



ILPA's Briefing for the House of Commons Report Stage for the Nationality and Borders Bill – Part 4: Age Assessments Amendment

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Proposed Amendment to remove the Age Assessment provisions in Part 4

Page 49, line 25, leave out Clause 48
Page 50, line 40, leave out Clause 49
Page 52, line 1, leave out Clause 50
Page 52, line 22, leave out Clause 51
Page 53, line 15, leave out Clause 52
Page 54, line 2, leave out Clause 53
Page 54, line 24, leave out Clause 54
Page 55, line 25, leave out Clause 55
Page 56, line 19, leave out Clause 56

Briefing

By clauses 48 to 56 in Part 4 of the Nationality and Borders Bill, the Home Office seeks to regulate the process of age assessments that determine whether or not a person subject to immigration control is a minor child. It seeks to so regulate not only for itself but also for local authorities who have social service departments. It also seeks to displace any legal remedy from the Courts into the First-tier Tribunal and to make provision for the type of evidence that is gathered and how it is to be considered.

Haste without warrant

The substantive proposals were only introduced on 21 October, during the Committee Stage of the Bill (only a placeholder clause on age assessments – Clause 58 – featured in the Bill as introduced to Parliament). The Refugee and Migrant Children’s Consortium (RMCC), of which ILPA is a member, produced a briefing on new clauses NC29-37 on Age Assessments after they were laid, which highlighted that ‘[t]he clauses ignore many of the concerns raised to date by those organisations working with unaccompanied children and young people and risk violating children’s rights.’¹ We emphasise certain observations and make a few further comments below.

The proposals are premature and ill-thought through. They should be left out of the Bill and properly considered proposals brought forward in children-related legislation if necessary. There is unnecessary haste and not enough consideration of the impact of the proposals. In every clause there are matters that deserve a pre-legislative White Paper, consultation, and mature deliberation (see below). The welfare of children is at stake.

The welfare of children is not an immigration matter

A local authority with a social services department may need to determine a person’s age in order to know whether it has jurisdiction to assist them as a minor child under the Children Act 1989, Parts 3 to 5 of which provide for support for children and families, the care and supervision of children, and the protection of children. These are matters that engage duties and obligations owed to children (including the need to act in their best interests), as well as the allocation of resources.

The Bill proposes to regulate the role of local authorities in relation to this matter by regulating how age is assessed. It is an immigration and nationality bill. If there are changes to be made to the assessment of age by local authorities, they should form part of a Bill that is focused on the welfare of children and where the scrutiny given to the proposed changes examines them in the context of how they fit into and alongside existing legislation providing for the welfare of children such as the Children Act 1989 and the Children Act 2004.

Lack of pre-legislative consultation

There has been a lack of meaningful pre-legislative consultation on the proposed changes. The questions of how best to provide for children’s needs and how to determine whether a person is

¹ https://www.childrenslegalcentre.com/wp-content/uploads/2021/10/RMCC-briefing-Committee-stage-NC29_37-Age-assessments-Nationality-and-Borders-Bill.pdf page 1

indeed a child (as opposed to a young adult) are pre-eminently matters for thorough consultation with persons and bodies that have expertise and experience in considering them. There are medical and social work professionals and institutions who have this experience and expertise, as well as academics who have considered the questions arising. In addition, local authorities themselves are well-placed to assess the impact of proposed changes and to offer their own insight into how best to proceed. It is also particularly important to hear from children and young adults who have been subject to age assessments.

There is a public interest in identifying correctly those who are children. The matter should not be rushed. Those with expertise and experience should be consulted on the *detail* of the proposals before they are shaped into legislation. We reiterate the concern we raised in our response to the New Plan for Immigration Consultation that the proposals on age assessments set out in the Secretary of State's Policy Statement lacked detail.²

'Scientific Methods'

The Bill proposes that certain 'scientific methods' to determine age may be prescribed in regulations to be made by the Secretary of State (clause 51). This is wrong for a number of reasons. All of them point to a need for further consultation.

First, the use of 'scientific methods' to determine chronological age is highly contested. The RMCC observes that 'professional medical bodies are unequivocal in their rejection of their use'.³ Allowing the matter to be settled by the Secretary of State by way of regulations merely creates a legal fiction that any such methods so specified are reliable.

Second, the methods of taking samples are invasive (saliva or cell samples, measuring body parts, etc. – see clause 51(2)) without being clinically necessary.

Third, it is no answer to suggest that the use of such methods will be voluntary. The proposals envisage that a refusal to consent may damage the credibility of a person in the age assessment process (see clause 51(7)).

² <https://ilpa.org.uk/wp-content/uploads/2021/05/New-Plan-for-Immigration-ILPA-response.pdf> page 22, para 63

³ https://www.childrenslegalcentre.com/wp-content/uploads/2021/10/RMCC-briefing-Committee-stage-NC29_37-Age-assessments-Nationality-and-Borders-Bill.pdf page 4

Legal Remedies

The Bill proposes that the legal remedy against an adverse age assessment conducted for a local authority or for the Secretary of State will be subject to a right of appeal to the First-tier Tribunal (clause 53), so displacing the trials currently held in the Upper Tribunal or High Court.

However, it is not obvious that the First-tier Tribunal is the right place for such dispute resolution. This is a matter on which pre-legislative consultation ought to be undertaken. Age assessment hearings are – for all practical purposes – trials where both sides call witnesses of fact (social workers, adult carers, etc.) and expert witnesses; trials that may last for a day or more. They are not like the ordinary matters heard by the First-tier Tribunal: relatively brief immigration appeals that may last a couple of hours, where only the person appealing calls witness evidence.

Even at first blush, it may be that the County Court or the Family Courts (both of which have long experience of trials) are better suited to hearing age disputes: their procedures are well suited to trials and the judges have the relevant expertise. But in any event, the point is there has been no consultation as to forum, to suitability, or to resource implications. There needs to be. It is important to get this right. To shoe-horn age disputes into the First-tier Tribunal without proper pre-legislative scrutiny is a mistake.