordance with the child’s age and level of maturity (Article 12);
- Asylum-seeking and refugee children are entitled to receive **appropriate protection and humanitarian assistance** pursuant to the CRC and other applicable international instruments (Article 22).

8. With a view to securing effective access to the rights set out in the CRC and the 1951 Refugee Convention, it is essential to ensure that a child is properly identified. This is particularly so where an asylum-seeking child is separated or unaccompanied.¹² It follows that States have a duty to identify children as children, and also whether they are separated or unaccompanied, as soon as their presence in the country becomes known to the authorities.¹³
9. It is accepted that identification measures to be carried out by States with respect to unaccompanied or separated children may include an age assessment.¹⁴ In carrying out age assessments the principles and safeguards below are to be taken into account, as follows:

- i. Age assessments are conducted only in cases when a child’s age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the child.¹⁵ This is because no method can determine age definitively. Most experts agree that age assessment is not a determination of chronological age but an estimated guess. Scientific methods currently available, including medical examinations based on dental or wrist bone x-rays, can only *estimate* age. Hence, there will always be a margin of error.¹⁶

¹² Recast APD, Article 25(1)(a), *supra*, note 8.

¹³ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 31(i), available at: <http://www.refworld.org/docid/42dd174b4.html>.

¹⁴ Recast APD, Article 25(5), *supra*, note 8. See also, *CRC General Comment No. 6, Ibid.*, Para. 31(i)

¹⁵ See, CRC General Comment No. 6, Para. 31(i) and UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: 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*, 22 December 2009, HCR/GIP/09/0 para. 75, (“Child Asylum Claims Guidelines”) available at: <http://www.refworld.org/docid/4b2f4f6d2.html>

¹⁶ *Separated Children in Europe Programme, Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, page 8, available at: <http://www.refworld.org/docid/4ff535f52.html>

- ii. Where doubts remain about the child's age after an assessment, the asylum-seeker is to be given the benefit of the doubt and assumed to be a child.¹⁷
- iii. Age assessment must be carried out in a safe, child- and gender-sensitive manner with due respect for human dignity.¹⁸
- iv. The child shall be assisted by legal representation throughout the asylum procedure.¹⁹
- v. Age assessments also need to take into account the ethnic and cultural background of the child.²⁰
- vi. A person claiming to be under the age of 18 should be treated as a child and benefit from the rights of a child unless this would be clearly unreasonable. The rationale of this presumption - that *inter alia* flows from the best interests of the child principle - is the need to ensure the rights guaranteed by the CRC and the 1951 Refugee Convention, notably the right to liberty (Art. 37(b), (c) and (d)) and the right to receive appropriate protection and humanitarian assistance (Art. 22).²¹
- vii. In most cases, age can properly be established via a personal interview and/or other available documentary evidence. Pursuant to Article 4(1) and (2) of the recast Qualification Directive,²² age is an element in assessing the facts and circumstances of an application for international protection. The interview as a basis for the identification of the child is also in line with *the child's right to express his or her views freely*, as stipulated in Article 12 of the CRC, and the right to be heard that is a general principle of EU law which '*must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System*'.²³
- viii. In line with Article 15(3)(a) of the recast Asylum Procedures Directive, the applicant's vulnerability must be fully taken into account when conducting the interview. Article 4(5) of the recast Qualification Directive makes it clear that in cases '*where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation*' provided the statements fulfill credibility assessment criteria. In UNHCR's view, this principle also applies to the age of an asylum-seeker.

¹⁷ Recast APD, Article 25(5), *supra*, note 8. See also, UNHCR, Child Asylum Claims Guidelines, *supra*, note 15, para 75.

¹⁸ UNHCR, Child Asylum Claims Guidelines, *supra*, note 15, para. 75

¹⁹ Recast APD, Article 25(1)(a), *supra*, note 8. See also, UNHCR, Child Asylum Claims Guidelines, *supra*, note 15, para. 69

²⁰ UNHCR, Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>.

²¹ See also, Separated Children in Europe Programme, Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012, available at: <http://www.refworld.org/docid/4ff535f52.html>, page 12.

²² European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>.

²³ M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General, C-277/11, European Union: Court of Justice of the European Union, 22 November 2012, para. 89, available at: <http://www.refworld.org/docid/50af68c22.html>.

ix. Age assessments are never to be used as a matter of routine. This is particularly the case where the age assessment relies on medical examinations involving invasive techniques. These principles are now embodied in the EU recast Asylum Procedures Directive which states, at Article 25(5):

*Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age [emphasis added].*²⁴

x. Procedures on age assessment need to be clear and transparent. Given the fact that age assessment of children seeking asylum is governed in EU Member States by the recast Asylum Procedures Directive, and is considered to be part of *'the examination of an application for international protection'*²⁵, this is the determining authority with whom the decision to seek an age assessment should rest. It is also the central asylum body in charge of an asylum examination procedure who must decide whether to refer the child to a medical age assessment.

xi. Age assessment should not be carried out immediately upon arrival of separated or unaccompanied children in border areas and/or on the territory since time is crucial in building trust and allows for proper recollection and sharing of information about the child's own story which is useful in establishing his or her age.²⁶

xii. Where medical examination is to be used as part of an age assessment, Article 25(5) of the recast Asylum Procedures Directive, which UNHCR considers a positive statement of applicable standards, provides that:

- the least invasive option should be followed;
- the assessment needs to be carried out by qualified medical professionals;
- the child and his/her representative should be informed in a language and manner they understand of the medical assessment, the method of medical assessment and the possible consequences of the assessment, including if he/she refuses to undergo the medical assessment;
- that consent is required by the child and/or his/her representative; and
- the refusal to consent cannot be the sole basis to reject an application for international protection.²⁷

UNHCR

1 June 2015

²⁴ Recast APD, *supra*, note 8.

²⁵ Pursuant to Article 25(5) of the EU recast Asylum Procedures Directive, medical examinations to determine the age of unaccompanied children may be used "within the framework of the examination of an application for international protection". *supra*, note 8

²⁶ Separated Children in Europe Programme, *supra*, note 21, page 15.

²⁷ Recast APD, Article 25(5), *supra*, note 8.