

## Age Disputed Young People in the Asylum System

June 2019

### Executive Summary

The Refugee Council is the largest organisation devoted to supporting refugees and people seeking asylum in the UK. Through our Children's Section Age Dispute Project (ADP), our advisers provide specialist advice and guidance to unaccompanied children seeking asylum who have been improperly deemed adults by the relevant authorities.

This paper briefly details the age assessment process for individuals seeking asylum before articulating our policy recommendations to make sure the asylum process works for age disputed young people. These recommendations are based on our extensive experience working with young people seeking asylum and on the findings of our [Age Disputes Project End of Year Report for 2017/18](#), which reveal the consequences faced by children who are disbelieved about their age and subsequently treated as adults through the asylum process.

This paper will discuss age disputed young people who are judged to be over 18 years old, rather than those children who are accepted to be under 18 but whose exact age is still disputed by the authorities.

**This briefing has been updated with information related to a recent judgment made by the England and Wales Court of Appeal (Civil Division).** On May 23<sup>rd</sup> 2019, the Court of Appeal ruled in 'BF (Eritrea)' that the Home Office policy on assessing age was unlawful and needed to be rewritten, because it failed to ensure children were not mistakenly treated as adults through the asylum process.<sup>i</sup>

The judgment specified that the wording enabling Immigration Officers to judge an individual as 'significantly over 18' based on their appearance and demeanour alone was too vague to account for the margin of error in judging age in this way. This led the Home Office to issue interim guidance stating 'for a person to be assessed as an adult in these circumstances, their physical appearance and demeanour must very strongly suggest that they are 25 years of age or over.'

We welcome the attention this court ruling has brought to the issue of judging age based on physical appearance and demeanour. The judgment has provided the Home Office with an opportunity to improve decision-making on age, thus ensuring the safety of young people in the asylum system is prioritised. We strongly encourage the Home Office to monitor the effectiveness of their interim guidance in correctly judging the age of young people seeking asylum.

The briefing is structured as follows:

- ❖ About age disputes

- ❖ About the Refugee Council's work with children
- ❖ Implications for young people whose age is disputed
- ❖ Refugee Council's policy recommendations
  1. The Home Office should improve its record keeping and data collection to monitor its adherence to policy, and to determine how many claimants are deemed adult by an Immigration Officer on the basis their appearance 'very strongly suggests that they are 25 years of age or over,' and how many of these, if any, are later assessed to be children.
  2. Until the Home Office is able to show the interim guidance related to judging age based on physical appearance and demeanour correctly identifies all children as such, it should not be relied upon to appropriately distinguish between children and adults.
  3. Local authorities should improve their adherence to statutory guidance and case law, ensuring that age assessments are only conducted where necessary and in line with professional good practice guidelines.
- ❖ Appendix: Age Dispute Project statistics for 2018/19

## About age disputes

### *What are they?*

An age disputed young person is an individual who has claimed asylum and is judged by the Home Office and/or local authority to be a different age from their claimed age.

Upon claiming asylum, young people may be placed in the care of a local authority directly, whether their claimed age was accepted or disputed. If their age is in doubt, the local authority must undertake a lawful age assessment.

Until the recent Court of Appeal ruling, the Home Office could, in the first instance, decide that an individual is an adult if their physical appearance and demeanour very strongly suggested the individual was 'significantly over 18.' In these cases, the young person was sent to Initial Accommodation (IA) to live amongst adults seeking asylum. It was often stated that due to the belief that the young person was over 18, they did not require a full age assessment. It was generally only after the intervention of an ADP adviser that a lawful age assessment was then conducted by a local authority.

The most common scenarios of age disputes encountered by our ADP advisers had, until the court ruling, been:

- The Home Office decides a young person is an adult based on their physical appearance and demeanour alone, and disperses them to Initial Accommodation to live amongst adults seeking asylum. At this point:

- The young person may hear about our service and receive support in challenging the Home Office's decision on their age. Our service, in addition to providing advice and guidance, would refer the young person to the relevant local authority to be taken into care as a child. The local authority might immediately accept the young person's claimed age, or might agree with the Home Office, thus disputing their age. If the latter, the local authority must conduct a lawful age assessment.
- The young person may not hear about our service or encounter any other support, such as from a solicitor, who could help them challenge the Home Office's decision. As the Home Office determined their age based only on appearance, and a full age assessment has not been conducted, it is possible that these young people are in fact children. If so, vulnerable children are left to navigate the adult asylum system, and all other aspects of their lives, alone and without appropriate support.
- The Home Office accepts that the young person is a child and refers them to a local authority. At this point, the local authority might accept or dispute the young person's age. If the local authority disputes their age, they must conduct a lawful age assessment.

### *Why do they occur?*

Determining an individual's age is a notoriously difficult and subjective process. It is widely accepted that it is not possible to determine age by one single method. Young people rarely arrive with reliable, formal means of identification, and sometimes the only means of ascertaining their age is their testimony. It is important to be mindful, in these circumstances, of how uncertain and anxious young people will be feeling and how their experiences in their home country and their journey will have affected them.

Moreover, age is culturally understood and chronologically measured differently across the world. Not all countries use the same calendar and dates can be incorrectly converted between them. Our conceptions of age can differ according to our own experiences. The above factors, in addition to a variety of other circumstances, can lead to a child's age being disputed.

## **About the Refugee Council's work with children**

Since 1994, our Children's Section has provided vital support to unaccompanied children seeking asylum in the UK. Our priority is to act in the best interests of the young people we support via the Children's Advice Project, the Trafficked Children's Project, the Youth Development Project, and the Age Dispute Project.

### *About the Age Dispute Project*

Created in 2010, the Age Dispute Project supports unaccompanied children seeking asylum who arrive in the UK and are disbelieved about their age. The project provides advice and support to unaccompanied children seeking asylum who are judged to be over 18 years old by the Home Office and/or local authority, and are thereby treated as such during the process of their asylum claim and in relation to their support.

The ADP helps young people to challenge decisions on their age which we believe to have been made in error, or where proper procedure has not been followed, to ensure the young people we work with are treated fairly. Sometimes this might lead to legal action. Through this we have been successful in contributing to changes in policy, including 'BF (Eritrea)' of 2019, 'S v LB Croydon' of 2017, and 'AA' of 2016 and 2017.

'S v LB Croydon'<sup>ii</sup> concluded that local authorities must treat young people whose age is disputed as children while a lawful age assessment is conducted. As such, this judgment applies the principle of the benefit of the doubt, and means that local authorities are obliged to provide accommodation and support under Section 17 and Section 20 of the Children Act 1989.

The 'AA' ruling<sup>iii</sup> determined that as age is a matter of objective fact, it would be unlawful to detain a child even if the Immigration Officer had reason to believe the individual to be an adult.

Most recently, we contributed evidence to the 2019 Court of Appeal case 'BF (Eritrea)'. This case determined that the wording 'significantly over 18' was too vague to account for the margin in error when judging aged based on appearance and demeanour alone. As such, this policy was deemed unlawful and has led the Home Office to publish interim guidance increasing the age for judgements based on appearance and demeanour to 25.

Since its creation in 2010, over 1,600 young people have been referred into our service for support. The ADP is the only project of its kind in England, and, crucially, we are unable to help every young person who is referred to us because of limited resources. In 2018/19, we were unable to provide support to 51 of the 441 cases referred into our service due to lack of capacity.

## **Implications for young people whose age is disputed**

When claiming asylum, an individual's age determines what type of support and services they are eligible to receive, as well as what processes they undergo as part of their asylum claim. Importantly for children, this means the ability to access their right to support and services under the Children Act 1989, which affords them the same rights as other 'looked-after' children and young people.

While in some cases adults will claim to be children, there is increasing evidence of poor decisions on age being made without sufficient reasons, with age assessment interviews being conducted improperly or without grounds for doubting the individual's claimed age. Notably, of the 139 closed cases in 2017/18, 123 of the young people supported by the ADP were later assessed to be children, suggesting significant errors in initial decisions. In 2018/19 this number was greater, with 158 young people supported by the ADP later assessed to be children.

These errors have significant and lasting implications on a child's welfare, development, and asylum claim. The 'AA' judgment, in which the ADP was involved, was an important ruling and it has significantly reduced the number of age disputed young people in detention. Unfortunately, the ADP has found that this reduction has been offset by a dramatic increase in young people being deemed to be 'significantly over 18' by the Home Office decision-makers and sent to live amongst adults in IA. It remains to be seen if the Home Office's new interim policy resulting from the 'BF (Eritrea)' case will resolve this issue.

Young people seeking asylum have often been exposed to violence, sexual exploitation, or other traumatic experiences. These vulnerabilities compound the serious safeguarding concerns that arise when a child is incorrectly housed in accommodation meant for adults. In these instances, the Home Office's duty to take into account the need to safeguard and promote the welfare of the child under Section 55 of the Borders, Citizenship and Immigration Act 2009 is not applied as the young person has been deemed to be adult.

While living in adult IA, young people who have been disbelieved about their age are also unable to access appropriate socio-developmental support which the local authority would have had a duty to provide under the Children Act 1989 had the young person been treated as an unaccompanied child.<sup>iv</sup> This includes the local authority's duty to provide and plan for: statutory health assessments undertaken by a paediatrician; support with emotional and behavioural development; self-presentation skills; and education and training. In these situations, young people also experience a lack of adult supervision and guidance that is available through foster care and semi-independent accommodation.

In addition, when a child has been disbelieved about their age there are consequences on how they are treated through the asylum process. Most notably, they are interviewed on the substance of their claim as though they were an adult. This means that amongst other differences, they are not provided with support through the asylum process from a responsible adult, they have different entitlements to legal advice, and they do not receive temporary protection against removal if they are refused. Moreover, the rules about how their claim should be processed are different, and statutory duties to ensure their safety and best interests as a child are protected also do not apply.

## **CASE STUDY**

When Osman arrived in the UK he was held at a police station where social workers conducted an age assessment - despite the fact that conducting an age assessment in a police station immediately after arrival is against agreed good practice. Although Osman stated he was 17 years old, social workers concluded that he was over 18. He was sent to IA and subsequently dispersed to other adult accommodation, where he was too scared to cook in the communal kitchen or use the bathroom as the door had no lock.

During this period, Osman frequently called the ADP asking to be housed with other young people. A GP who examined him suspected that Osman had been raped, and he later confirmed this by disclosing to a volunteer. This explained his strong fear of adult men and why living with men in shared accommodation terrified him.

Following this discovery and the consistent intervention of the ADP, the social workers realised how traumatised he was. After several sessions, they accepted his claimed age and also concluded that his mental state was that of a 12 or 13 year old. He was then placed in supported living with other young people, provided with a female immigration solicitor and a female social worker, and received additional support from a charity specialising in survivors of torture and violence.

Similarly, we know that in complex age dispute cases where the young person must act as a witness for their case in court, the process can be very lengthy and can re-traumatise the young person involved by requiring them to relive their experiences. If it could be ensured that all age disputed young people received a lawful assessment, that proper processes were followed and respected, and that the young person's testimony was considered, it would help reduce the number of disputes overall, and therefore the instances of going to court.

'The nature of being disbelieved about your age upon arriving in a new country can be incredibly damaging, and in spite of the often harrowing circumstances of home and the journey, it can be the nature of what happens on arrival – shattering the idea of safety and refuge – which does the greatest harm.<sup>v</sup> Considering the above implications, it is therefore crucial that if there are grounds to doubt a young person's age, they are provided with a lawful age assessment in the first instance.

## POLICY RECOMMENDATIONS

### **1. The Home Office should improve its record keeping and data collection to monitor its adherence to policy, and to determine how many claimants are deemed adult by an Immigration Officer on the basis their appearance 'very strongly suggests that they are 25 years of age or over,' and how many of these, if any, are later assessed to be children.**

We recognise that the Home Office policy on age has improved incrementally over recent years. The increased attention brought to this issue as a result of the 2019 'BF (Eritrea)' case is also welcome. The challenge is to ensure that these recommendations and guidelines come to fruition in practice as well as on paper.

The 'BF (Eritrea)' case is a very important first step in acknowledging the risk of erroneously judging a child to be an adult based on if their appearance and demeanour suggest they are 'significantly over 18'. It is our hope that the Home Office's interim policy, which increases the age in these circumstances to 25, will be an effective remedy to the issues the ADP has seen in relation to judging age based on appearance. Yet this will remain unknown unless the Home Office commit to monitoring how many of these cases are later overturned following a full age assessment.

The data collected by the ADP is inevitably just part of the overall picture; Home Office record keeping and data collection on how many people it deems adult based on appearance and demeanour alone, and the outcome of those that receive a lawful age assessment, would therefore play a vital role in assessing the effectiveness of its new interim guidance.

Unfortunately, Home Office record keeping has been consistently criticised in a number of independent reports.<sup>vi</sup> This does not inspire confidence in the government's ability to monitor its adherence to its own policies. Nevertheless, the 'BF (Eritrea)' case awards the Home Office with an opportunity to remedy and improve its record keeping, thus providing much-needed transparency for both the government and external agencies. This would ultimately lead to improved processes which both benefit the Home Office by being more efficient, and which, importantly, act in the best interest of the child.

### **2. Until the Home Office is able to show the interim guidance related to judging age based on physical appearance and demeanour correctly identifies all children as such, it should not be relied upon to appropriately distinguish between children and adults.**

The European Asylum Support Office (EASO) guidelines state that 'no single method currently available can determine the exact age of a person...The observation of physical appearance cannot be considered as a method of age assessment in and of itself, nor can it be used in isolation since it cannot provide any specific chronological age with certainty.'<sup>vii</sup>

Since the 'AA' ruling in 2016<sup>viii</sup>, the ADP has seen an increased number of unaccompanied children who have been processed and housed alongside adults through the asylum system because they are deemed by the Home Office to be 'significantly over 18' on physical appearance and demeanour alone. Indeed, in 2018/19 more than 50% of total referrals into the ADP project were because a young person's age was disputed based on their appearance alone. In comparison, 39% and 37% of total referrals were made as a result of this policy in 2017/18 and 2016/17 respectively.<sup>ix</sup>

Data from the ADP also clearly indicates that errors often occur when a decision about age was made by a Home Office official based solely on the young person's appearance and demeanour. In 2017/18, 72 young people we supported had their age disputed using this criteria alone. This number significantly increased to 177 in the following year. Of these cases which concluded with an outcome in the same year<sup>x</sup>, 89% resulted in the young person being accepted as a child in 2017/18, and 88% had the same outcome in 2018/19.

These figures illustrate how errors in decision-making about age frequently occur when a young person's age is judged by a Home Office official based solely on appearance and demeanour. It is possible the ADP will see a reduction in these figures as a result of the Home Office's new interim guidance for judging age in these circumstances, which states that 'their physical appearance and demeanour must very strongly suggest that they are 25 years of age or over.'

Nevertheless, until the Home Office proves the effectiveness of this policy in correctly judging a young person's age, this interim guidance is unreliable. Because physical appearance is generally insufficient on its own to determine age, it is possible the ADP will continue to encounter young people who have been incorrectly judged adult.

Considering the potential for harm to a child's welfare, development, and fair processing of their asylum claim as outlined above, it is vital that this policy is properly evaluated. We therefore recommend that in the meantime, while this interim guidance is in use, any age disputed young person who is judged by an Immigration Officer to be '25 years of age or over' should be internally recorded by the Home Office as such, but then referred to a local authority for social workers to undertake their own independent lawful assessment. The Home Office should monitor the outcome of these assessments in comparison to their own decision.

### **3. Local authorities should improve their adherence to statutory guidance and case law, ensuring that age assessments are only conducted where necessary and in line with professional good practice guidelines.**

The ADP has seen numerous cases in which age assessments were either not undertaken or were but not in accordance with guidelines and case law. Similarly, there will often be a note in the young person's file to say that an age assessment has taken place but no evidence to support its conclusions.

It is therefore recommended that age is not disputed unless there is a very strong reason to do so. If such a reason exists and a young person's age is then disputed, the benefit of the doubt should be given to the young person in the first instance – rather than judge on appearance alone – thus applying the principles of the 'S v LB Croydon' ruling from the beginning. This ensures the young person's best interests are taken into account and they are not at risk of experiencing the safeguarding hazards and impact on their welfare that result from being inappropriately treated as an adult, as outlined above.

Where there are considerable grounds to dispute a young person's age, it is recommended that social workers from local authorities' children's services – not Home Office officials – should conduct the assessment and do so properly, by undertaking assessments lawfully. This does not need to mean lengthy, but does ensure the fair treatment of young people seeking asylum. A more thorough and culturally sensitive practice, which complies with national and international guidance, would help to reduce errors in decisions and mitigate undue harm to the young person.

## Appendix: Age Dispute Project statistics for 2018/19

The following statistics are taken from the Age Dispute Project for financial year 2018/19. Statistics shown here include cases which have been carried over from previous years, i.e. may have been referred into the project prior to 2018 and received continuous support into 2018.

It is important to note that once a young person is referred into the care of a local authority, they may have a lengthy wait before an age assessment is conducted. Similarly, age assessments themselves can take weeks or months, and where a challenge is brought before a court, the resolution will take even longer. As a result, the statistics below only capture those cases who received an outcome within the year 2018/19.

The categories are as follows:

- Assessed as child: The young person was accepted to be a child under 18 years old.
- Assessed as adult: The young person was assessed to be an adult.
- Treated as child pending age assessment: An ADP adviser has referred the young person to a local authority and they are receiving care and support under the Children Act 1989 pending the outcome of an age assessment.
- Outstanding: A referral for a young person into the ADP has been accepted. They are receiving support from an adviser but are not yet in the care of a local authority.
- Young person lost touch with the service: The young person lost touch with our service and we were unable to maintain contact with them.

Outcome in 2018/19	Number of cases
<b>Assessed as child</b>	158
<b>Assessed as adult</b>	29
<b>Treated as child pending age assessment</b>	116
<b>Outstanding</b>	47
<b>Young person lost touch with the service</b>	6

These statistics illustrate that 158 young people were erroneously deemed to be adult but, following the intervention of an ADP adviser, were later accepted to be children.

There is a large number of cases still awaiting the outcome of an age assessment. Based on our experience, it is likely that many of these cases will be assessed and accepted as children.

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- <sup>i</sup> <https://www.bailii.org/ew/cases/EWCA/Civ/2019/872.html>
- <sup>ii</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2017/265.html>
- <sup>iii</sup> <https://www.bailii.org/ew/cases/EWCA/Civ/2017/138.html>
- <sup>iv</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/656429/UASC\\_Statutory\\_Guidance\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656429/UASC_Statutory_Guidance_2017.pdf)
- <sup>v</sup> [https://www.refugeecouncil.org.uk/assets/0004/4225/ADP\\_Report\\_201718\\_FINAL\\_002\\_.pdf](https://www.refugeecouncil.org.uk/assets/0004/4225/ADP_Report_201718_FINAL_002_.pdf) Page 10
- <sup>vi</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/695310/An\\_in\\_spection\\_of\\_the\\_best\\_interests\\_of\\_unaccompanied\\_asylum\\_seeking\\_children\\_March\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695310/An_in_spection_of_the_best_interests_of_unaccompanied_asylum_seeking_children_March_2018.pdf)
- <sup>vii</sup> <https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf>
- <sup>viii</sup> The 'AA' ruling determined that as age is a matter of objective fact, it would be unlawful to detain a child even if the Immigration Officer had reason to believe the individual to be an adult. See Endnote 1.
- <sup>ix</sup> These figures include both cases we supported and those we were unable to support due to lack of capacity or other reasons, such as the young person losing touch with our service.
- <sup>x</sup> Concluded cases are those which resulted in an outcome of either being accepted as a child, or assessed to be an adult.