Ad hoc Committee for the Rights of the Child (CAHENF)

Drafting Group of Experts on Children’s Rights and Safeguards in the context of Migration (CAHENF- Safeguards)

**Working title:** Draft Recommendation CM/REC(2018)... of the Committee of Ministers to Member States on Human Rights Principles and Guidelines on age assessment for children in migration (second working version of 20 February 2018)

For discussion at the fourth meeting of the CAHENF (Strasbourg, 21-23 March 2018)

Agenda item 6.1

**Venue:**
Council of Europe, Strasbourg (France)
Agora Building, Room G.01, from 9:30 to 18:00

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Key issues

The objective for the CAHENF at its 4th meeting is:

a) to have a first exchange of views on the proposed text and hold an in-depth discussion on the principles and guidelines included therein;

b) to discuss and agree on the Updated roadmap for the finalisation of the proposals for standards on age assessment\(^1\), including the timelines for consultation of all CAHENF members on the revised draft.

Background

1. This paper proposes elements on the principles and guidelines on age assessment that could be included in the future instrument on this topic, to facilitate the first discussion by the CAHENF-Safeguards. This first draft version of the text was prepared by the consultant and the secretariat, on the basis of the substantive contributions and comments received in writing and orally from CAHENF – Safeguards experts and CAHENF members after the plenary meeting of 22-24 November 2017.

2. The structure aims at responding to comments raised by delegations on the preliminary outline distributed by the Secretariat, which supported a short and concise text building on a series of principles, adopting a human-rights based approach to age assessment and taking into account the different ways in which state responsibilities are organised nationally. The draft text develops principles and guidelines aimed at ensuring that age assessment frameworks, which are respectful of the human rights and dignity of children, can be established across different national contexts. Their development and strengthening is encouraged and supported.

3. This revised draft attempts to integrate the views and written comments of CAHENF-Safeguards experts following their last meeting\(^2\).

Next steps

4. It is proposed that following the meeting, the CAHENF should invite delegations to provide detailed written comments and drafting suggestions so that a first consultation of all delegations takes place before the next meeting of the CAHENF-Safeguards (7-8 June 2018).

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\(^1\) See CAHENF-Safeguards(2017)REV4 as proposed.

\(^2\) For an overview of issues discussed, see CAHENF-Safeguards(2018)PV1
Preamble

The Committee of Ministers, under the terms of article 15.b of the Statute of the Council of Europe;

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, inter alia, by promoting common standards and co-operation in the field of human rights;

Reaffirming the principle of equal dignity of all human beings and the principle of full and equal enjoyment of human rights and fundamental freedoms of any child within the State’s jurisdiction, regardless of his or her nationality, migration, residence or other status;


Taking into account the rights and obligations set out in relevant European legal instruments, such as the European Convention on Human Rights (ETS No. 5) and the Protocols thereto, the European Social Charter (ETS No. 35 and its revised version, ETS No. 163), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126), the Council of Europe Convention on Human Rights and Biomedicine (ETS No. 164), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210);


Noting the relevant Committee of Ministers’ Recommendations to member states in the area of children's rights, including Recommendation Rec(2003)5 on measures of detention of asylum seekers, Recommendation Rec(2005)5 on the rights of children living in residential institutions, Recommendation Rec(2011)12 on children’s rights and social services friendly to children and families, Recommendation Rec(2012)2 on the participation of children and young people under the age of 18, as well as the Committee of Ministers’ Guidelines on child-friendly justice (2010) and on child-friendly health care (2011);

Referring to the Council of Europe Programme “Building a Europe for and with children”, the Council of Europe Strategy on the Rights of the Child (2016-2021), and the Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019);
Taking into account the relevant case law of the European Court of Human Rights, the decisions of the European Committee of Social Rights, and the relevant recommendations of monitoring bodies, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), the Group of Experts on Action against Trafficking in Human Beings (GRETA), Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), and the Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;

Recognising that States should respect, protect and fulfil the rights of the child, and that children in migration should be treated first and foremost as children;

Deeply concerned that children in the context of migration are in particularly vulnerable situations, irrespective of whether they are accompanied, unaccompanied or separated from their parents, and as such are at increased risk of violation of their fundamental rights and freedoms, in particular the right to life, survival and development, the right to non-discrimination, [the right to preserve his or her identity], the right to privacy and family life, the right to health and medical care, the right to education, the right to housing, access to justice and the right to freedom from all forms of violence;

Aware that age assessment of children is applied in different contexts such as immigration and asylum procedures, juvenile justice, or for the purpose of children who migrate to exercise sport for professional reasons, and that it entails specific difficulties in cases where children have not been registered at birth, or are not in possession of identity documents;

Considering that where the age of the child is under reasonable doubt, age assessment may serve the best interests of the child in order to facilitate establishing a child’s identity to ensure access their rights and to safeguards afforded to the child under national and international law, including child protection;

Considering the detrimental impact on the safety, well-being and psycho-social development of a child who is wrongfully considered or assessed as an adult, including any lifelong consequences, and the need to prevent a possible secondary victimisation of the child;

Acknowledging the progress made in member states towards developing age assessment procedures respectful of the rights of the child;

Aware that legislation and practices on age assessment procedure vary, including within the territory of the same state, thereby creating legal uncertainty and risks of discrimination as regards the age assessment of a child;

Considering that this guidance should inspire and contribute to the further development of legislation, policies and practices of member States with regard to age assessment for children in migration;

Recommends the governments of member States:

1. Adopt the Human Rights Principles and Guidelines contained in the Appendix to this Recommendation;

2. Take measures to review national legislation, policies and practices in line with the Human Rights Principles and Guidelines outlined below and to ensure that adequate resources are available to implement it;
3. Co-operate with each other to avoid repeated or multiple age assessments on the same child in several States and exchange expertise, data, analysis, research and training with regard to human rights based age assessment frameworks and methodology;

4. Ensure that this Recommendation, including its Appendix, is translated and disseminated as widely as possible amongst all competent national authorities, officials and professionals, including non-governmental actors.

5. Examine the implementation of this Recommendation and its Appendix three years after its adoption.

Appendix to the Recommendation (2018)

I. Purpose and scope

1. The present Human Rights Principles and Guidelines are intended to support States to ensure that any age assessment of a child in migration within their jurisdiction is conducted in accordance with their best interests, with respect for their human rights and dignity, their right to protection from all forms of violence or exploitation, in line with international and European standards.

2. Taking into account the relevant international and European legal instruments, as well as guidance and experience in this area, these Human Rights Principles and Guidelines seek to:

   a) provide guidance on the development and implementation of an ethical, legal and technical framework for age assessment that safeguards the rights of the child and ensures respect for the child's best interests, dignity, the presumption of minority and the principle of the benefit of the doubt;

   b) encourage States to facilitate and promote the exchange of human rights-based, child-centred age assessment practices, as well as to recognise age assessment decisions taken in other member States.

3. The Human Rights Principles and Guidelines apply to any age assessment conducted in the context of immigration or asylum procedures, including to determine if a person is under 18 years old or his/her the chronological age.

4. A person subject to age assessment is hereafter referred to as "child" and is presumed as such until the conclusion of the procedure.

II. Human Rights Principles and Guidelines

Principle 1 - Safeguarding the rights of the child subject to age assessment. Age assessment shall be carried out in a manner that respects the child's right to life, survival and development and to a life free from violence, including the right not to be subject to inhuman and degrading treatment.

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Note for explanatory memorandum: judges, prosecutors, lawyers, police, border guards and other law enforcement authorities, child protection professionals, social workers, asylum and immigration officials, guardians, health professionals, staff of welfare institutions and care accommodation, regional and local authorities.
Age assessments shall be conducted in accordance with the child’s right not to be deprived of their liberty, non-discrimination, right to a private and family life, the right to health and medical care, the right to be heard and informed and the right to privacy and data protection.

1.1 States should ensure that the primary aim of age assessment is to ensure that children are treated first and foremost as children in accordance with the rights of the child.

1.2 Age assessment should only ever take place where there are [reasonable] [serious] doubts about the age of a child and it is in their best interests to establish their identity. Age assessment should not be initiated in a routine or arbitrary manner. When age assessment is deemed in the best interests of the child, States should ensure that it is completed promptly. Serious doubts may exist where one or more of the following circumstances occur: the person does not possess identity documents and his/her declared age cannot be verified and there are [reasonable] [serious] doubts about his/her claimed age or the person is not in a position to state his/her age. The serious doubts which justify the referral to age assessment must be outlined in the decision.

1.3 In accordance with the principle of presumption of minority, any person referred to age assessment shall be treated as a child from the moment of identification and referral to age assessment throughout the procedure. The child undergoing age assessment should benefit from all the rights of the child and all the additional safeguards afforded to children under international and European law. The best interests of the child shall be a primary consideration throughout the age assessment procedure including at the point of referral to a particular method used to determine the age of the child.

1.4 Children should not be subject to detention or deprivation of liberty during the age assessment procedure. In accordance with the principle of the presumption of minority, children undergoing age assessment should be accommodated separately from adults who are unrelated to them. Accommodation should be suited to the needs of the child, taking into account their gender and claimed age.

1.5 States should safeguard the child’s human dignity throughout age assessment procedures and ensure that no child is subject to cruel, inhuman or degrading treatment. The child should be treated with care, sensitivity, fairness and respect throughout the procedure. States should pay attention to identify children in situations of extreme vulnerability to identify victims of trafficking and other forms of violence. Special attention should be given to each child’s personal situation, gender, culture, wellbeing and specific needs, and with full respect for the child’s physical and psychological integrity.  

1.6 The child has the right to be informed in a child-friendly manner about the age assessment procedure and his/her rights and to be consulted throughout, either directly or through a representative or an appropriate body. The child’s views should be given due weight in accordance with the child’s evolving capacities, bearing in mind the child’s maturity. States should seek to obtain the child’s informed consent before proceeding with the age assessment procedure.

1.7 The child’s rights to privacy and personal data protection must be respected when undertaking an age assessment.

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Recommendation Rec(2012)2 of the Committee of Ministers to member States on the participation of children and young people under the age of 18, par. 2.
**Principle 2 - Legal, policy, regulatory or administrative framework.** States should provide for adequate, standardised legal, regulatory and/or administrative frameworks and policies in accordance with international and European standards and in line with the principles set forth in these Guidelines.

2.1 The age assessment framework and policies should specify the steps of the procedure, such as a reasoned referral decision, the assessment procedure, and decision-making process, as well as procedural safeguards and effective remedies available, including timelines for each step of the procedure.

2.2 With full respect for the child's right to private and family life, States should ensure a multidisciplinary approach to age assessment through close co-operation between different professionals in order to obtain a comprehensive understanding of the child. The multidisciplinary framework should include consideration of documentary evidence, evidence gathered in an interview with the child, as well as the child's maturity in the context of their psychological, emotional, developmental, environmental and socio-cultural background. Such frameworks should provide for the professional rules on confidentiality to apply, define the circumstances under which referral to medical age assessment is lawful and ensure that adequate safeguards and effective remedies are in place.

2.3 Co-operation and coordination between the different services should be ensured throughout the multi-disciplinary procedure, including social protection, welfare and child protection systems.

2.4 The age assessment framework should define the authorities and professionals competent for referral to age assessment, carrying out the assessment, and for making age determination decisions in a timely manner, in accordance with the principle of the best interests of the child. Such authorities and professionals should be impartial and accountable.

2.5 The age assessment framework should include specific safeguards for children in situations of particular vulnerability, including children who have been victims of sexual violence or exploitation, trafficking or other criminal offences, pregnant girls, and children suffering from trauma.

2.6 States should provide for initial and continuous training of professionals involved in age assessment procedures, including training on multi-disciplinary age assessment procedures, on the rights and needs of the child, child development, best interests determination, child gender and culture sensitive communication and interviewing techniques, including with children in situations of particular vulnerability.

**Principle 3 - Steps of the age assessment procedure.** States should guarantee that the age assessment procedure upholds the child’s dignity, physical and psychological integrity at all times. It should be child-friendly, rights-based, safe, gender-sensitive and culturally appropriate. States should use scientific, reliable and least invasive methods and act in accordance with the principle of due diligence.

3.1 Before any referral to age assessment is made States should endeavour to establish the child's identity, including through examination of any documentary identification in the child's possession and an interview with the child. If it becomes apparent that serious doubts exist as to the age of the child then the child may be referred to age assessment.
3.2 Age assessment should not take place at the first point of entry or upon the first contact after arrival, but once the child’s basic needs have been addressed, including accommodation in a safe place, provision of food and medical assistance, childcare and protection services.

3.3 The authenticity of identity documents or other evidence submitted by the child should be evaluated, in accordance with relevant national and international standards, and considered genuine unless there is proof to the contrary. The competent authorities must not contact the authorities of the country of origin of an asylum seeker or refugee or a person who has expressed their intention to seek asylum at any time for any reason during the age assessment.

3.4 The age assessment interview should be conducted in accordance with the multi-disciplinary framework, may include qualified professionals such as social workers, psychologists and paediatricians, on the basis of evidence-based child-friendly interviewing protocols. The interview should take place in a timely manner, in accordance with the best interests of the child, and in a child-friendly environment.

3.5 States should exhaust all elements of the multi-disciplinary approach before resorting to medical examination, the use of radiological medical examination should be limited to a minimum. The best interests of the child are a primary consideration when making a referral to medical examination. Special measures and safeguards should govern referral to and use of medical examinations involving exposure to ionisation for the purpose of age assessment. The results of the medical examination should be taken into consideration in combination with all other evidence gathered. The child has the right to be accompanied to the medical examination by a person of trust who is competent to promote the best interests of the child without interfering with rules of privacy during the examination.

3.6 Age assessment by medical examination should only take place with the child’s informed consent, and/or the informed consent of their parent, legal representative or guardian in accordance with national law. If a child or their representative refuses to give their consent, the authority should explore the reasons for the refusal and make an age determination decision based on the elements in their position. Refusal to consent to medical examination should not result in an automatic decision that the child is an adult.

3.7 States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error and can also be traumatic and lead to unnecessary legal processes. Sexual maturity examinations should be prohibited by law.

3.8 The child should not be exposed to repetitive age assessment procedures. All age assessment methods, including medical examinations, must be adapted to the individual gender and the specific vulnerabilities of the child.

3.9 In accordance with the principle of the best interests of the child and the benefit of the doubt, States should apply the margin of error in favour of the child when interpreting the results of age assessment to make a decision.

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6 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 obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return CMW/C/GC4-CRC/C/GC/23, §4.

7 ECHR, Bataliny v. Russia, no. 10060/07, judgment of 23 July 2015

8 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 obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return CMW/C/GC4-CRC/C/GC/23, § 4.
3.10 The age assessment decision should be given in writing and include the legal and factual reasons for the decision. It should include details of the methods used, document uncertainties and the specific margin of error and, the scientific reliability of any medical examination used in that case as well as information about remedies available to challenge the decision.

3.11 The child shall be notified immediately, in a language and manner that the child understands, of the age assessment decision and all supporting documentation should promptly be made available to the child and his/her parent, legal representative or guardian.

**Principle 4 – Procedural safeguards.** In accordance with the general principles of due process, States should ensure that age assessment is conducted with due respect of procedural safeguards.

4.1 A temporary guardian and/or legal representative should be appointed, without delay and at the latest at the time of referral. This guardian and/or legal representative should assist the child with all legal and procedural matters related to the age assessment throughout the duration of the procedure.

4.2 States should ensure that the child has the right to express his/her views freely throughout the age assessment procedure, the views of the child should be given due weight in accordance with the child’s evolving capacities and maturity.

4.3 At all times prior to and during the age assessment procedure, States should guarantee the right of the child and his/her parent, legal representative or guardian to be promptly and adequately informed and advised, in simple terms and in a language the child understands, inter alia, of: the reason for age assessment; the purpose of such an assessment; the methods, steps and possible consequences of the age determination decision; the right of the child to refuse to participate in any part of the age assessment procedure as well as the possible consequences of refusal; procedural safeguards and available remedies.

4.4 States should ensure the child understands that they have the right to refuse to participate in age assessment, refusal should not entail any automatic decision concerning the child’s age or negatively impact on the child’s immigration status or the child’s application for international protection.

4.5 States should ensure that effective mechanisms for monitoring and oversight of age assessment procedures, including by state institutions and independent courts or bodies.

4.6 States should ensure that age assessment procedures are free of charge for the child undergoing it and/or his/her legal representative or guardian. If, having claimed to be an adult, a person is nevertheless determined to be a child, he/she should not be penalised for having declared to be an adult.

**Principle 5 – Remedies.** States should provide for effective remedies to challenge referral to age assessment, the age assessment procedure and the age assessment decision.

5.1 A child undergoing age assessment should have access to a child-sensitive, independent and impartial complaints mechanism at every stage of the age assessment procedure.

5.2 Complaints mechanisms should not impose any financial burden on the child and his/her legal representative, parent or guardian.

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5.3 States should ensure that every child has access to an effective remedy before a competent authority or body, including to challenge the decision of the complaints mechanism. The competent authority should be impartial and independent, in accordance with the European Convention on Human Rights and the Committee of Ministers’ Guidelines on child-friendly justice (2010).

5.4 An effective remedy implies that the child should have access to free legal advice and assistance and interpretation wherever required, proceedings should be child-sensitive, accessible, free of charge and conducted in accordance with the urgency principle.