

A Report for HAQ Centre for Child Rights

# WHO SAID AGE IS JUST A NUMBER?

A report into the issue of age determination for  
juvenile accused and victims

October 2020

**LAWS 4052  
INTERNATIONAL PARTICIPATION AND COMMUNITY  
ENGAGEMENT**

ELLY DRING, SEETHA EASWARAN, MATT ROFE, AMY KING AND OLIVIA  
DEPARES

**Project Supervisors:**

Debra Ronan & Lise Barry (PACE Supervisors at Macquarie University)  
Bharti Ali (Co-Founder & Executive Director at HAQ)

# TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION	7
METHODOLOGY, SCOPE & LIMITATIONS	8
AGE DETERMINATION FOR JUVENILES IN INDIA	10
COUNTRY ANALYSIS	
Pakistan	13
South Africa	23
Uganda	32
United Kingdom	38
United States of America	44
RECOMMENDATIONS	58
CONCLUSION	66
BIBLIOGRAPHY	68

# EXECUTIVE SUMMARY

This report provides insight into the legal frameworks used to determine the age of juvenile accused and victims, particularly when official birth registration documents are not available. Based on the following analysis into the process of age determination across five key jurisdictions, this report provides recommendations which ensure the most just and conclusive determination of age. The jurisdictions chosen include Pakistan, Uganda and South Africa, which have low rates of birth registration. The United Kingdom and United States of America have also been included as official birth registration is the norm and judicial frameworks have been implemented. Our analysis has led to the following findings:

## **The age determination process**

Pakistan, Uganda and South Africa have all developed specific legislation dealing with age determination for the accused and have more general case law and auxiliary legal approaches to address uncertainty surrounding a victim's age. Despite this statutory foundation, inconsistency in the application of these laws is common, with judges left to develop the law further as cases arise.

The United Kingdom and the United States of America have both developed legal frameworks and policies to address age determination for immigrants and refugees, with most age enquiries handled by government agencies responsible for immigration matters.

In all jurisdictions, multiple Government agencies and judicial bodies are involved with the age determination process; both when the individual comes into conflict with the law and when the case advances to the courts. Police, government agencies and community members tend to have a more limited, *ad hoc* role in age determination enquiries in developing nations. A medical officer plays a larger role in Pakistan, Uganda and South Africa where medical examinations are relied upon more heavily due to the lack of adequate and reliable documentation. Comparatively, medical assessments of age in the United Kingdom and United States of America have been recognised as unreliable when used as a sole source of evidence, thus demonstrating a reluctance to rely upon medical age assessments as the primary source of evidence. The time frame to conduct an age

determination is very inconsistent between jurisdictions, and is often not adhered to in practice. Delays in conducting age determination assessments can be exacerbated by limitations in collecting reliable evidence and minimal court or government agency resources.

### ***Evidence used during age assessments***

Documentary evidence relied upon in all jurisdictions ranges from official birth registration and identity documents, to more unofficial sources of information such as baptismal certificates, school report cards and immunisation records. Despite the high risk of fabrication and inaccurate documentation being admitted as evidence of an individual's age, no jurisdiction has specific verification requirements which ensure the reliability of these pieces of documentary evidence.

Medical reports are also heavily relied upon in Pakistan, Uganda and South Africa, however no strict processes are codified within legislation. This results in a wide range of medical assessment methods with varying accuracy being used as definitive proof of an individual's age. Significant inconsistencies and the serious consequences of this *ad hoc* approach are evident in case law from these countries. In comparison, although no specific medical assessments are noted in the United Kingdom and United States of America, there is less reliance upon these reports due to the recognition that it is impossible to accurately estimate age using medical processes. These countries use a more holistic approach to age determination, including expert opinions and sources of information before coming to a conclusion on age.

### ***Presumption of minority for accused and victims***

No jurisdiction has statute specifically addressing whether the accused or victim is presumed to be a minor when uncertainty still exists following an age inquiry. Case law in Pakistan, Uganda and South Africa suggests that benefit will be given to the accused in these scenarios as a protection offered to children in conflict with the law. However, this is applied inconsistently due to the absence of any statute. The approach of these jurisdictions to victims in similar situations is unclear due to a lack of law discussing this issue. Neither the United Kingdom nor United States of America have any specific law discussing the presumption of minority in relation to age determination cases.

## ***Conflict between mental and biological age***

Currently the law regarding the legal capacity of persons with intellectual disabilities and the discrepancy between their mental and biological age is developing. There is no specific statute in any of the chosen jurisdictions discussing whether a lower mental age can be utilised as a mitigating or aggravating factor in sentencing or procedural rules in criminal cases. There has been case law in the chosen jurisdictions which has attempted to grapple with this issue however, there are several ethical concerns with classifying someone with an intellectual disability as being of a certain mental age.

This research and comparative analysis has led us to make several recommendations which will assist in improving the process of age determination in India. These recommendations have been made with consideration to the capacities and resources of Government agencies and judicial institutions in India. A summary of the recommendations has been provided below:

*Recommendations 1:* Age assessments should only be undertaken if reasonably required.

*Recommendation 2:* Age assessment completed prior to commencement of court case.

*Recommendation 3:* Age assessments must be multi-disciplined and multi-stepped.

*Recommendation 4:* Utilise medical examinations as a last resort, recognising margin of error and considering the ethical issues.

*Recommendation 5:* Suggested age determination process – the role of police, the Juvenile Justice Board and Court.

*Recommendation 6:* Findings of police, social worker and medical practitioners should be submitted to an impartial board who considers the evidence as a whole.

*Recommendation 7:* If, after all processes have been concluded and there is doubt, the lowest age of the range is valid and the benefit of doubt should go to the accused.

*Recommendation 8:* Both biological and mental age of the individual shall be given due weight and consideration.

# INTRODUCTION

Age is an integral aspect of a person's identity and is not merely just a number. The importance of an individual's age cannot be overstated as it is a fundamental human right providing access to specific entitlements and protections under law. Individuals with undetermined birthdates primarily encounter issues when they come into conflict with the law as a suspect or as a victim of a crime. Age determination processes have subsequently developed where the age of the victim or accused is unknown or in question.

Determining the age of juveniles in the legal system is crucial as the age determination process can conflict with the courts in several ways. Firstly, where age is necessary to determine the appropriate jurisdiction of the court, where age is an element of the crime or where age is relevant in determining sentencing. Age determination processes are thus essential to safeguard juveniles from a violation of their legal rights and the risks that accompany being classified as an adult at law.

This report provides a background into the current age determination laws and challenges faced specifically in India, and an in-depth examination of age assessment processes in five jurisdictions; Pakistan, Uganda, South Africa, the United Kingdom and United States of America. These particular jurisdictions were selected as they encapsulate nations with similar social contexts as India and includes Western countries where official birth registration is the norm. The concluding recommendations represent a consolidation of our findings and presents solutions to the common issues discovered across these jurisdictions.

Our report aims to provide HAQ with an overview of different global approaches to age assessment and present recommendations which offer the most appropriate legal and ethical solutions to the issues surrounding age determination in India.

# METHODOLOGY, SCOPE & LIMITATIONS

Law and policy relating to age determination pose a significant issue to legal jurisdictions globally. Preliminary research conducted for this report included examining the approaches taken to age determination in countries such as Denmark, Somalia, Turkey, Nepal, and Afghanistan. For an outline of all preliminary research into international age determination practises, please see the Appendix attached to this report.

Due to the scope of this paper, it cannot respond to all laws, policy and literature regarding age determination procedures around the world. Consequently, this paper will primarily focus on a case study of five countries. Those are Pakistan, South Africa, Uganda, the United Kingdom and the United States of America. These countries were specifically selected to represent a diverse cross-section of legal processes, cultures and policy relating to age determination. Countries such as Pakistan, South African and Uganda face similar hurdles to India in regards to age determination such as low birth registration rates. Therefore, these jurisdictions were chosen to demonstrate how legal systems outside of India have attempted to mitigate challenges to their age determination processes. Countries such as the United Kingdom and United States of America have developed extensive policy, law and literature regarding both the age determination of victims and accused. While in these regions, age determination is primarily utilised in immigration cases, these jurisdictions were chosen to demonstrate the alternative approach to age enquiries utilised by Western nations and how effectively they are enforced. These two countries were also chosen as there is extensive literature regarding the age determination of victims and the legal capacity of those with intellectual disabilities within these jurisdictions.

Utilising a socio-legal approach, this report will outline how the laws surrounding age determination are applied in each of these five countries, enabling a comparative analysis of each approach. The effectiveness of these laws, procedures and policy will then be analysed. The report then seeks to recommend approaches to determining age and the treatment of juveniles within the court system in India.

Some limitations of this report should be noted. Firstly, there were language barriers in accessing domestic court material in some of these countries.



Additionally, there was limited information regarding the age determination process for victims of crimes in countries such as Pakistan which have limited literature on the subject. It is also acknowledged that the authors of this report do lack an element of cultural understanding and in-country knowledge of just how effectively these laws and policies are actually applied within each jurisdiction.

# AGE DETERMINATION FOR JUVENILES IN INDIA

The ages of both the victim and the accused are pivotal in determining how the law operates in the charging, trial and sentencing stages of the criminal justice system in India.<sup>1</sup> However, determining the age of both the accused and victim is problematic, as only 41% of births are registered in India.<sup>2</sup>

Currently, the law for age determination in India is governed by two pieces of legislation. The first piece of legislation is s 94 of the *Juvenile Justice (Care and Protection of Children) Act, 2015* ('JJ Act'). It stipulates that when a person is brought before the Committee or the Board under any of the provisions of the JJ Act, other than for the purpose of giving evidence, and it is obvious 'based on the appearance of the person' that they are a child.<sup>3</sup> This observation should be recorded 'stating the age of the child as nearly as may be' and the inquiry should be proceeded with, 'without waiting for further confirmation' of the person's age.<sup>4</sup> However, if the Committee or the Board has reasonable grounds for doubting whether the person brought before it is a child or not, then a process of age determination must be undertaken.<sup>5</sup> This age determination process firstly involves trying to obtain 'the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board'.<sup>6</sup> If this is unavailable, then 'the birth certificate given by a corporation or a municipal authority or a panchayat' is to be obtained.<sup>7</sup> If neither of these can be obtained, then 'age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board'.<sup>8</sup> This age determination test must be completed within 15 days from the date of the order.<sup>9</sup> Importantly, rule 54(18)(iv) of the *Juvenile Justice (Care and Protection of Children) Model Rules 2016* states

---

<sup>1</sup> Jyoti Belur and Brijesh Bahadur Singh, 'Child sexual abuse and the law in India: a commentary' (2015) 4(26) *Crime Science* 1.

<sup>2</sup> Jayakumar Jayaraman, Graham Roberts, Hai Ming Wong, Fraser McDonald and Nigel King, 'Ages of Legal Importance: Implications in Relation to Birth Registration and Age Assessment Practices' (2016) 56(1) *Medicine, Science and the Law* 77, 79.

<sup>3</sup> *Juvenile Justice (Care and Protection of Children) Act 2015* (India) s 94(1).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid* s 94(2).

<sup>6</sup> *Ibid* s 94(2)(i).

<sup>7</sup> *Ibid* s 94(2)(ii).

<sup>8</sup> *Ibid* s 94(2)(iii).

<sup>9</sup> *Ibid.*

that for the age determination of a victim, in relation to an offence against children under the *JJ Act*, the procedure in s 94 of the *JJ Act* is to be followed.

The second piece of legislation for age determination is s 34 of the *Protection of Children against Sexual Offences Act 2012* ('*POCSO Act*'). It stipulates that if a question arises in any proceedings before the Special Court about whether a person is a child or not, the question is to be 'determined by the Special Court after satisfying itself about the age' of the person.<sup>10</sup> Importantly, if an offence under the *POCSO Act* is committed by a child, this child is to be dealt with under the provisions of the *JJ Act*.<sup>11</sup> Consequently, the age determination procedure under the *POCSO Act* is mostly used to determine the age of a victim of an offence. However, this age determination procedure in the *POCSO Act* has been criticised for not providing any guidelines for how a Special Court is to determine a person's age.<sup>12</sup> This means that there is no set procedure for determining a victim's age for an offence stipulated under the *POCSO Act*.

However, case law has developed for how the age of a victim under the *POCSO Act* is to be determined. In *Rajendran v State* it was held that the age of a victim under the *POCSO Act* can be determined by using the procedure in s 94 of the *JJ Act*.<sup>13</sup> Further, in *Jarnail Singh vs State of Haryana*, it was stated that for the issue of minority, there is barely any difference between who is a victim of crime and a child in conflict with law.<sup>14</sup>

Additionally, a problem in the current law is that when an age range is given for a victim, it is not clear whether the benefit of doubt should go to the accused or the victim. In *Shweta Gulati v State*, a bone ossification test was conducted to determine the age of a victim.<sup>15</sup> The victim's age was stated to be in the range of 17 to 19 years.<sup>16</sup> Referring to *Ram Suresh Singh v Prabhat Singh*,<sup>17</sup> and *Jyoti Prakash Rai v State of Bihar*,<sup>18</sup> it was stated that the ossification test is not conclusive for age determination, as the margin of error in the age determined was two years on either side.<sup>19</sup> Since the estimated

---

<sup>10</sup> *Protection of Children against Sexual Offences Act 2012* (India) s 34(2) ('*POCSO Act*').

<sup>11</sup> *Ibid* s 34(1).

<sup>12</sup> *Belur and Singh* (n 1).

<sup>13</sup> Criminal Appeal No. 483 of 2016.

<sup>14</sup> (2013) 7 SCC 263.

<sup>15</sup> (2018) 251 DLT 667 ('*Shweta Gulati v State*').

<sup>16</sup> *Ibid*.

<sup>17</sup> (2009) 6 SCC 681.

<sup>18</sup> (2008) 15 SCC 223.

<sup>19</sup> *Shweta Gulati v State* (n 15).

age was 17 to 19 years, once applying the margin of error principle, the age could therefore be between 15 to 21 years.<sup>20</sup> The court stated that it is an established position of law that the benefit of doubt must go in favour of the accused.<sup>21</sup> Consequently, the court held that giving the benefit of doubt to the accused, the victim was determined to be an adult.<sup>22</sup> Similarly, in *Razak Mohammad v State*, a medical examination determined the age of the victim to be between 17 to 18 years and it was held that the victim was not a minor, as the benefit of doubt must go in favour of the accused.<sup>23</sup>

However, other case law indicates that the benefit of doubt should go to the victim. In *State of Assam v Md. Abdul Kalam*, it was stated that if the benefit of doubt is given to the accused, then with the margin of error of two years being applied to age determination, no child who does not have a birth certificate and who is above the age of 16 will get justice.<sup>24</sup> Similarly, in *State v Varun*, it was stated that when considering the objectives of the POCSO Act, if there is doubt about the age of the victim, the court must tend towards the juvenility of the victim.<sup>25</sup>

This report seeks to analyse age determination laws in other jurisdictions to determine how India's current age determination laws can be improved.

---

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> (2018) 9 SCC 248.

<sup>24</sup> POCSO case No. 23 of 2015.

<sup>25</sup> SC 108 (2013) decided on 29.10.2013.

# COUNTRY ANALYSIS: PAKISTAN

## ***What is the law on age determination for both accused and victims?***

In 2004 the Lahore High Court struck down the *Juvenile Justice System Ordinance 2000* ('JJSO') due to its unreasonableness, impracticality and failure to adequately protect the rights of juveniles. There was minimal recognition of the importance of age determination when dealing with juvenile offenders. Section 7 merely required a medical report of the age of the accused to be ordered by the court only when the accused's age was in question.<sup>26</sup>

The treatment and rights of juveniles in criminal proceedings are now governed by the recently introduced *Juvenile Justice System Act 2018* ('JJSA'). The JJSA has attempted to strengthen the requirement and process of age determination and provide a more adequate system of juvenile justice. The new legislation has introduced several key definitions relating to the meaning of 'child', 'juvenile', 'major offence' and 'heinous offence' to assist in the distinction between child and adult offenders.<sup>27</sup> Under the JJSA, an accused juvenile is a child if they are under 18 years of age at the time of the commission of the offence and the minimum age of criminal responsibility is 7 years of age.<sup>28</sup>

Section 8 of the JJSA stipulates the law regarding the process of age determination in respect of the accused juvenile and those involved in the age determination process.<sup>29</sup> It is stipulated that when an accused 'physically appears or claims to be a juvenile', the relevant police officer is obliged to make an inquiry to determine the age of the accused with reference to their 'birth certificate, educational certificate or any other pertinent documents'.<sup>30</sup> If these documents are unable to be attained, the age of the accused can be determined by way of a medical examination report produced by a medical officer.<sup>31</sup> When the accused is brought before

---

<sup>26</sup> *Juvenile Justice System Ordinance 2000* (Pakistan) s 7 ('JJSO').

<sup>27</sup> *Juvenile Justice System Act 2018* (Pakistan) s 2 (definitions) ('JJSA').

<sup>28</sup> *Ibid*; *Penal Code 1869* (Pakistan) s 82.

<sup>29</sup> JJSA s 8.

<sup>30</sup> *Ibid* s 8(1).

<sup>31</sup> *Ibid*.

a court, the court is required to make a finding of age through reference to reports provided by the police or medical officer.<sup>32</sup>

Age determination appears to only be addressed in the aforementioned legislation, *The Code of Criminal Procedure 1898* failing to prescribe any procedure for age inquiry.<sup>33</sup> Additionally, there does not appear to be any law stipulating the requirement that the age of the victim be determined, nor a process by which this determination should take place. The only reference made to victims in the *JJSA* is in respect to the right of victims to legal assistance at the expense of the State.<sup>34</sup>

### ***Is age determined when the case is registered with the police or when it goes to court?***

Prior to the introduction of the *JJSA*, the *JJSO* stipulated that only if the question of age arose, the Juvenile Court was required to order an inquiry into the accused's age.<sup>35</sup> The inquiry would produce a medical report which would allow the court to record a finding of the accused's age.<sup>36</sup>

The recently adopted *JJSA* has made the finding of the accused's age a mandatory task that is to be completed when the case is registered with police. It is a compulsory role of the ranking police officer or investigating officer to make an inquiry, at the time of arrest, to determine the age of any accused who physically appears to be a juvenile or who claims to be one.<sup>37</sup>

Moreover, it has been affirmed in case law that the age of an accused should be determined at the time of arrest. In the case of *Babar Ali v The State*, the Lahore High Court stipulated several guidelines in respect to the process of age determination.<sup>38</sup> These guidelines state that 'soon after the arrest of a young person on a criminal accusation, the arresting police officers must make a tentative assessment as to whether the arrested young person is a child'.<sup>39</sup>

Additionally, if the case proceeds to court, an enquiry into the accused's age is also required to be undertaken by the court. The court is required to

---

<sup>32</sup> *Ibid* s 8(2).

<sup>33</sup> *The Code of Criminal Procedure 1898* (Pakistan).

<sup>34</sup> *JJSA* (n 27) s 3(1).

<sup>35</sup> *JJSO* (n 26) s 7.

<sup>36</sup> *Ibid*.

<sup>37</sup> *JJSA* (n 27) s 8(1).

<sup>38</sup> (2007) PLD Lahore 650.

<sup>39</sup> *Ibid* 676-678.

consider the documentation provided by the police officer or medical officer and record its own finding.<sup>40</sup>

It has been stipulated in the case of *Muhammad Raheel alias Shafique v The State*, that the onus of proving juvenility is placed on the accused.<sup>41</sup> Whilst this case pre-dates the introduction of the *JJSA*, there is no indication that this requirement does not still stand, placing a burden on the accused to provide documentation to ascertain their age. Furthermore, Pakistani courts have consistently been reluctant to address the question of age determination when it is raised at a belated stage by the accused, with judges being known to draw adverse inferences in such instances.<sup>42</sup>

In respect to juvenile victims, there does not appear to be any stipulation of a requirement that the age of the victim be determined at any point. Rather, case law indicates that determination of age of the victim only occurs when it becomes a factual issue in the case at hand. This has been reflected in the pending case of Huma Younus, in which the 14-year-old Christian girl was taken from her family and forced to marry her abductor.<sup>43</sup> The victim was forcibly converted to Islam, under which Sharia law permits marriage following the girl's first menstrual cycle, even if she is underage. In a hearing in February this year, the Sindh Supreme Court observed that the marriage between the victim and the alleged abductor was valid.<sup>44</sup> The court adjourned the hearing, allowing police to conduct tests to confirm the age of the victim which has resulted in ossification tests indicating that she is 17 years of age.<sup>45</sup> The parents of the victim also produced church and school documents which confirmed the victim's age to be 14.<sup>46</sup> Production of these documents had not been requested prior to this, indicating that age determination of victims is not high on the agenda of authorities. Hence, it appears that the requirement of age determination of victims is not mandatory under Pakistani law and there appears to be no demand for an age inquiry to take place unless the issue is raised.

---

<sup>40</sup> *JJSA* (n 27) s 8(2).

<sup>41</sup> (2015) (PLD SC 145).

<sup>42</sup> *Ibid.*

<sup>43</sup> Fionn Shiner and Marta Petrosillo, 'Pakistan: Case of 'abducted' girl to be taken to Supreme Court', *Independent Catholic News* (Online Post, 28 March 2020) <<https://www.indcatholicnews.com/news/39218>>.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

**What are the roles and responsibilities of police, child protection agencies, doctors, courts and any other authority involved in the age determination process?**

Despite the existence of laws attempting to ensure the process of age determination for accused and victims in Pakistan, there remains a lack of awareness between departments and authorities as to their duties.

*Police*

The JJSA has implemented special duties upon police officers in regard to the process of age determination. Section 8 clearly imposes a duty on the officer in charge or the investigating officer to 'make an inquiry to determine the age' of the accused.<sup>47</sup> This determination is to be made on the basis of the production of evidence, such as a birth or school certificate.<sup>48</sup> If these documents are not available, the accused's age can be determined by way of a medical examination that is ordered by the officer.<sup>49</sup>

However, evidence has shown that police officers are largely unaware of these duties and the required procedures to be undertaken when dealing with juveniles. Police officers have failed to exercise any efforts to accurately confirm the age of the accused or make any recording of their judgement of the accused's age. These issues are largely a result of a lack of training regarding their duties and the process of evidence collection.<sup>50</sup> Many mistakenly assume that the process of age assessment falls under the purview of the courts as was the case under the JJSO.<sup>51</sup> Whilst the court has the duty to order medical examination if the duties of the police have not been exercised,<sup>52</sup> failure to determine the accused's age at time of arrest runs the risk of the accused being denied certain rights. These rights seek to protect the accused juvenile throughout the police investigation process, interrogations, period awaiting trial and court appearances.<sup>53</sup>

In filling out crucial documentation, such as a 'Saza Slip' and a 'First Information Report', both requiring the recording of the age of the accused,

---

<sup>47</sup> JJSA (n 27) s 8(1).

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Imran Ahmad Sajid, 'Juvenile Justice Policy: Gaps Identification and Role of Key Stakeholders in Pakistan' (2009) 1(3) *Pakistan Journal of Criminology* 119, 129.

<sup>51</sup> Ibid.

<sup>52</sup> JJSA (n 27) s 8(2).

<sup>53</sup> Sajid (n 50) 130.



police have sought to avoid declaring the accused as a juvenile. Police continue to use the term 'Hojawan-ul-Omar' or 'nojawan' which translates to 'young man'.<sup>54</sup> These terms cause ambiguity surrounding the accused's age, especially when no documentary evidence has been provided. Additionally, police officers often use their personal judgement and a quick visual assessment of the physical appearance of the accused when determining their age.<sup>55</sup> It has been found that where the accused's appearance leaves little doubt as to their juvenility, police will record their age as '16 to 17'.<sup>56</sup> Yet, where the physical appearance of the accused is uncertain, their age is recorded as '22 to 23'.<sup>57</sup> This can often lead to inaccurate recordings which then causes delays in the court process if the accused is incorrectly submitted through a court which is not the Juvenile Court.

In the recent case of *Saleem Khan v The State*, the police officer in charge failed to exercise his duty to determine the age of the accused, requiring the process to be conducted by the court.<sup>58</sup> This often occurs due to the reluctance of the police to identify the accused as a juvenile as it entails more documentation. Additionally, it has been found that in dealing with cases with multiple accused, police will book the adults and juveniles of that case in the same court to avoid the hassle of pursuing the case in multiple courts.<sup>59</sup>

### *Court/Magistrates*

Under the *JJSO*, determining the age of the accused was the responsibility of the trial court, requiring the court to order a medical report.<sup>60</sup> Under the new *JJSA*, the inquiry into the determination of age is to be conducted by the police, but still remains a statutory requirement that the court is to exercise. The *JJSA* stipulates that when an accused is brought before a court, whether a court of general criminal jurisdiction or the Juvenile Court, and physically appears to be a juvenile, the court must record its findings regarding the age based on the available records submitted by the police and medical

---

<sup>54</sup> International Federation for Human Rights and Human Rights Commission Pakistan, *Punished for being vulnerable: How Pakistan executes the poorest and the most marginalized in society* (Report, October 8 2019) 18.

<sup>55</sup> *Ibid.*

<sup>56</sup> Justice Protect Pakistan, *Death Row's Children: Pakistan's Unlawful Executions of Juvenile Offenders* (Report, February 2017) 22.

<sup>57</sup> *Ibid.*

<sup>58</sup> Criminal Petition No. 251-L of 2020.

<sup>59</sup> International Federation for Human Rights and Human Rights Commission Pakistan (n 54) 18.

<sup>60</sup> *JJSO* (n 26) s 7.

officer.<sup>61</sup> If found to be a juvenile in a court of general jurisdiction, the court is equipped with the power to transfer the case to the Juvenile Court to commence proceedings.<sup>62</sup>

The *JJSA* is silent as to the standard to which the Court must be satisfied that the reports provided by the police or medical officer correctly record the age of the accused.

### *Prosecutor*

The prosecution plays a crucial role as a liaison body between the police and the court, ensuring the administration of justice and the juvenile's rights.<sup>63</sup> Following the recording of the accused's age by the police, it is the responsibility of the prosecutor to ensure that the age is recorded accurately.<sup>64</sup> However, prosecutors often fail to exercise this duty.<sup>65</sup> Additionally, when police are investigating into the age of the accused, the prosecution department has the obligation to ensure that these investigations are conducted in a timely manner, which also does not occur.<sup>66</sup>

### *Medical experts*

Upon the request by the presiding police officer or court, medical experts are required to conduct a medical examination of the accused.<sup>67</sup> It is not stipulated however the specifics of this medical examination or the required qualifications of the medical expert.

### ***What documentary evidence do courts rely upon and how are they verified?***

Birth registration is often neglected in Pakistan, with 58% of children recorded as not being registered in 2018.<sup>68</sup> Despite government efforts to address this, a lack of official birth registration process has resulted in the abundance of falsified documents.<sup>69</sup> As a result, this renders all documentation relating to

---

<sup>61</sup> *JJSA* (n 27) s 8(2).

<sup>62</sup> *Ibid* s 4(7).

<sup>63</sup> Sajid (n 50) 129.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*.

<sup>66</sup> International Federation for Human Rights and Human Rights Commission Pakistan (n 54) 18.

<sup>67</sup> *JJSA* (n 27) s 8.

<sup>68</sup> World Bank, *Completeness of birth registration (%)* (Web Page) <<https://data.worldbank.org/indicator/SP.REG.BRTH.ZS>>.

<sup>69</sup> International Federation for Human Rights and Human Rights Commission Pakistan (n 54) 18.

the age of the child, including legitimate documents, suspect. This makes it increasingly difficult for juveniles who are in conflict with the law to establish that they are below the age of criminal responsibility and should be tried as a juvenile rather than as an adult.

The new *JJSA* appears to have failed to address this issue, still relying on the provision of birth certificates and educational certificates to determine the accused's age.<sup>70</sup> These documents that are provided are often flawed and have likely been forged,<sup>71</sup> which can cause alarming issues for cases which concern death-row sentences and lengthy sentences.

In attempting to oppose an accused's claim of juvenility, prosecutors have pointed to various forms of evidence such as voting registrations and National Identity Cards.<sup>72</sup> Documentation, such as a National Identity Card, which are not reliant upon the accused volunteering information but rather is produced by a registered authority, is said to hold significant probative weight in determining age.<sup>73</sup> The originality of documents provided to ascertain the age of the accused has also been an issue, with a photocopy of an accused's School Leaving Certificate being rejected.<sup>74</sup>

In the absence of such required documentation to determine the age of the accused, their age may be determined through ordering a medical examination report to be conducted by a medical officer.<sup>75</sup> However, the extent of this examination and the required tests are not specified. Additionally, it is stated that age 'may' be determined by way of a medical examination report, indicating that it is not a requirement that such a report be produced.<sup>76</sup>

### **What medical procedures are prescribed in law?**

The *JJSO* failed to stipulate a mechanism by which the Juvenile Court could determine the age of the accused, not specifying any required medical procedures or examinations. Similarly, whilst the *JJSA* has stipulated that the 'age of the accused may be determined on the basis of a medical examination',<sup>77</sup> it does not stipulate what this medical examination entails.

---

<sup>70</sup> *JJSA* (n 27) s 8.

<sup>71</sup> Justice Protect Pakistan (n 56) 23.

<sup>72</sup> *Muhammad Ayyaz v The State etc (Judgment)* Criminal Revision No. 706 of 2016 [3].

<sup>73</sup> *Abdul Ghani and others vs Mst. Yasmeen Khan and others* (2011) SCMR 837.

<sup>74</sup> *Muhammad Ayyaz v The State etc* (n 72) [10].

<sup>75</sup> *JJSA* (n 27) s 8(1).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

Several methods of age determination are available in Pakistan, yet none appear to be specifically required. In attempting to determine the age of the accused, law enforcement and courts can undertake procedures and assessments such as medical history checks, external physical assessments, wrist x-rays and dental examinations.<sup>78</sup> These procedures and assessments are not streamlined nor are they conducted coherently throughout the country.

Case law has indicated that ossification tests have been the primary tests used to determine the age of the accused.<sup>79</sup> In *Sulta Ahmed vs Additional Sessions Judge-I Mianwali and 2 Others* the Supreme Court of Pakistan identified that ossification tests should not be considered as a last resort mechanism.<sup>80</sup> Whilst courts appear to be reluctant to gain insight from such medical reports, an accused must be subject to a medical examination if there is no reliable documentary evidence, unless there are strong reasons to believe that such examination is not necessary.<sup>81</sup>

However, while ossification tests are regarded as providing a good level of accuracy in the finding of a juvenile's age, there are some limitations. As ossification tests are unable to provide a conclusive determination of the juvenile's age, the test provides a margin of error of one to two years on either side.<sup>82</sup> This proves to be difficult when the margin of error extends from age of juvenility to above the age of 18, particularly when it concerns a death penalty.<sup>83</sup> Therefore, courts have continued to prefer the submission of authentic documentation over medical reports due to this ambiguity.<sup>84</sup>

### **What is the time frame prescribed for the courts for commencing and concluding an age inquiry?**

There does not appear to be any prescribed time frame for the commencement or conclusion of an inquiry into the age of the accused. Whilst the authorities are duty bound to order age tests upon the accused's first appearance before the court, these tests are often not done in a timely

---

<sup>78</sup> Khurshid Iqbal, 'Judging Juvenility: Determination of age of Juvenile Offenders under Pakistan's Juvenile Justice System' (2009) 1(3) *Pakistan Journal of Criminology* 105, 115.

<sup>79</sup> *Muhammad Abdullah v Additional Sessions Judge* (2014) (Judgment Sheet) Writ Petition No. 237.

<sup>80</sup> (2004) (PLD SC 758).

<sup>81</sup> *Ibid* [25]; *Mohamad Ilyas v The State* (2017) YLR Note 71 [52].

<sup>82</sup> Iqbal (n 78) 115.

<sup>83</sup> *Muhammad Basit v The State* (2016) PCrLJ 1745.

<sup>84</sup> *Tajammul Abbas v The State & Another* (2019) (Judgment Sheet) Criminal Revision No. 64759 of 2017 [9].

manner.<sup>85</sup> This results in the accused being held in the criminal justice system whilst awaiting the conduct of the tests.<sup>86</sup> This proves problematic when procedures, such as ossification tests are conducted, as these tests cease to be accurate once the accused reaches the age of 20.<sup>87</sup>

***In case of an age range, the benefit of doubt always goes to the accused and age on the lower side is considered to give the accused benefits of the juvenile justice law. But what happens in the case of victims in similar situations?***

Despite repeated assertions of the leniency towards accused juveniles in the case of an age range, in practice there is inconsistency in the exercise of this practice and some judges avoid erring on the side of possible juvenility.<sup>88</sup> Some cases have reported that where joint trials continue, judges have indeed been lenient towards juveniles, yet the accused may still be tried alongside the accused adults. In the case of *Bashir Ahmed v The State*, Ahmed was 15 years-old at the time of his offence and was tried with two adult accused.<sup>89</sup> These adults were initially sentenced to death whilst the judge took a lenient view in respect of Ahmed, sentencing him to 10 years of rigorous imprisonment due to his age.<sup>90</sup> The Appellate bench of the Singh High Court then set aside Ahmed's sentence but refused to acknowledge that he should not have been tried alongside the two adults.<sup>91</sup>

In the case of *Sajjad Serhani v The State*, the ossification test provided an age range of the accused between 18 to 20 years at the time of the offence.<sup>92</sup> Due to contradictory evidence that was provided, such as the accused's National Identity Card, the court ensured that the accused was entitled to a year's margin of error and he was declared a juvenile.<sup>93</sup>

It has also been found that in cases where police make cursory visual assessments of the accused and record their age, courts continue to assume the correctness of this recording.<sup>94</sup> This proves problematic as the burden of

---

<sup>85</sup> Iqbal (78) 112.

<sup>86</sup> Ibid.

<sup>87</sup> International Secretariat Amnesty International, *Pakistan: Protection of Juveniles in the Criminal Justice System Remains Inadequate* (Report, September 30 2005) 27.

<sup>88</sup> Ibid 15; Justice Protect Pakistan (n 56) 22.

<sup>89</sup> (2004) PCrLJ 707.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> (2017) PCrLJ 474.

<sup>93</sup> Ibid.

<sup>94</sup> Justice Protect Pakistan (n 56) 22.

proof is placed on the accused despite many being unable to provide documentary evidence of their age to support their claim of juvenility. Case law has dictated that when the accused fails to meet their burden through positive evidence, no benefit of doubt concerning the accused's age is given.<sup>95</sup>

It appears that when an age range is provided for a victim, the benefit of doubt remains with the accused, particularly when conclusive evidence is provided to support the accused's claim of juvenility.

***What do the courts consider as a child's age if there is a difference between the mental age and biological age of the child?***

There does not appear to be legislation or guidance regarding the consideration of the interaction between the mental and biological age of accused juveniles. However, in a case relating to blasphemy, the mental and biological age of the juvenile was addressed. In 2012, Rimsha Masih was charged with blasphemy, accused of burning pages of the Quran.<sup>96</sup> A medical report that was submitted found Masih to be 14 at the time of her arrest. However, this report also found that she had some form of cognitive delay which placed her mental age below her chronological age, and she was described as 'uneducated'.<sup>97</sup> Her parents contended that she was only 11 years-old and had Down's Syndrome. Whilst she was acquitted on the grounds of lack of evidence and that she had been falsely implicated, the court did take note of her learning disability.

---

<sup>95</sup> *Muhammad Raheel alias Shafique v The State* (2015) (PLD SC 145) [7].

<sup>96</sup> *Rimsha Masih v Station House Officer, Police Station Ramma* (2012) (Judgment Sheet) Writ Petition No .3172-Q/2012 [9].

<sup>97</sup> *Ibid.*

# COUNTRY ANALYSIS: SOUTH AFRICA

## **What is the law on age determination for both accused and victims?**

In South Africa, legislation on age determination is necessary as only 44% of births in Sub-Saharan Africa are officially registered.<sup>98</sup> This is due to the large number of street children's identities remaining unknown, unsystematic record-keeping and the absence of uniform laws across jurisdictions.<sup>99</sup> This creates great difficulty when unregistered individuals come into conflict with the law and can have potentially devastating impacts if children are wrongly sentenced as adults.<sup>100</sup>

The *Child Justice Act* ('CJA') covers South Africa's legislative response to age determination issues in detail,<sup>101</sup> with the *Criminal Procedure Act* ('CPA') acting as a supplementary provision to be relied upon when the processes established in the CJA are inconclusive.<sup>102</sup>

Part 3 of Chapter 2 in the CJA is solely dedicated to the process of age estimation following interactions of children with the law. All children must be assessed by a probation officer on a range of issues, including age estimation, prior to their preliminary inquiry before a magistrate.<sup>103</sup> The age estimation must consider a range of documentary evidence, close contacts of the individual and medical practitioner's estimation, however this can be altered before sentencing if new evidence arises.<sup>104</sup> If the accused's age is still uncertain, the preliminary inquiry magistrate or children's court judge can consider the probation officer's report and additional evidence to make their own determination of age.<sup>105</sup> In the case of an incorrect age determination, s

---

<sup>98</sup> International Labour Organization, *Age verification - Protection for unregistered children from child labour* (Report, 2016) 2.

<sup>99</sup> James Maguire, 'Children of the abyss: Permutations of childhood in South Africa's Child Justice Act' (2012) 15(1) *New Criminal Law Review* 68, 74.

<sup>100</sup> Albert Aynsley-Green et al, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control' (2012) 102 *British Medical Bulletin* 17, 18.

<sup>101</sup> *Child Justice Act No. 75 2008* (South Africa) ('CJA').

<sup>102</sup> *Criminal Procedure Act No. 51 1977* (South Africa) ('CPA').

<sup>103</sup> CJA (n 101) s 13(3).

<sup>104</sup> *Ibid* s 13(2).

<sup>105</sup> *Ibid* s 14.

16 requires the judge to alter the record and proceed accordingly based on the CJA, however if this error caused prejudice to the individual, the case must be transmitted to the High Court for further deliberation.

The CPA expands these provisions by enabling the presiding judicial officer to go beyond the CJA, and make an age determination based on the person's appearance or any other information.<sup>106</sup> A judicial assessment will not be used if subsequently proven incorrect and the accused was unlawfully charged due to the incorrect age estimation.<sup>107</sup> Despite this provision providing wide discretionary power to the judge in age determination, case law has repeatedly enforced that this section only be used as a last resort measure. *Biyela v S* noted the court is only to estimate age if 'no or insufficient evidence is available' which was not satisfied in this case, as the district surgeon was available to make a medical assessment.<sup>108</sup> Justice Plaskett also warned magistrates against simply recording a personal estimation of age when there was uncertainty, as these determinations were crucial to ensuring children are protected as required under the *South African Constitution*.<sup>109</sup>

Additional laws referring to age determination include the *Children's Act*, holding that a children's court is empowered to estimate age,<sup>110</sup> and the *Criminal Law Amendment Act* which notes that for serious offences the onus of proving the child's age beyond reasonable doubt is placed on the State.<sup>111</sup>

These age determination processes will apply to both the accused and the victim. The CJA refers exclusively to the accused as it repeatedly denotes 'the child, at the time of the commission of the alleged offence'.<sup>112</sup> Comparatively, the CPA includes age assessment of victims as it establishes procedure where the 'age of any person is a relevant fact'.<sup>113</sup> Therefore, as the CPA mandates the usage of the CJA's estimation processes, the law on age determination applies equally to the accused and victims.

---

<sup>106</sup> CPA (n 102) s 337.

<sup>107</sup> Ibid.

<sup>108</sup> [2011] ZASCA 43.

<sup>109</sup> *S v Dial* [2004] ZAECHC 34.

<sup>110</sup> *Children's Act No. 38 2005* (South Africa) s 48(2).

<sup>111</sup> *Criminal Law Amendment Act No. 105 1997* (South Africa) s 51(7).

<sup>112</sup> CJA (n 101) s 12-16.

<sup>113</sup> CPA (n 102) s 337.



## ***Is age determined when the case is registered with the police or when it goes to court?***

In South Africa, age determination occurs both prior to the first court appearance by the probation officer, and again in the preliminary inquiry if uncertainty still exists.

The initial age assessment is undertaken by the probation officer, factoring in both documentary, testimonial and medical evidence, and is mandatory prior to an accused child's preliminary court inquiry if authorities doubt the accused's age.<sup>114</sup> When the results of this age assessment is determined the officer must complete a prescribed form containing an estimation and submit this alongside relevant documents to the inquiry magistrate.<sup>115</sup>

If the government chooses to pursue the matter in court, the magistrate has wide discretion to reconsider all evidence informing the probation officer's decision and attain additional information by subpoenaing all relevant persons.<sup>116</sup> The court's role was evident in *Gumede v S* where an appeal was raised over a prior charge based on the appellant's age of 26 years at the time of the offence.<sup>117</sup> This adult's age accorded with the date of birth listed on prior convictions however there was no evidence supporting this and the preliminary magistrate referred to the appellant as a 'young man, only 18 years old'.<sup>118</sup> The appeal was upheld with the matter reverted back to the magistrate to correctly conduct an age assessment and reconsider the sentences based on the outcome, due to their initial failure to resolve this unexplained discrepancy.<sup>119</sup> This case highlights the courts role as the 'final arbiter' in age determination to ensure any doubts surrounding age are dispelled prior to decision-making.<sup>120</sup>

## ***What are the roles and responsibilities of police, child protection agencies, doctors, courts and any other authority involved in the age determination process?***

A range of authorities play an important role in ensuring age inquiries occur in a timely and accurate manner.

---

<sup>114</sup> CJA (n 101) s 34.

<sup>115</sup> Ibid s 13(3).

<sup>116</sup> Ibid s 14.

<sup>117</sup> [2011] ZAECGHC 88.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Maguire (n 99) 80.

The police have a limited role in age determination, as they are only required to treat the accused according to the protective measures in the CJA if their age is uncertain.<sup>121</sup> Police officials must either immediately notify probation officers if they suspect a person who committed an offence is under 12 years,<sup>122</sup> or inform probation officers after serving written notice, summons or arresting children suspected to be over 12 but under 18.<sup>123</sup>

Similarly government departments, community and religious leaders play an auxiliary role in age determinations by providing statements on the child's age to the probation officer or courts.<sup>124</sup> However, the role of local authorities and police should not be diminished as where official documentation does not exist, their opinions on the child's age is given substantial weight and can shape the child's eventual age determination.<sup>125</sup>

Probation officers have the greatest responsibility in age determinations as they are responsible for the initial investigation and estimation when concerns are raised. This involves considering all available information by sourcing documentary evidence, conducting interviews with the family, locals, and the individual themselves, and obtaining a scientific estimation from a doctor.<sup>126</sup>

If the case progresses to trial, the preliminary inquiry magistrate must then consider all documentation from the probation officer and conduct further testing before recording a final age in the proceedings.<sup>127</sup> In making this assessment, case law has repeatedly held that the court must be satisfied beyond reasonable doubt of the individual's age before making a determination.<sup>128</sup> Where the onus of proof lies on this matter is still unclear. For certain serious offences, the *Criminal Law Amendment Act* places the onus on the State to prove the child's age to the necessary standard of proof, however Hefer JA interpreted the current age determination provision in the CPA and rejected the notion of the accused or the State proving age,

---

<sup>121</sup> CJA (n 101) s 12.

<sup>122</sup> Ibid s 9.

<sup>123</sup> Ibid s 17-19.

<sup>124</sup> Ibid s 13(2).

<sup>125</sup> Maguire (n 99) 118-9.

<sup>126</sup> CJA (n 101)13(2).

<sup>127</sup> Ibid s 14.

<sup>128</sup> *Biyela v S* (n 99).

instead placing the onus squarely on the court when making this determination.<sup>129</sup>

Medical practitioners play the final integral role in age determination, as their evidence is used by both probation officers and courts to estimate age on a scientific basis. Despite inconsistencies with medical assessments in South Africa, case law highlights the significant weight placed on medical age assessments, in comparison to all other forms of documentary or testimonial evidence. In *S v Dial*, the failure to determine the accused's age through a medical examination due, to the inconvenience and inaccessibility of a district surgeon in the area, was held to be a failure of the preliminary magistrate's duty.<sup>130</sup> The appellate judge held that the accused should have been referred to the nearest district surgeon or State-run hospital for a medical examination, as opposed to making an arbitrary age determination based on the available evidence.<sup>131</sup> Thus a great amount of reliance is placed on doctor's expert assessment, regardless of any resources exhausted or inaccuracies existent in this estimation.

### **What documentary evidence do courts rely upon and how are they verified?**

The CJA clearly outlines the types of documentary evidence used by authorities to make age assessments in section 13(2) which notes the following sources of information as mandatory considerations:<sup>132</sup>

- Previous official age determinations by a magistrate
- School registration form
- School report
- Baptism or other religious certificate
- Scientific age estimation by a medical practitioner

Despite this wide range of documents which must be considered, the legislation makes no mention of verification requirements for these sources. This means that local sources of information, for example the church, could be entirely incorrect due to a flawed understanding of the child's age or intentional fabrication. This can be problematic as there is no legal basis to verify and exclude this information from the age assessment.

---

<sup>129</sup> *S v M* [1988] 4 All SA 456, 22.

<sup>130</sup> [2004] ZAECHC 34, [8].

<sup>131</sup> *Ibid* [10].

<sup>132</sup> CJA (n 101) s 13(2).

It was also noted by Maguire that the wide range of documentary evidence which includes unofficial sources, makes age determination dependent on local individuals as opposed to a 'central state authority' which is typically responsible for issues associated with birth registration.<sup>133</sup> By giving weight to community members' opinions, the veracity of age determinations by probation officers could be greatly reduced.<sup>134</sup> However, in regions with minimal state oversight, these sources may be the only available resource from which an age assessment can be conducted.

### **What medical procedures are prescribed in law?**

The CJA fails to prescribe specific medical procedures to be undertaken by practitioners when making age estimations.<sup>135</sup> Additionally there is no guidance given regarding the qualification or specific experience required of medical practitioners conducting an age determination.<sup>136</sup> Due to this, a range of medical methods including skeletal, dental, radiographic, physical and psychological assessments may be utilised by district surgeons in South Africa on request of courts or probation officers.<sup>137</sup>

The complete absence of mandated medical procedures results in significant inconsistencies in the application of the CJA by medical practitioners. This is evident as assessments in the Natal province involve radiological assessments,<sup>138</sup> whereas age determination in Cape Town typically uses physical assessments of individuals, as is required under the *Children's Act*.<sup>139</sup>

The only prescribed form which exists for medical assessments is under the *Children's Act* but is not mandatory.<sup>140</sup> The form requires the assessment of general fields such as height, weight, facial features, dental assessment of molar teeth and physical signs of puberty.<sup>141</sup> Using these physical indicators will likely lead to an inaccurate age determinations and physical assessment

---

<sup>133</sup> Maguire (n 99) 80.

<sup>134</sup> Ibid 80.

<sup>135</sup> CJA (n 101) s 13(2).

<sup>136</sup> Marianne Tiemensma and V M Phillips, 'The dilemma of age estimation of children and juveniles in South Africa' (2016) 106(11) *South African Medical Journal* 1061.

<sup>137</sup> Ibid.

<sup>138</sup> *S v Mtolo and Others* [1993] ZASCA 180, 18.

<sup>139</sup> Tiemensma and Phillips (n 136).

<sup>140</sup> *Children's Act No. 38 2005* (South Africa).

<sup>141</sup> Department of Justice and Constitutional Development South Africa, 'Form 7 – Medical Report and Age Assessment of Child', (Government Form)  
<<https://www.justice.gov.za/forms/child/J772.pdf>>.

of sexual development can be 'highly intrusive and ethically questionable'.<sup>142</sup> Studies have also shown that dental assessments use development standards of Caucasian children which results in significant inaccuracies of age estimation when applied to Black South African children.<sup>143</sup> Requiring medical practitioners to reach a scientific estimation of age is particularly difficult in any circumstances for children aged from 15 to their early 20s, as physical maturity accelerates at different rates during this period.<sup>144</sup> Therefore, inconsistencies are inevitable using this prescribed form and could lead to the unlawful imprisonment of a child.

### **What is the time frame prescribed for the courts for commencing and concluding an age inquiry?**

Probation officers are notified by police officials of the need to conduct an assessment within 24 hours of serving written notice, summons or arrest. The initial age inquiry by a probation officer must then occur within 7 days of police notification for children under 10.<sup>145</sup> For children over 10, assessment must occur prior to the preliminary inquiry, which can occur within 48 hours of arrest if the child is still detained.<sup>146</sup>

Age determinations by the court during its preliminary inquiry must occur 48 hours after arrest, if the child remains in custody,<sup>147</sup> or can take longer based on specific time limits prescribed in the accused's summons or written notice.<sup>148</sup> The inquiry magistrate can only postpone these proceedings for a maximum of 14 days if a more detailed assessment of the child is recommended by the probation officer.<sup>149</sup> Therefore, at most an age inquiry should occur within 4 weeks of the child committing an alleged offence.

Despite these strict time frames set out in the *CJA*, in practice these assessments are not regulated and delays occur often.<sup>150</sup> This situation was noted in *S v M* as the judge stated that although the court has responsibility to make an age determination, both parties should not leave the collection

---

<sup>142</sup> Aynsley-Green et al (n 100) 28.

<sup>143</sup> Helen M Liversidge, 'Timing of human third molar formation' (2008) 35 *Annals of Human Biology* 294.

<sup>144</sup> Aynsley-Green et al (n 100) 27.

<sup>145</sup> *CJA* (n 101) s 34(3).

<sup>146</sup> *Ibid* s 43(3)(b).

<sup>147</sup> *Ibid* s 20(5).

<sup>148</sup> *Ibid* s 43(3)(b)(ii).

<sup>149</sup> *Ibid* s 48(4).

<sup>150</sup> Jacqui Gallinetti, 'What happened to the Child Justice Bill? The process of law reform relating to child offenders' (2006) 17 *South African Crime Quarterly* 7, 10.

and presentation of relevant information 'to the concluding stages of the trial (as so often happens)'.<sup>151</sup> Increased uniformity and adherence to legislative time frames for age determination is thus crucial to ensure proper assessments are conducted.

***In case of an age range, the benefit of doubt always goes to the accused and age on the lower side is considered to give the accused benefits of the juvenile justice law. But what happens in the case of victims in similar situations?***

It is clear from South African case law that the benefit of the doubt regarding age determination, will always benefit the accused. In *S v M* the judge noted that where there is 'irresoluble uncertainty'<sup>152</sup> of the accused's age where no further assessment can be done, the court should exercise their discretion to impose a lighter sentence 'for his benefit and not against him'.<sup>153</sup>

In regard to victims in similar circumstances, there is no clear case law detailing where the benefit of doubt lies. However, some understanding of the appropriate response to victims who require age verification can be uncovered by consideration of other child law principles and legislation. The South African Constitution and CJA are underpinned by *grundnorm*, which emphasises the best interests of the child and safeguards children in conflict with the law.<sup>154</sup> Accordingly, the CJA in conjunction with the *Constitution*, CPA and common law, all work to 'enhance the welfare and special needs of children'. Additionally, this legislative framework guarantees the child's right to be presumed innocent by placing the burden on the party alleging a crime was committed.<sup>155</sup>

Based on this, it is likely that the victim will similarly be given the benefit of doubt and be considered under 18 for the purposes of criminal proceedings, where the other party is not a child. However, as these provisions also focus on safeguarding the accused's rights, in a situation where a younger victim would result in a more stringent sentence for an accused child, it is possible that the court will impose a lighter sentence based on a higher age of the victim.

---

<sup>151</sup> [1988] 4 All SA 456, 23.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid* 22.

<sup>154</sup> Mariam A. Abdulraheem-Mustapha, 'Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa' (2016) 16(2) *African Human Rights Law Journal* 435, 446.

<sup>155</sup> *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 10,12, 28, 38; *Children's Act No. 38 2005* (South Africa) ch 2; CJA (n 101) s 11.

**What do the courts consider as a child's age if there is difference between the mental age and biological age of the child?**

South African law does not specifically cover the distinction between biological and mental age in relation to criminal proceedings and age determination. From the principle of *grundnorm* which is espoused in the *Constitution* and South African law, as noted earlier, it is likely that where there is a conflict between a child's biological and mental age, preference will be given to the option which protects the child from harsher sentencing.

Beyond considering these overarching principles, case law also provides some guidance regarding the treatment of children with differing biological and mental ages.

In the case of *Van Der Bank v The State* the victim of indecent assault and rape had a biological age of 19 but due to her cerebral palsy, had a reduced mental age of 8.5 years.<sup>156</sup> This case considered the application of section 170A(1) of the CPA which states a competent intermediary can be appointed where criminal proceedings may expose a 'a witness under the biological or mental age of 18 to undue mental stress'.<sup>157</sup> The court held that despite being biologically over 18, the term 'age' includes mental age, thus meaning the victim could be held to be under 18 and have an intermediary assigned.<sup>158</sup> The case of *ZF v S* additionally emphasised that in addition to the provision clearly applying to children, it similarly holds for any adult with the mental age below 18.<sup>159</sup>

Although this case law does not apply to age determination, there is some legal basis for holding that mental age is a relevant consideration when assessing the appropriate age of an individual and in criminal proceedings. If similar reasoning is applied to age determination cases, it would hold that rather than biological age, an individual's lower mental age could be used when deciding sentencing.

---

<sup>156</sup> [2014] ZAGPPHC 1017 [43]-[46].

<sup>157</sup> CPA (n 102) s 170A.

<sup>158</sup> *Van Der Bank v The State* (n 156).

<sup>159</sup> [2016] 1 All SA 296 [10].

# COUNTRY ANALYSIS: UGANDA

## **What is the law on age determination for both accused and victims?**

Age determination in Uganda is an issue as only 30% of all births are registered.<sup>160</sup> The law on age determination in Uganda is sourced from *The Children Act 2019 ('TCA')*. Section 88 of *TCA* states that an accused person is presumed to be a child if they claim or appear 'to be younger than 18 years old pending a conclusive determination of age by court.'<sup>161</sup> This age determination of the accused by the court is to be done from 'a full assessment of all available information, giving due consideration to official documentation including a birth certificate, school records, health records, statements certifying age from the parent or child, or medical evidence.'<sup>162</sup> Further, s 107 of *TCA* states that 'when a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he or she is under eighteen years of age, the court shall make an inquiry as to the age of that person.'<sup>163</sup> When making this age inquiry, 'the court shall take any evidence, including medical evidence, which it may require.'<sup>164</sup> Importantly, it is s 107, rather than s 88, that is cited and used by Ugandan courts to determine the age of an accused person.<sup>165</sup>

However, s 107 of *TCA* is not cited for the age determination of a victim, rather age determination of a victim is sourced from caselaw. *Uganda v Kagoro Godfrey*, stated that the most reliable way of proving the age of a child is by a birth certificate, followed by the testimony of the parents.<sup>166</sup> However, other ways of proving the age of a child can be equally conclusive, such as the court's own observation and common-sense assessment of the age of the child.<sup>167</sup> This is continually cited by Ugandan

---

<sup>160</sup> Jayaraman et al (n 2) 79.

<sup>161</sup> *The Children Act 2019* (Uganda) s 88(5) ('TCA').

<sup>162</sup> *Ibid* s 88(3).

<sup>163</sup> *Ibid* s 107(1).

<sup>164</sup> *Ibid* s 107(2).

<sup>165</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64; *Uganda v O.F (a juvenile)* [2018] UGHCCRD 173.

<sup>166</sup> H.C. Crim. Session Case No. 141 of 2002.

<sup>167</sup> *Ibid*.



courts as a statement of the law for age determination of a victim.<sup>168</sup> Further, in these cases the pattern is that the court will have a parent testify the victim's age, the victim will be medically examined and the court will also observe the victim.<sup>169</sup> However, even when there is no testimony from a victim's parent and the court does not see the victim, medical evidence can solely be used to determine the age of the victim.<sup>170</sup> Indeed, it was stated in *Uganda v Othieno* that 'it is trite law that age of the victim can be determined by medical evidence', as 'medical evidence is paramount in determining the age of the victim'.<sup>171</sup>

### ***Is age determined when the case is registered with the police or when it goes to court?***

The age of both the accused and the victim is determined both when the case is registered with the police and again when the case goes to court. When the case is reported to the police, the police need to determine both the age of the accused and the age of the victim in order to determine what charge should be given to the accused.<sup>172</sup> According to the *Police Guidelines on the Implementation of The Children Act*, the police are to determine the age of a child by relying on documentary evidence and they can also rely on the testimony of the child's parents and the testimony obtained from members of the community where the child lives or was born.<sup>173</sup> Further, it is common practice that both the victim and accused are medically examined to determine their age when a case is reported to the police.<sup>174</sup>

Additionally, when the case goes to court, an age inquiry is commenced again.<sup>175</sup> The court will often assess the evidence that the police gathered to make this age determination.<sup>176</sup>

---

<sup>168</sup> *Uganda v O.R* [2019] UGHC 80; *Uganda Vs Kakande Alias Ojara* [2019] UGHCCRD 30; *Uganda v Asua Muhamed* [2018] UGHCCRD 66; *Uganda v Anyovi* [2018] UGHCCRD 70; *Uganda v Ssemwanga* [2018] UGHCCRD 147; *Uganda v Kavuma* [2018] UGHCCRD 145.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Uganda v Yindu* [2016] UGHCCRD 70.

<sup>171</sup> [2010] UGHC 175.

<sup>172</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64.

<sup>173</sup> *Police Guidelines on the Implementation of The Children Act*, cited in Government of Uganda and UNICEF, *Prosecuting child related cases in Uganda* (Report, September 2016).

<sup>174</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64.

<sup>175</sup> *Kiiza v Uganda* [2014] UGCA 19.

<sup>176</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64.

**What are the roles and responsibilities of police, child protection agencies, doctors, courts and any other authority involved in the age determination process?**

The police have the role and responsibility of determining the age of both the accused and victim in order to determine the appropriate charge.<sup>177</sup> If there is a dispute as to the age of the accused and in the mind of a reasonable person, the child is aged 12 or above, that child is to be charged with the offence committed and is to be taken to the Family Court within 24 hours and the dispute in relation to the age of the child is to be brought to the attention of court.<sup>178</sup>

Further, it is also the role and responsibility of the court to determine the age of the victim and the accused. Importantly, it was stressed in *Kiiza v Uganda* that during the trial it is necessary to ascertain the age of every accused person at the time they allegedly committed the offence.<sup>179</sup> This is due to age having a 'vital bearing on the whole trial, including the conviction and or sentencing process, amongst other considerations.'<sup>180</sup> Further, the court has to determine the age of the victim, as they must determine whether the victim was a child beyond a reasonable doubt.<sup>181</sup>

Additionally, doctors have the role of conducting a medical examination to determine the age of victims and those accused.

**What documentary evidence do courts rely upon and how are they verified?**

TCA stipulates that documentary evidence relied upon by courts when conducting an age assessment consists of birth certificates, school records and health records.<sup>182</sup> Further, it was stated in *Uganda v Apunyo Hudson* that

---

<sup>177</sup> *Police Guidelines on the Implementation of The Children Act* (n 173).

<sup>178</sup> *Ibid.*

<sup>179</sup> *Kiiza v Uganda* (n 175).

<sup>180</sup> *Ibid.*

<sup>181</sup> *Uganda v O.R* [2019] UGHC 80; *Uganda v Kakande Alias Ojara* [2019] UGHCCRD 30; *Uganda v Anyovi* [2018] UGHCCRD 70; *Uganda v Muwanga* [2018] UGHCCRD 13; *Uganda v Ssemwanga* [2018] UGHCCRD 147; *Uganda v Kavuma* [2018] UGHCCRD 145; *Uganda v Yindu* [2016] UGHCCRD 70; *Uganda v Dradriga* [2016] UGHCCRD 76; *Uganda v Orem* [2010] UGHCCRD 50; *Uganda v Othieno* [2010] UGHC 175; *Uganda v Fualwak* [2018] UGHCCRD 110.

<sup>182</sup> TCA (n 161) s 88(3).

the best evidence for proof of age is a birth certificate, immunisation card or baptism certificate, whichever is available.<sup>183</sup>

There is no stipulated process for verifying these documents. However, the authenticity of the evidence can be questioned during the trial. In *Uganda v O.F (a juvenile)* the Probation and Social Welfare Officer submitted a birth certificate where the State Attorney disputed the authenticity of the certificate.<sup>184</sup> The court observed the birth certificate and found that the probability that it was prepared specifically for the case was probable. Instead, a medical examination was relied upon to determine the accused age. Further, in *Uganda v Mayengo & 4 Ors*, the prosecutor disputed the authenticity of the birth certificate submitted.<sup>185</sup> The court scrutinized the document, which revealed that the paper was much older than the writing on it and the handwritten insertions of particulars looked fresh.<sup>186</sup> It was held that the probability that the birth certificate was prepared specifically for the case was palpable and thus was rejected as misleading and unreliable evidence.<sup>187</sup>

### **What medical procedures are prescribed in law?**

TCA simply states that medical evidence can be used for age determination,<sup>188</sup> without expanding on the exact medical procedures. However, case law has prescribed particular medical procedures.

Firstly, a dental assessment, where an individual's teeth in their upper and lower jaw is examined, is permitted.<sup>189</sup> If an individual has a full set of 32 teeth, it indicates that they are an adult.<sup>190</sup> The eruption and maturity of teeth has been held as reliable data for estimation of age.<sup>191</sup> Indeed, medical examination based on dental development was solely relied upon to determine that a juvenile offender was 12 years old in *Uganda v O.F (a juvenile)*.<sup>192</sup> Secondly, the general physical development of a person, including their height, weight and secondary sexual characteristics are

---

<sup>183</sup> [2004] UGHC 52.

<sup>184</sup> [2018] UGHCCRD 173.

<sup>185</sup> [2018] UGHCCRD 148.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> TCA (n 161) ss 88(3), 107(2).

<sup>189</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> [2018] UGHCCRD 173.

helpful in the estimation and determination of that person's age.<sup>193</sup> However, both these types of medical evidence are based on estimates and cannot be relied upon to determine with precision the exact age of a person.<sup>194</sup> Thus, it does not amount to legal proof of a person's age.<sup>195</sup> This is particularly in situations of borderline cases.<sup>196</sup>

Further, X-rays interpreted by an expert radiologist based on the developments of the bones and epiphyses is a medical procedure prescribed in law and is held to be a more reliable method of age determination.<sup>197</sup> However, this age determination based on the developments of the bones is susceptible to a two-year margin of error and thus not completely reliable.<sup>198</sup>

### ***What is the time frame prescribed for the courts for commencing and concluding an age inquiry?***

There is no time frame prescribed for the courts in regard to an age inquiry.

### ***In case of an age range, the benefit of doubt always goes to the accused and age on the lower side is considered to give the accused benefits of the juvenile justice law. But what happens in the case of victims in similar situation?***

In Uganda, in borderline cases of age determination, the accused is given the benefit of the doubt and is considered a juvenile.<sup>199</sup> Indeed, in *Uganda v O.R. (a juvenile)*, it was considered that since the borderline age of the accused of 18 years was a mere estimate, the offender was to be given the benefit of the doubt and to be considered a juvenile.<sup>200</sup>

However, for victims, the prosecution is required to prove beyond reasonable doubt that the victim is below a certain age.<sup>201</sup> In *Uganda v Fualwak*, the

---

<sup>193</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Uganda v Oryem Bosco* [2020] UGHC 78; *Uganda v Ojara Stephen & Another* [2020] UGHC 64; *Kiiza v Uganda* [2014] UGCA 19; *Uganda v O.R. (a juvenile)* [2018] UGHCCRD 161; *Uganda v O.S. alias O.G. (a juvenile)* [2018] UGHCCRD 162.

<sup>200</sup> [2018] UGHCCRD 161.

<sup>201</sup> *Uganda v Fualwak* [2018] UGHCCRD 110.

court could not say with reasonable certainty what the victim's specific age was at the time of the offence. This left 'considerable doubt which ought to be resolved in favour of the accused'.<sup>202</sup> Thus, it is only in cases where the evidence proves beyond a reasonable doubt that a victim was below the required age for the offence, that their juvenile age is declared.<sup>203</sup>

**What do the courts consider as a child's age if there is difference between the mental age and biological age of the child?**

There are no cases in Uganda which have considered what a child's age should be if there is a difference between the child's mental and biological age. However, in *Kiiza v Uganda* it was stated that it is vital that courts in the course of the trial ascertain not only the biological age but also the mental status of every accused person at the time the alleged offence was committed.<sup>204</sup> This is necessary, as both the age and mental status of the accused influences how the trial is conducted.<sup>205</sup>

---

<sup>202</sup> Ibid.

<sup>203</sup> *Uganda v O.R* [2019] UGHC 80; *Uganda v Kakande Alias Ojara* [2019] UGHCCRD 30; *Uganda v Anyovi* [2018] UGHCCRD 70; *Uganda v Muwanga* [2018] UGHCCRD 13; *Uganda v Ssemwanga* [2018] UGHCCRD 147; *Uganda v Kavuma* [2018] UGHCCRD 145; *Uganda v Yindu* [2016] UGHCCRD 70; *Uganda v Dradriga* [2016] UGHCCRD 76; *Uganda v Orem* [2010] UGHCCRD 50; *Uganda v Othieno* [2010] UGHC 175.

<sup>204</sup> [2014] UGCA 19.

<sup>205</sup> Ibid.

# COUNTRY ANALYSIS: UNITED KINGDOM

## ***What is the law on age determination for both accused and victims?***

The United Kingdom does not have a problem with the under-registration of births or lack of documentation for its citizens. The age determination process is predominately used in conjunction with immigration procedures. Individuals may come to the United Kingdom from countries with low birth registration rates or come without documentation. As part of the asylum seeker and refugee process, United Kingdom authorities are required to verify the age of applicants to ensure they are fulfilling their international and domestic obligations when it comes to children.

The age determination process in the United Kingdom is outlined by the common law and administrative guidelines. The general rule is that a person should be treated as a child unless their physical appearance and demeanour very strongly suggests they are over the age of 25.<sup>206</sup> The United Kingdom recognises that the benefit of the doubt must be applied in favour of the person being a child, which explains the favourable test employed.<sup>207</sup> A conclusion as to a person's age can be reached in each of the following circumstances:<sup>208</sup>

- A Local Authority Merton compliant age assessment has been completed, which Home Office has agreed with, after giving significant weight to the assessment and taking all reliable evidence into account;
- There is credible and clear documentary evidence of the claimed age;
- Two Home Office staff, one at least of Chief Immigration Officer or Higher Executive Officer grade, have independently assessed the individual as an adult (because their physical appearance and demeanour very strongly suggest they are over 25 years of age), or a child.

The responsibility for age assessment is shared by two entities. The first is Local Authority which is a local government described as either a County (upper

---

<sup>206</sup> *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872 [65].

<sup>207</sup> Home Office, *Assessing Age* (23 May 2019) 15.

<sup>208</sup> *Ibid* 11.

tier) or District (lower tier). Local Authorities are responsible for a range of services including health, planning, education and social services. The Home Office is the federal authority responsible for immigration. In most cases, an individual comes to the attention of federal authorities first, which means the process begins with the Home Office. Two members of the Home Office staff independently assess the applicant. One of the assessors must be either Chief Immigration Officer or Higher Executive Officer grade.<sup>209</sup> The officers assess the individual's physical appearance and demeanour to determine if that very strongly suggests they are 25 years or over.

A Local Authority assessment may in some circumstances be completed before an individual is in contact with the Home Office. A Local Authority assessment is carried out by two social workers trained in age assessments. They conduct an interview that is compliant with the principles in *B v Merton LBC*, often called a 'Merton compliant age assessment'.<sup>210</sup> The principles in *Merton* state that where no reliable documentary evidence exists, the credibility of the applicant, physical appearance and behaviour must be assessed.<sup>211</sup> This includes an outline of the individual's general background, family circumstances, education and history.

Following a Local Authority assessment, the Home Office must assess whether or not to take further actions. The Home Office is required to give significant weight to the Merton compliant assessment, but also take into account all reliable evidence.<sup>212</sup> If the Home Office accepts the findings of the Local Authority, no further action is required. Otherwise, they may undertake their own assessment as described above.

### ***Is age determined when the case is registered with the police or when it goes to court?***

The age determination process begins when an individual first comes into contact with United Kingdom authorities. Local Authorities and the Home Office conduct the assessment requirements. The court's role is assessing the lawfulness and accuracy of an age assessment.<sup>213</sup>

---

<sup>209</sup> Ibid.

<sup>210</sup> [2003] EWHC 1689 ('Merton').

<sup>211</sup> Ibid [20].

<sup>212</sup> Home Office (n 207) 11.

<sup>213</sup> Ibid 52.

**What are the roles and responsibilities of police, child protection agencies, doctors, courts and any other authority involved in the age determination process?**

Police and child protection agencies have limited involvement in the age determination process in the United Kingdom. This is because the majority of cases of age determination are immigration related. However, the Home Office is under an obligation to ensure its immigration, asylum and customs functions are compliant with the need to safeguard and promote the welfare of children who are in the United Kingdom.<sup>214</sup> This duty, which exists under s 55 of the *Borders, Citizenship and Immigration Act 2009*, gives effect to the *United Nations Convention on the Rights of the Child*.<sup>215</sup> The Home Office staff are alert to indicators of abuse or neglect, and share information with other public bodies with a responsibility to safeguard a child.<sup>216</sup> Similarly, Local Authorities have statutory duties to support children in need under the *Children Act 1989* (UK).

Doctors also have limited involvement in the process after *B v Merton LBC* found that a medical report was unnecessary.<sup>217</sup> However, in cases where they are requested by an applicant they are considered by the Home Office and the courts. Importantly, due to the margin of error and lack of reliability of medical examinations, a medical report does not attract any greater weight than a Merton compliant assessment.<sup>218</sup>

Courts are responsible for making the final finding of age when there is a dispute. Courts are also responsible for creating and reforming the processes around age determination and ensuring compliance with international and domestic law. An example of the execution of this role is the case of *BF (Eritrea) v Secretary of State for the Home Department*, where the court found that the Home Office policy was unlawful because it failed to ensure children were not mistakenly treated as adults.<sup>219</sup>

When challenging the lawfulness or accuracy of an age assessment, the burden of proof is on the applicant. The standard of proof is the lower standard of 'reasonable degree of likelihood', in line with all asylum seeker

---

<sup>214</sup> Ibid 8; *Borders Citizenship and Immigration Act 2009* (UK) s 55.

<sup>215</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>216</sup> Home Office (n 207) 8.

<sup>217</sup> *Merton* (n 201) [51].

<sup>218</sup> Home Office (n 207) 31.

<sup>219</sup> *BF (Eritrea) v Secretary of State for the Home Department* (n 206).



cases.<sup>220</sup> When assessing the lawfulness of an assessment, the court asks whether the decision made was reasonably open to the assessor and based on all material evidence.<sup>221</sup>

### **What documentary evidence do courts rely upon and how are they verified?**

Local Authorities may base their assessment on documentary evidence from the individual's country of origin. Local Authorities refer any documents to the Home Office to be verified before conducting their assessment. Fraud experts may be used by the Home Office to establish the validity of the documents. Travel documents and birth certificates are normally accepted evidence of age provided they bear a photograph of the individual. However, particular caution is taken when accepting documents from countries where there is evidence that documents can be obtained improperly or through ways that provide little evidence that the information is correct.<sup>222</sup> Evidence of age from visa applications or biometric data usually requires additional proof of age. If a paediatrics assessment is provided by the applicant this will be considered by authorities. However, they must consider the margin of error that medical assessments have, and are entitled to prefer other forms of identification.<sup>223</sup> If an age assessment has been conducted by another country, it should be judged on its merits in accordance with the guidelines for the United Kingdom.

### **What medical procedures are prescribed in law?**

No medical procedures are prescribed under United Kingdom law. In *B v Merton LBC*, it was found that a medical report is unnecessary. A report from the Royal College of Paediatrics and Child Health was accepted in *Merton* and stated:

No single approach can be relied on...[a]ge 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.<sup>224</sup>

---

<sup>220</sup> Home Office (n 207) 53.

<sup>221</sup> *R (NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin) [29].

<sup>222</sup> Home Office (n 207) 39.

<sup>223</sup> *A v London Borough of Croydon and Secretary of State for the Home Department* [2009] EWHC 939 [80].

<sup>224</sup> *Merton* (n 210) [22].

While medical examinations can be conducted, they are generally solicited by the applicant. They can be considered, but are not given any special weight and are considered with all other forms of evidence.

***What is the timeframe prescribed for the courts concluding an age inquiry?***

The 2015 guidelines from the Home Office for assessing age provided that Local Authorities will aim to assess the age of an individual within 28 days from when a case is referred from Home Office.<sup>225</sup> However, in the updated guidelines no such time frame exists. In *R (NA) v London Borough of Croydon*, taking two months to write up an interview was found to be contrary to the practice at the time.<sup>226</sup>

Some guidance is given in situations where the Home Office is waiting on a Merton compliant assessment from Local Authorities. The Home Office is obliged to follow up any delays on receiving the decision from Local Authorities. They are responsible for minimising delays and moving the process forward if age assessment is not essential in the pending matter.<sup>227</sup> Provisionally treating an applicant as a child where doubt remains is one way the burdens of time are alleviated. The Home Office guidance states that an applicant claims to be a child, but if doubt remains, the person must be afforded the benefit of the doubt until further assessment has been completed.<sup>228</sup>

Once a judicial matter has been completed, the Home Office staff have only 14 days to appeal the decision. This is to ensure finality and reduce any time delays.

***In case of an age range, the benefit of doubt always goes to the accused and age on the lower side is considered to give the accused benefits of the juvenile justice law. But what happens in the case of victims in similar situation?***

The only guidance on age determination for victims of a crime comes from the *Modern Slavery Act 2015* (UK). Section 51 requires the Home Office staff to assume a person is under 18 if there are reasonable grounds for believing

---

<sup>225</sup> Home Office, *Age Assessment Joint Working Guidance* (2015) 5.

<sup>226</sup> *R (NA) v London Borough of Croydon* (n 212) [50].

<sup>227</sup> Home Office (n 207) 37.

<sup>228</sup> *Ibid* 18.

they may be a victim of modern slavery.<sup>229</sup> This presumption applies until a formal age determination process has been completed.

***What do the courts consider as a child's age if there is a difference between the mental age and biological age of the child?***

While the mental, social and emotional capacity of an applicant is assessed, there is no evidence to suggest a finding of younger mental age would impact the findings of an age determination. United Kingdom authorities focus on the biological age of an applicant, and assess their mental health as part of that process. When a Merton compliant assessment is being undertaken, United Kingdom policy suggests that maturity is not a reliable measure of age.<sup>230</sup> In the Home Office guidance about assessing behaviour, great care is taken to understand the various circumstances and hardships an asylum seeker may have been through in their lives and journey to the United Kingdom. However, each of these considerations is geared towards determining accurately the individual's biological age.

---

<sup>229</sup> *Modern Slavery Act 2015 (UK) s 51.*

<sup>230</sup> Home Office (n 207) 15.

# COUNTRY ANALYSIS: UNITED STATES OF AMERICA

## **What is the law on age determination for both accused and victims?**

The United States of America's (U.S.) *Immigration and Nationality Act 2020* defines a child as someone who is unmarried and under the age of 21.<sup>231</sup> The legal definition of a 'child,' 'minor,' 'juvenile,' or 'child of tender age' in the U.S. differs between the fifty States. North Carolina has the youngest minimum age of criminal responsibility at six years old,<sup>232</sup> whereas Massachusetts has the oldest age at twelve years old.<sup>233</sup> North America, along with Western Europe, has the highest levels of birth registration in the world.<sup>234</sup> Therefore, in the U.S., age assessment is not a widespread issue in the majority of criminal legal proceedings. Laws regarding age determination are required in immigration cases as well as criminal proceedings such as child pornography cases, cases involving human trafficking and in adoption enquiries. Age determination processes in the U.S. are most commonly utilised in the following three categories:

Firstly, in immigration or refugee cases where people have arrived in the U.S. by utilising traditional, legal migration pathways. These cases are handled by United States Citizenship and Immigration Services ('USCIS'). Immigrants who arrive in the U.S. often do not know their exact birthdate for a variety of reasons.<sup>235</sup> Usually, these people will not need to undergo extensive age determination procedures and they will be assigned an estimated birth date by the USCIS.<sup>236</sup> For example, there are an estimated 200,000 immigrants in the U.S. who were given the estimated birthdate of January 1<sup>st</sup>, 1997.<sup>237</sup> This estimated birth date is then included on all the individual's U.S. identification documentation. The USCIS recognises that the birth records of foreign countries can be inaccurate, therefore if the immigrant wishes, after entry into the U.S. they can seek a medical age assessment and the USCIS will

---

<sup>231</sup> s 101(b).

<sup>232</sup> NC Gen Statute § 7B-1501(7).

<sup>233</sup> Mass Gen Laws ch 119 § 52.

<sup>234</sup> Unicef, *Birth Registration* (Report, June 2020).

<sup>235</sup> Ross Pearson, 'What's my Age Again? The immigrant problem in the criminal justice system' (2013) 98 *Minnesota Law Review* 745, 750.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid* 745.

amend the birthdate on their identification documents.<sup>238</sup> This system of estimated birth dates becomes an issue if the person becomes involved in the court system and it needs to be proven if they are to be treated as a juvenile or as an adult for procedural, jurisdictional or sentencing reasons.

Age determination also plays a major role in illegal immigration cases in the U.S. For an immigrant who arrived in the U.S. without authorisation, and is intercepted by a Government customs or law enforcement agency, the age determination process is more comprehensive. The procedures relating to age determination of minors in U.S. immigration custody have been significantly guided by the 1997 U.S. Supreme Court decision *Flores v Reno*, which is commonly referred to as the 'Flores Agreement'.<sup>239</sup> The *Flores Agreement* sets out standards of care for minors held in immigration custody and outlines policy regarding the length and nature of juvenile detention.<sup>240</sup> The enactment of the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* ('TVPRA') codified elements of the *Flores Agreement* into federal law.<sup>241</sup> The TVPRA required the U.S. Department of Homeland Security ('DHS') (specifically the Immigrations and Customs Enforcement agency ['ICE']) and the U.S. Department of Health and Human Services ('HHS') to develop age determination procedures in the case of immigrant children.<sup>242</sup> This procedure was released in 2009, and titled 'Guidance on Age Determination.'<sup>243</sup> If these immigrant minors are unaccompanied or if they do not have official documentation proving their date of birth, they will undergo a formal age determination assessment conducted by ICE or HHS to determine if they are over or under the age of 18.<sup>244</sup> This includes an investigation into documentary evidence, interview statements from the alien or from their parents, as well as medical age assessments.<sup>245</sup>

---

<sup>238</sup> United States Citizenship and Immigration Services, *Policy Manual, Volume 7 – Adjustment of Status*.

<sup>239</sup> *Janet Reno, Attorney General, et al. v Jenny Lisette Flores et al.* 507 U.S. 292 ('*Flores v Reno*').

<sup>240</sup> *Ibid.*

<sup>241</sup> 122 Stat. 5044, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, P.L. 110–457 ('TVPRA')

<sup>242</sup> *Ibid* ss (4).

<sup>243</sup> Department of Homeland Security Office of Inspector General, 'Determination Practices for Unaccompanied Alien Children in ICE Custody' (Report, OIG-10-12, November 2009); Office of Refugee Resettlement, 'Children Entering the United States Unaccompanied: Section 1.6.2. (2015).

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

Age determination assessments also play a major role in child pornography cases in the United States.<sup>246</sup> In the U.S. the age in which a person is considered a child, in relation to child pornography matters, differs between States, such as under 16 in New Jersey, and under 18 in Michigan.<sup>247</sup> Age enquiries are often conducted in child pornography cases where the age of the victim needs to be determined as an element of the crime. Although this process is very different to traditional age enquiries as usually there is no physical victim that law enforcement or doctors can interview or examine, so the age determination process is solely conducted through the photographs or videos found by law enforcement.<sup>248</sup>

***Is age determined when the case is registered with the police or when it goes to court?***

In the case of an immigrant legally arriving in the U.S. States without sufficient identification documents or a birthdate, the USCIS will assign an estimated 'U.S.' birthdate. There is no record kept of how often these birthdates are estimated by the USCIS.<sup>249</sup> If in the future, the person is arrested and their status as a juvenile or an adult is questioned, the age of the person is examined in greater detail when the case goes to Court. This process is similar with those immigrants who entered the U.S. illegally and underwent a formal age assessment enquiry. ICE or HHS is to conduct an age assessment enquiry upon their entry into the U.S. and if this estimated birth date is called into question in future, it will be deliberated by the appropriate criminal court.

In the instance of child pornography cases, police are to determine the age of children depicted in the material before the defendant is charged.<sup>250</sup> Trained law enforcement agents are able to utilise their own judgement as well as expert paediatric opinion to estimate the age of the victims.<sup>251</sup> Research shows that in the U.S, law enforcement agents are relatively accurate in determining cases of child pornography, as one report demonstrated that out of all child pornography cases reported by police,

---

<sup>246</sup> Juliane Kloess et al, 'The challenges of Identifying and Classifying Child Sexual Abuse Material' (2017) 31 *ASTA Journal* 2, 173.

<sup>247</sup> 18 U.S. Code § 2256; New Jersey Code of Criminal Justice § 2C:24-4 (2014); Michigan Penal Code § 750.145c (4).

<sup>248</sup> Melissa Wells et al, 'Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession' (2007) 8 *Police Practice and Research* 3, 277.

<sup>249</sup> Pearson (n 235).

<sup>250</sup> Wells (n 248).

<sup>251</sup> *Ibid*, 278.

92% were found to be determined as child pornography in court.<sup>252</sup> A research report determined that the majority of child pornography cases in the U.S. involve pre-pubescent children where it is relatively easy for law enforcement agencies and prosecutors to prove that the child is under the age of 18.<sup>253</sup> These cases make age determination a uniquely difficult situation as usually the offender has not had any contact or communication with the victim and the age determination process is conducted solely through the photographs or videos in question.<sup>254</sup> Regarding older children, this process is more difficult for police or paediatricians to determine if they are under age and the State prosecutor may be reluctant to take the case if it is difficult to prove that the victim is a minor.<sup>255</sup> In these cases, it will be up to the prosecutor to prove that the person in the photographs is a 'child' under U.S. law.

***What are the roles and responsibilities of police, child protection agencies, doctors, courts and any other authority involved in the age determination process?***

*Government Agencies: DHS, ICE, HHS, ORR, USCIS*

Unaccompanied alien children reach U.S. government custody in a variety of ways. These alien children may be encountered by local police who will detain them and contact their local ICE Office.<sup>256</sup> U.S. Customs and Border Protection (CBP) may also intercept these children and they will usually conduct initial interviews and take the responsibility of collecting basic biographical evidence regarding the age of the child.<sup>257</sup> Once ICE Officers have detained a minor who is not authorised to enter the U.S., they must be transferred to the HHS or Office of Refugee Resettlement ('ORR') custody and be placed into appropriate juvenile detention centres.<sup>258</sup> ICE, HHS and ORR are the specific Government agencies which are able to conduct age assessment enquiries and are guided by the principles set forward in the TVPRA and the *Flores Agreement*.<sup>259</sup> These Government agencies are able to take into consideration different evidence to determine the age of the child

---

<sup>252</sup> Ibid, 272.

<sup>253</sup> Ibid, 276.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid, 280.

<sup>256</sup> Department of Homeland Security, Office of Inspector General (n 243).

<sup>257</sup> Ibid, 4.

<sup>258</sup> Ibid, 11.

<sup>259</sup> *Flores v Reno* (n 239).

including interview statements, physical appearance, psychological testing and behavioural characteristics.<sup>260</sup>

### *Doctors*

In age assessment enquiries where there is a lack of documentary evidence, medical professionals are required to give their opinion regarding the age of the person.<sup>261</sup> In the instance of immigrants or alien children, the guidelines mandated by HHS and ICE require medical professionals to conduct full medical age assessments, including physical examinations as well as dental and skeletal radiographs.<sup>262</sup> As no medical age assessment can be exact, the doctor must submit a probability estimate as to the percentage chance that the person is over or under 18 years of age.<sup>263</sup> HHS applies a 75 percent probability threshold on these medical age assessments.<sup>264</sup>

In child pornography cases in the U.S., courts usually call upon paediatric experts to give evidence as to the age of the person depicted in the explicit material.<sup>265</sup> Generally, this involves the Tanner staging method, which is also known as the Sexual Maturity Rating Scale. The Tanner method has been widely adopted in the U.S. paediatrics community in cases where it is necessary to evaluate if the victim of a crime is a minor.<sup>266</sup> The medical procedures commonly conducted by doctors within an age assessment enquiry in the U.S. will be discussed in greater detail later in this report.

### *Courts*

Courts become involved in the age determination process when an immigrant reaches the court system as they have been accused of a crime and their estimated age is brought into question due to jurisdictional or sentencing issues. Often immigrants who are assigned an estimated birth date are hesitant to challenge the age given to them by USCIS officials so not to potentially detriment the status of their immigration or visa application.<sup>267</sup>

---

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Department of Homeland Security, Office of Inspector General (n 243) 6.

<sup>263</sup> Office of Refugee Resettlement (n 243).

<sup>264</sup> Ibid.

<sup>265</sup> Wells (n 248) 278.

<sup>266</sup> *People of the State of Michigan v Robert Erwin Stumpmier* No. 330145 (Mich. Ct. App, 2017).

<sup>267</sup> Pearson (n 235) 752.



The age of the defendant becomes important when they are being charged of a crime and the jurisdiction of the appropriate court needs to be determined. Most juvenile courts in the U.S. have jurisdiction over children up until the age of 18.<sup>268</sup> However, there are exceptions which allow the juvenile court to transfer jurisdiction of a case to an adult district court. Most U.S. states give the juvenile and district courts concurrent jurisdiction, so usually in these cases where there is a dispute whether the person is for example, 17 or 18 years-of-age, the juvenile court will waive jurisdiction and the defendant will be tried in an adult district court. There are additional exemptions which allow the juvenile court to waive jurisdiction if there are certain factors such as the nature of the crime, any aggravating factors, at the prosecutorial discretion or if the defendant has previous felonies.<sup>269</sup>

Court's also must decide the burden of proof for age determination in criminal cases. As there is no federal law which addresses the burden of proof for age determination, the burden of proof in criminal cases alters between the States; ranging from beyond reasonable doubt to placing the burden of proof on the defendant to disprove age jurisdiction.<sup>270</sup> As discussed in the case *United States v Salgado-Ocampo*, the defendant is in a unique situation to produce evidence as to their date of birth, such as school records.<sup>271</sup> It is difficult for the prosecutor in these cases to 'ever meet a standard of proof higher than preponderance of the evidence', and therefore the lower burden of proof is ideal to allow the defendant to provide evidence to establish their own age.<sup>272</sup> In criminal cases in which the age of the accused is in question, courts will often request that the defendant undergo medical age assessments to estimate their age.<sup>273</sup> Often, this is at the expense of the defendant and not the court and it will be the responsibility of the defendant to provide medical evidence to prove that they are a minor.<sup>274</sup>

### ***What documentary evidence do courts rely upon and how are they verified?***

In the case of persons legally entering into the U.S., such as refugees or migrants arriving through traditional immigration pathways, the USCIS requires immigrants to provide a birth certificate in their application to live in the

---

<sup>268</sup> Ibid.

<sup>269</sup> See Alabama Code § 12-15-203(a), (d) (2012).

<sup>270</sup> *United States v Salgado-Ocampo*, 50 F. Supp. 2d 908, 909 (D. Minn. 1999); Pearson (n 235) 757.

<sup>271</sup> *United States v Salgado-Ocampo* (n 270).

<sup>272</sup> Ibid.

<sup>273</sup> *State v Mohamed* (178 Ohio App, 3d 695, 2008).

<sup>274</sup> Ibid.

U.S.<sup>275</sup> However, the USCIS guidelines do not define a birth certificate nor provide standards on the officiality of the birth certificate provided.<sup>276</sup> Therefore, it has been found that the USCIS may accept birth certificates issued by non-governmental organisations which also contain estimated birthdates and may have been issued several years after the juveniles were born.<sup>277</sup> When an applicant does not have any birth registration documents, these persons must prove their documents are unavailable or submit a claim to state that these documents are unavailable.<sup>278</sup> Then, the applicant is able to submit secondary evidence such as school records or baptismal records as evidence of the persons age.<sup>279</sup> Using this information USCIS will then estimate the child's age. This estimated birthdate will then be included on all of the immigrant's U.S. identification documentation.

In illegal immigration cases, ICE states that the department prefers credible documentation to conduct age assessments rather than having to resort to medical procedures.<sup>280</sup> Examples of these forms of documentation include birth certificates, school records, immunisation records, baptism documents, medical records, passports and identity cards.<sup>281</sup> The validity of these documents must be checked with the appropriate Government agency of their home country.<sup>282</sup> ICE Officers will also attempt to find other documentary evidence from U.S. Government Departments, if the person has entered the U.S. before.<sup>283</sup> ICE officers revealed that consular involvement from the person's country of origin is very common and helpful in these types of cases. Consulates can often verify biographical information provided to ICE through cross referencing their own countries databases and records. ICE agents may also interview the child in question and any of their family members in order to ascertain the birth year of the child.<sup>284</sup>

In child pornography cases, the entire age determination process is usually conducted solely through examining the pornographic material recovered by law enforcement. As the person in the material is often not known to law enforcement or the accused, the age determination process is unique in the fact it is a completely virtual assessment where markers of puberty are

---

<sup>275</sup> United States Citizenship and Immigration Services (n 238) Chapter 4, Documentation.

<sup>276</sup> Ibid.

<sup>277</sup> Pearson (n 235) 750.

<sup>278</sup> United States Citizenship and Immigration Services (n 238) Chapter 4, Documentation.

<sup>279</sup> Ibid ss B(2).

<sup>280</sup> Department of Homeland Security, Office of Inspector General (n 243) 16.

<sup>281</sup> Ibid 13.

<sup>282</sup> Ibid 14.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid 11.

observed and lacks a physical victim or patient.<sup>285</sup> This provides difficulties in the age determination process as poor image quality as well as contextual or composition factors of the image can impede and limit the ability of an expert witness to testify as to the age of the victim.<sup>286</sup>

### **What medical procedures are prescribed in law?**

The *TVPR* states that age determination procedures conducted by the Department of Homeland Security and its subsidiary agencies must take into consideration multiple forms of evidence, including radiographs.<sup>287</sup> Additionally, the *Flores Agreement* permits the medical and dental examination of minors to aid in the processing of age determination.<sup>288</sup> Procedures outlined by ICE and HHS describe the medical age assessments which are utilised by these Government agencies in determining the age of a potentially juvenile immigrant. These assessments are conducted by licensed medical professionals and rely on medical imaging and physical examination.<sup>289</sup> Dental radiographs are used to examine development of wisdom and molar teeth whereas skeletal radiographs are utilised to measure hand, wrist and collarbone development.<sup>290</sup> DHS requires the medical professional to complete a two-page worksheet with the examination results and their interpretation of the results.<sup>291</sup> The worksheet requires the practitioner to submit a probability estimate regarding the age determination in the form of a percentage.<sup>292</sup> DHS and HHS require a probability threshold of 75 percent, which is considered a norm in the medical community, to apply to medical examinations of age determination.<sup>293</sup>

ICE recognises the concerns that have been raised by advocacy groups regarding the reliability of these medical procedures.<sup>294</sup> Often, when ICE has inappropriately relied on radiographs to determine the age of an alien, the decision has been successfully challenged in court.<sup>295</sup> Additionally, research by advocacy groups has revealed that medical or dental experts utilised by

---

<sup>285</sup> Wells (n 248).

<sup>286</sup> *United States v Katz*, 178 F.3d 368 (5th Cir, 1999).

<sup>287</sup> *TVPR* (n 241) ss (4).

<sup>288</sup> *Flores v Reno* (n 239).

<sup>289</sup> Department of Homeland Security, Office of Inspector General (n 243) 6.

<sup>290</sup> *Ibid*.

<sup>291</sup> *Ibid* 17.

<sup>292</sup> Office of Refugee Resettlement (n 243).

<sup>293</sup> *Ibid*.

<sup>294</sup> *Ibid* 2.

<sup>295</sup> Seattle DSA, 'Flores Settlement Public Comments Arguments: Toolkit on the Proposed Rules Changes to End the Flores Agreement' (Law Reform, 2016) 5.

ICE often do not have any training in conducting age determinations.<sup>296</sup> The House Appropriations Committee has pushed for a more holistic approach to age determination and less reliance on intrusive and potentially inaccurate medical examinations. However, legally under the TVPRA, DHS or HHS is not required to take such an approach and therefore, radiographs continue to play a vital role in these age determination processes.<sup>297</sup>

In the instance of age determination in child pornography cases, paediatric physicians are often utilised by prosecutors and law enforcement to give testimony in court. Where the age of the person depicted in the explicit material is in question, medical experts are often called to give testimony in criminal proceedings.<sup>298</sup> The Tanner staging method (also known as Sexual Maturity Rating) is widely adopted in the U.S. paediatrics community in cases where it is necessary to evaluate if the victim of a crime is a minor.<sup>299</sup> This method uses a five point scale where physicians can estimate the age of the person by observing the stages of physical characteristics of puberty. In child pornography cases, this is done by observing the photographic or video evidence however, Tanner staging is also conducted in person in adoption or child trafficking cases. This method of age determination is widely utilised throughout the U.S. Court districts and States including Missouri,<sup>300</sup> Indiana,<sup>301</sup> Michigan,<sup>302</sup> and Louisiana.<sup>303</sup> However, it is not without criticism, even from its namesake Dr James Tanner. Studies into the Tanner method have been focused primarily in industrialised countries and fail to take into consideration the diversity and patterns of puberty in places such as developing countries, rural areas or war-torn areas.<sup>304</sup> In the case *United States v Katz*, the court was unwilling to include one image of the child pornography into evidence as the ethnicity of the person depicted in the material was unclear and, “the scientific methodology of the Tanner Scale was not sufficiently verified on non-Caucasian individuals.”<sup>305</sup> The Tanner Staging method has also raised some ethical concerns due to the intrusive nature of the exam when conducted in person.<sup>306</sup> Some U.S. States have legislation in regard to the age determination of victims of child pornography. For example, Louisiana

---

<sup>296</sup> Ibid.

<sup>297</sup> TVPR (n 241).

<sup>298</sup> *People of the State of Michigan v Robert Erwin Stumpmier* (n 266).

<sup>299</sup> Ibid.

<sup>300</sup> *Matter of Care and Treatment of Sebastian*, 556 S.W.3d 633 (2018).

<sup>301</sup> *United States of America v Jeffrey M. Scot*, 3:11-CR-104 JD (2013).

<sup>302</sup> *People of the State of Michigan v Robert Erwin Stumpmier* (n 266).

<sup>303</sup> *State of Louisiana v Peter E. Haley*, 222 So.3d 153 (2017).

<sup>304</sup> Dr. Sharon Cooper and Damon King ‘Effective Use of the Medical Expert in Child Pornography Cases’ (2004) 52 *United States Attorneys’ Bulletin* 2, 35.

<sup>305</sup> *United States v Katz* (n 286) 371.

<sup>306</sup> Cooper (n 304).

criminal code permits physicians as expert witnesses in a criminal proceeding to take into a number of considerations when determining the age of a person depicted in pornography.<sup>307</sup> These include the general body growth of the person, the development of body hair as well as expert testimony regarding the person's chronological age or mental maturity.<sup>308</sup>

### **What is the time frame prescribed for the courts for concluding and concluding an age inquiry?**

The TVPRA outlines that U.S. Immigration and Customs Enforcement is responsible for conducting "prompt" age determination assessments of an immigrant or refugee child.<sup>309</sup> The time frame in which these evaluations are completed depends on the types of material required to conduct the assessment. Reports by the Office of the Inspector General reveals that it is in the best interest of ICE to conclude age assessment enquiries in a timely manner due to tight time constraints placed upon the agency.<sup>310</sup> The *Flores Agreement* places care requirements upon the agency regarding unaccompanied minors and outlines that the Government must release children from detention facilities within 20 days, "without reasonable delay".<sup>311</sup> It further stipulates that minors must be transferred to a licensed juvenile shelter within three to five days of reaching U.S. custody.<sup>312</sup> This tight time constraint places pressure on ICE agents to make age determination assessments as soon as possible. However, there have been reports of aliens being held in DHS custody for five weeks and even up to thirteen months, showing that the government has been in substantial violation of the *Flores Agreement*.<sup>313</sup>

A review of ICE's age determination practices by the department's Office of Inspector General, outlined the benefits of using radiographs in age determination assessments as they can be completed relatively quickly.<sup>314</sup> One research report showed that in over 85% of cases, radiographs were

---

<sup>307</sup> Louisiana Revised Statute Tit ch14, § 81.1.

<sup>308</sup> Ibid ss G(5).

<sup>309</sup> TVPRA (n 241) § 235(b)(4).

<sup>310</sup> Department of Homeland Security, Office of Inspector General (n 243) 13.

<sup>311</sup> *Flores v Reno* (n 239).

<sup>312</sup> Ibid.

<sup>313</sup> *Flores v Sessions*, No. 2:85-CV-04544, 2017 WL 6060252, at 20-21 (C. D. Cal. June 27, 2017) as cited per Sarah Peck and Ben Harrington, 'The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions' (Congressional Research Service Report, No. R45297, 2018) 9.

<sup>314</sup> Department of Homeland Security, Office of Inspector General (n 243) 13.

completed within one day after the request was submitted by ICE officers.<sup>315</sup> The Office of Inspector General's evaluation stated that radiographs can "facilitate acquisition of a more credible age estimation under tight time constraints."<sup>316</sup> The time frame in which these age assessments can be completed are also dependent on external factors and the response time on the request for documentation from other organisations. For example, ICE often contacts Consulates for further information regarding the validity of documentation and the birthdate of the potential juvenile.<sup>317</sup>

***In case of an age range, the benefit of doubt always goes to the accused and age on the lower side is considered to give the accused benefits of the juvenile justice law. But what happens in the case of victims in similar situations?***

In relation to immigration cases, The *Flores Agreement* and the *Code of Federal Regulations* states that if a "reasonable person" would assume that the alien is an adult, despite their claims that they may be a minor, the individual shall be treated as an adult.<sup>318</sup> Therefore, ICE, DHS or immigration services will treat these persons as adults for all purposes, including detainment and processing.<sup>319</sup>

In the U.S., the most criminal cases which require the age of a victim of a crime to be determined is in child pornography cases. Where the children depicted in this material are observed to be in the later Tanner stages, or post-pubescent, prosecutors are often hesitant to keep or pursue the case without the presence of the victim in person. As without birth records from the victim to prove their age, the age determination assessment presents certain challenges, as it has to be conducted solely through what is displayed in the videos or photographs.<sup>320</sup> In cases where it is particularly difficult to determine if the person in the material is an older teenager or a young adult, the case is usually dismissed for lack of evidence.<sup>321</sup>

---

<sup>315</sup> Ibid.

<sup>316</sup> Ibid 21.

<sup>317</sup> Ibid 14.

<sup>318</sup> *Flores v Reno* (n 239); Department of Homeland Security, 'Processing, detention, and release of alien minors', 8 C.F.R. § 236.3 (c)(2).

<sup>319</sup> Department of Homeland Security, 'Processing, detention, and release of alien minors', 8 C.F.R. § 236.3 (c)(2).

<sup>320</sup> Wells (n 248) 277.

<sup>321</sup> Ibid.

### **What do the courts consider as a child's age if there is a difference between the mental age and biological age of the child?**

The U.S. Supreme Court has considered the ethical and legal concerns in criminal cases in which adult defendants with intellectual disabilities have the mental age of a young child. The case of *Penry v Lynaugh* involved a 22-year-old defendant who was charged with capital murder.<sup>322</sup> Psychological assessments demonstrated the defendant was intellectually disabled and had the mental age of a six-year-old child.<sup>323</sup> This case demonstrated the Supreme Court moving away from a reliance upon traditional assessment tools such as intelligence quotient testing (IQ) or the notion of 'mental age' in relation to determining the nature of an accused's intellectual disability or their level of criminal culpability.<sup>324</sup> This ideology was furthered in the case *Hall v Florida*, where the Supreme Court ruled that the ability for persons with an intellectual disability and the 'mental age' of a child to be held criminally culpable should not be limited to such traditional diagnostic tools.<sup>325</sup> The Supreme Court found that disability and criminal culpability should be viewed as a spectrum and a variety of factors should be taken into consideration by judges and juries to determine the competence of the defendant.<sup>326</sup> The Supreme Court recognised that the concept of 'mental age' should not be used to determine the criminal culpability of defendants who have the mental capacity of a young child.<sup>327</sup> As by the same premise those individuals could be denied their legal freedom as adults in other aspects such as the right to marry or enter into a contract.<sup>328</sup> *Atkins v Virginia* involved an accused murderer facing the death penalty who was found to have the mental age of a nine-year-old child.<sup>329</sup> The Supreme Court ruled that execution of someone who is mentally disabled constitutes cruel and unfair punishment which is unconstitutional as per the Eighth Amendment to the *Constitution of the United States of America*.<sup>330</sup> The Supreme Court again demonstrated its reluctance to rely solely upon IQ test scores and the concept of mental age to determine criminal culpability in criminal cases

---

<sup>322</sup> 492 U.S. 302 (1989).

<sup>323</sup> *Ibid* 41.

<sup>324</sup> *Ibid* 76.

<sup>325</sup> 572 U.S. 701 (2014).

<sup>326</sup> *Ibid* 318.

<sup>327</sup> *Ibid*.

<sup>328</sup> *Ibid* 320; *Penry v Lynaugh* (n 322) 340; *Atkins v Virginia*, 536 U.S. 304 (2002) 306.

<sup>329</sup> *Atkins v Virginia* (n 238).

<sup>330</sup> *Ibid* 437.

due to the imprecise nature of such testing.<sup>331</sup> While the Supreme Court has demonstrated an awareness of the nature of intellectual disabilities and the ways how they can reduce the culpability of an offender; the Court has shown a reluctance to adopt the notion of 'mental age' as a line-drawing principle of criminal culpability, as it does not accurately assess the severity of intellectual disability and may deny the defendants their inherent legal rights as adults.<sup>332</sup>

American law enforcement agencies and courts have also had to consider cases in which adults with the mental age of a child are victims of sexual assault, abuse or neglect. The case of *Magee v Mississippi* involved a victim of sexual assault with a chronological age of 66 and a mental age of a 6 – 8 year-old child.<sup>333</sup> In this instance the Court of Appeals confirmed it was appropriate to utilise Mississippi's evidence rules which are designed for children 'of a tender age,' that being under 12 years old.<sup>334</sup> Mississippi law allows the admission of hearsay evidence in cases where a 'child of tender age' describes any sexual contact with or by another person.<sup>335</sup> The Judge in this case drew upon other Mississippi Court of Appeals decisions and outlined that these evidence rules should not necessarily be limited to someone of a certain chronological age, but in appropriate cases, should apply in instances where the attestant has the chronological age of an adult but the mental age of a child.<sup>336</sup> In this instance it was found that the victim of this crime, despite being a 66 year-old was, for purposes of this evidence rule, a 'child of tender years.' While the intellectual disability of a victim can serve as an aggravating factor in sexual assault claims, especially in cases where the offender knows that the victim is incapable of consent,<sup>337</sup> there is overall, a reluctance to view these adults as children for legal purposes outside of evidence or procedural rules. Literature warns about the reliance on the concept of mental age as a threshold for witness competency as it can lead to people with mental disabilities being denied the opportunity to testify in court in sexual assault cases.<sup>338</sup> Treating adults with the mental age of a child

---

<sup>331</sup> Ibid 37.

<sup>332</sup> Ian Freckelton QC, 'Offenders with Intellectual and Developmental Disabilities: Sentencing Challenges after the Abolition of Execution in the United States' (2016) 23 *Psychiatry, Psychology and Law* 3, 335.

<sup>333</sup> 056 So.2d (2020).

<sup>334</sup> Ibid.

<sup>335</sup> Mississippi Rule of Evidence 803(25).

<sup>336</sup> *Magee v State of Mississippi* (n 333); *Russell v State*, 203 So.3d 750 (Miss. Ct. App. 2016) 11.

<sup>337</sup> Alaska Statute. §§ 11.41.410(a)(3)(A) (2017).

<sup>338</sup> Jasmine Harris, 'Sexual Consent and Disability' (2018) 93(3) *New York University Law Review* 480, 502.



as a juvenile for legal purposes should be avoided in order to prevent the overregulation of sexual agency of people with intellectual disabilities which may impede consensual sexual relationships maintained by people with a disability.<sup>339</sup>

---

<sup>339</sup> Ibid.

# RECOMMENDATIONS

The above research into the process of age determination in India and various other jurisdictions has highlighted several loopholes and areas for improvement in both legislation and protocols. A crucial step in improving the process of age determination for juveniles is to ensure the registration of births in the country. This step will effectively minimise the uncertainty that is exacerbated by age ranges provided by medical procedures, will reduce the time that juveniles spend in the criminal justice system and will remove unnecessary examinations that can be traumatizing for children. However, this step proves unhelpful in addressing age determination issues relating to children who are already born, yet not registered and without any credible documentary evidence. Several recommendations have been provided to adequately address the issue of age determination in India and ensure the rights of juveniles are protected.

## ***Recommendations 1: Age assessments should only be undertaken if reasonably required***

Age assessments should not be a routine practice and there are a number of reasons for this. The first is that there is sufficient evidence to suggest that the assessment procedure can be distressing or even dangerous to young people.<sup>340</sup> Secondly, unnecessary age assessment has the ability to undermine the benefit of the doubt that goes to the child.

No steps in the age assessment procedure should be carried out unless there are substantial doubts that warrant further investigation.<sup>341</sup> The European Asylum Support Office suggests age assessments must be deemed necessary and useful considering the expected results.<sup>342</sup>

## ***Recommendation 2: Age assessment completed prior to commencement of court case***

A conclusive finding on age must be made before a case commences in court. It is contrary to international best practice to leave age unknown for

---

<sup>340</sup> Marry Anne Kenny and Maryanne Loughry, 'Addressing the Limitations of Age Determination for Unaccompanied Minors: A Way Forward' (2018) 92 *Children and Youth Services Review* 15, 18.

<sup>341</sup> European Asylum Support Office, *Practical Guide on Age Assessment* (2<sup>nd</sup> ed, 2018) 23.

<sup>342</sup> *Ibid* 21.

such an extended period of time and it runs the risk of denying a person of their rights.<sup>343</sup> The court is not a suitable venue to investigate the age of a person. Firstly, judges are untrained in this type of investigation. Secondly, courts are an inappropriate venue for conducting interviews for the purposes of age determination as the formal and intimidating atmosphere makes an analysis of a person's behaviour and demeanour unreliable.<sup>344</sup>

Instead, the findings of police, social workers and medical practitioners should be consolidated by The Board or Committee prior to the case coming to court. The court's role will be assessing the lawfulness of the assessment procedures, and the accuracy of the findings. It is recommended that the court asks whether or not the findings made by the assessors was reasonably open to them given the available evidence. This ensures the court does not encroach on the knowledge of the professionals who undertook the assessment but allows a suitable review of the decision.

***Recommendation 3: Age assessments must be multi-disciplined and multi-stepped***

Following an analysis of international best practice, it is clear that successful procedures have multiple steps or levels of age assessment and utilise a multi-disciplinary approach. A multi-disciplinary approach limits the margin of error of the process by utilising different fields of expertise.<sup>345</sup> The recommended procedure below utilises the experience and expertise of an investigating officer, a psychologist or social worker, and medical professionals to reduce the margin of error and provide a more reliable approach that protects the rights of the child.

***Recommendation 4: Utilise medical examinations as a last resort, recognising margin of error and considering the ethical issues***

When dealing with children and young adults, it is especially important to undertake the age assessment process with as much care as possible. Where an assessment is justified, the least intrusive and safest method must be prioritised.<sup>346</sup> Only where this method is inconclusive or ineffective, should a more invasive procedure be undertaken.

Currently in India, there are limited steps between a lack of documentary evidence and a medical exam being conducted. Multiple studies have

---

<sup>343</sup> See Pakistan, UK, South Africa, USA.

<sup>344</sup> Home Office, *Age Assessment Joint Working Guidance* (2015) 5.

<sup>345</sup> European Asylum Support Office (n 341) 11; Kenny and Loughry (n 340) 18.

<sup>346</sup> European Asylum Support Office (n 341) 31.

concluded that ossification tests have a margin of error of at least two years on both sides.<sup>347</sup> The British Royal College of Paediatrics suggests that this margin could be up to five years.<sup>348</sup> In fact, the College suggests it is not possible to predict the age of the individual using any anthropometric measure and argue that it should not be attempted.<sup>349</sup>

Academic sources argue that the ethical issues associated with these tests make them unjustifiable. Mishori argues these procedures 'represent an unethical and unprofessional use of science and medicine...and can potentially deprive those under the age of 18 with the protections that they are owed under international human rights laws'.<sup>350</sup> Using medical procedures as the first, and only source of further investigation, is out of touch with international best practice. Not only is it unreliable, but there are serious concerns about the effects of these tests on children and young people. With this in mind, it is a misuse of the technology to consider medical examination to be more conclusive than other methods of assessment. It is recommended that medical examinations be used as a last resort due to the ethical and reliability issues. While newer and more reliable medical procedures are being developed, the ethical considerations must remain at the forefront of the minds of assessors. When using these tests, it is essential that the margin of error is noted on the report.

### ***Recommendation 5: Suggested age determination process – the role of police, the Juvenile Justice Board and Court***

#### 5.1 Police role of initial investigation

The process in India already recognises the potential biases held by police that warrant a reduced role in age determination. The role of the police should be limited to making an initial investigation into the age of the person. Police should make an initial finding on age by assessing the person's physical appearance and demeanour. This assessment should also include a review of birth certificate, relevant school

---

<sup>347</sup> Ranit Mishori, 'The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights' (2019) 6(7) *Children (Bansel)* 85, 87.

<sup>348</sup> *Merton* (n 210) [22].

<sup>349</sup> *Ibid.*

<sup>350</sup> Mishori (n 347) 87.

documentation and seeking clarification from person's parents if possible.

During this process, police should be seeking to rely firstly on credible documentary evidence to prove age. When obtained, there should be no reason to argue against credible documentary evidence. Police must also be trained to apply the benefit of doubt in favour of the person being a child.

### 5.2 Police power to provisionally treat as a child

It is recommended that police have the power to provisionally treat a person as a child until a properly conducted age assessment has concluded. This protects the rights of the child, and the benefit of the doubt. Where a doubt exists and an age assessment is ongoing, a person must be given the services and protections a child is entitled to. It is recommended that a broad and favourable test is implemented to adequately ensure against the unintentional deprivation of a child's rights.

### 5.3 Role of Juvenile Justice Board

The Board should continue its role as an intermediary between the court and police. If an initial assessment by an investigating police officer concludes that there is reasonable doubt as to the person's true age, the Board must undertake further investigation. In line with recommendation 3, methods of investigation must increase in intrusiveness. It is recommended that the second step of investigation is an interview conducted by a properly trained social worker. It is suggested that the UK Home Office Guidelines are used to guide this process.<sup>351</sup> Once all steps of the investigation are completed, the Juvenile Justice Board will have the role of consolidating the findings and making a final determination.

### 5.4 Interview process

It is recommended that prior to the use of any medical examination, a psychological interview is conducted. The

---

<sup>351</sup> Home Office, *Assessing Age* (23 May 2019).

professionals undertaking these tests must have adequate training and be supported by suitable guidelines.

The interview will have three main goals: assessing physical appearance, behaviour and credibility. When assessing physical appearance, potential indicators may include height, build, facial features such as facial hair, skin lines or folds, voice and expression. As stated by Kenny and Loughry, a person's varied experiences need to be taken into consideration when determining age on appearance.<sup>352</sup>

When assessing behaviour, attitude, mannerisms, body language and eye contact are all relevant factors which may contribute to a finding. It is also important to gather an understanding of the general background, family circumstances, education and history of the individual. Each of these factors can help inform an interviewer's assessment of age.

Procedural fairness must be complied with throughout the procedure. The interviewee must be granted an opportunity for an independent adult to be present, and it should be conducted in an impartial and informal manner. This means that a police station, or court is an inappropriate venue to conduct the assessment.

### 5.5 Medical procedure

Once completed, if doubt persists, it may be appropriate to conduct a medical test. It is recommended that medical tests, be used as a last resort. It is also important that the least invasive medical tests are used first. Examples of intrusive tests include those involving exposure to high levels of radiation and sexual maturity tests that are invasive to the body.

There is no suggestion that the Board should stray from its current guidelines that suggest an ossification test or any latest medical determination.<sup>353</sup> However, it is essential that the tests used are not stagnant, and the Board is aware of new developments in

---

<sup>352</sup> Kenny and Loughry (n 340) 17.

<sup>353</sup> *Juvenile Justice (Care and Protection of Children) Act 2015* s 94.

the field. It is essential for the reliability of the test that the margin of error is noted by the medical practitioner.

#### 5.6 Consolidation and review of findings

It is then the role of the Board or Committee to gather all levels of evidence and consider them. As per recommendation 4, no special favour should be given to a medical test over a properly conducted interview or initial investigation. The Board must give due consideration to all pieces of evidence and provide a final finding as to the person's age.

The role of the court is limited to determining the lawfulness of the assessment methods, and the accuracy of the Board's findings. It is recommended the court ask whether or not the findings made by the Board were reasonably open to it given the available evidence. This prevents the court from encroaching on the role of the Board in making age determination findings.

***Recommendation 6: Findings of police, social worker and medical practitioners should be submitted to an impartial board who considers the evidence as a whole***

Currently, in India it is the role of the Juvenile Justice Board to determine a claim of juvenility through consideration of the documentary evidence and medical reports provided.<sup>354</sup> However, as the recommendations above suggest, there is a need for an age determination process that is multi-disciplined and multi-stepped. This will consequently require the production of various reports and documentation. As the board will be required to assess these reports and documents to make a finding of the age of the accused or victim, those on the Board must be impartial in their assessment of the evidence. It must be ensured that equal weight is given to all the documentation that is put forward and that the documents are considered as a whole rather than being independent of each other. This holistic and impartial assessment is necessary given the margins of error that are produced by medical tests and the lack of birth registration and verification of documentation in India. It is important that the Board recognises that

---

<sup>354</sup> Ibid.

medical assessment outcomes differ from one individual to another and do not take into account external causes such as environmental factors.<sup>355</sup>

***Recommendation 7: If, after all processes have been concluded and there is doubt, the lowest age of the range is valid and the benefit of doubt should go to the accused***

Once a holistic and impartial evaluation of the documentary evidence and medical reports has been conducted and there still appears to be doubt as to the individual's age, the lowest age range will be the recorded age. With the implementation of the above recommendation relating to a multi-disciplined and multi-stepped approach, it is likely that these methods will reduce the margin of error and doubt in determining the accused or victim's age. This will allow for the accused and victim to be placed on the same pedestal as far as age determination is concerned and will ensure that consideration of the accused's sentencing, and victim's compensation is more accurate and suitable. However, where doubt still remains it is clear that case law in India is divided as to where the benefit of doubt lies. It is recommended that, in line with principles fundamental to a democratic system, the benefit of doubt is given to the accused.<sup>356</sup> This is important especially in respect to unaccompanied minors and the difficulty of providing reliable evidence and documentation of age.<sup>357</sup> Also, research has found that the psychological effects of incorrectly sentencing a juvenile as an adult are detrimental and long lasting.<sup>358</sup> This recommendation acknowledges the importance of incorporating the 'best interests of the child' into practices of age determination and the child's intersection with the law.<sup>359</sup>

***Recommendation 8: Both biological and mental age of the individual shall be given consideration, yet this must be approached with caution and only applied in extreme cases.***

---

<sup>355</sup> Vivien Feltz, 'Age Assessment for Unaccompanied Minors: When European countries deny children their childhood' (Report, Doctors of the Word, August 28 2015) 5.

<sup>356</sup> United Nations Committee on the Rights of the Child (CRC), General Comment No. 14, CRC/C/GC/14 (29 May 2013) 4; Asylum Information Database, *Detriment of the Doubt: Age Assessment of Unaccompanied Asylum-Seeking Children* (Legal Briefing No. 5, December 2015); Council of Europe, 'We are children, hear us out!: Children speak out about age assessment' (Report, May 2019) 13.

<sup>357</sup> Feltz (n 355) 5.

<sup>358</sup> Richard Redding, 'The Effects of Adjudicating and Sentencing Juveniles As Adults' (2003) 1(2) *Youth Violence and Juvenile Justice* 128, 130.

<sup>359</sup> United Nations Committee on the Rights of the Child (n 215).



The issue of conflicting evidence as to the biological and mental age of individuals is a contentious one. Currently, s 15 of the *Juvenile Justice (Care and Protection of Children) Act 2015* stipulates that in the case of heinous offences alleged to have been committed by an individual between 16-18 years of age, the Board is required to 'conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence'.<sup>360</sup> Whilst the Board is able to acquire the assistance of experienced psychologists and other experts, this provision presumes that the individual is guilty of the crime.<sup>361</sup> It has been argued that, like medical assessments of the individual's biological age, assessments of mental capacity are not conclusive. As a result, this preliminary assessment by the Board is subjective and allows for a large scope of arbitrariness, with the Board able to transfer a juvenile to be tried as an adult. Additionally, it has been held that the provisions of the Protection of Children from Sexual Offences 2012 cannot be interpreted to allow for the mental age of the victim to be considered.

Consequently, this lack of consideration of the distinction between mental and biological age runs the risk of blurring the juvenile-adult distinction and may neglect to acknowledge the social upbringings and development of children in low-socioeconomic areas.<sup>362</sup> Whilst there is limited law in jurisdictions that adequately deal with this distinction between mental and biological age, it is recommended that juvenile courts in India give consideration to evidence if it is identified that there is a difference between the mental and biological age of the accused or victim. However, this consideration must be done with extreme caution and applying the individual's mental age over biological age should only be done in extreme circumstances. This is due to literature which has identified that recognising the mental age of an individual can diminish the perceived competency of the individual to testify in proceedings, leads to the exacerbation of the stigma surrounding disabilities and the rights granted to these individuals.<sup>363</sup>

---

<sup>360</sup> *Juvenile Justice (Care and Protection of Children) Act 2015* s 15.

<sup>361</sup> Deepak Singh, 'An Analysis of Section 15 of the Juvenile Justice Act, 2015' (2019) 8(2) *Christ University Law Journal* 3, 4.

<sup>362</sup> *Ibid.*

<sup>363</sup> Harris (n 338) 502.

# CONCLUSION

After examining the age determination processes around the world, it is evident that no one country has perfected the age enquiry process. This report has discussed the numerous ways an individual's age can be assessed and clearly depicts that the concept of age can become a complex and highly critical matter in criminal proceedings. All the examined jurisdictions have approached this issue based on specific concerns within their countries and have developed legislative responses which can operate alongside their legal frameworks and available resources. Despite this, the above analysis of five jurisdictions highlights both key failures and successes in their age assessment processes. Our final eight recommendations represent a consolidation of these findings and detail best practices for age determination, which can help inform future reforms in India. These recommendations ultimately recognise that an individual's age is more than merely just a number. Age assessment processes should accordingly have a multidimensional approach which places all relevant evidence before an impartial body with the requisite knowledge to make such a critical decision.

The research conducted for this report was limited to the scope of the topic area. However, it has opened up many more questions regarding the ethical concerns and biases present within juvenile justice systems around the world. This report has revealed the need for further research into case law which has attempted to discuss moral issues raised within the age determination processes. These topic areas could include:

- What could be the implications of the role of police or any agency that does not have a judicial function in age determination of children, particularly when the children belong to a particular socio-cultural and economic background?
- What is the impact of cultural variance on age determination?
- How can the nature of the offence be utilised as a consideration during age determination enquiries?
- What is the effect of treating mental age similarly to chronological age in deciding legal matters, particularly in the sentencing of juveniles?
- How do courts proceed with age determination in cases of consensual sexual relationships between minors?

Whilst Government officials or courts may pass off the age determination process as merely an administrative or procedural hurdle, the reality is that the estimated age given to juveniles will form part of their identity for the rest of their lives. The right to a correct identification of age is a critical step in providing lifelong legal protection and is a prerequisite to all other liberties offered as a member of society. It is evident that age is not just a number but a cornerstone of the fundamental human right to identity.

# BIBLIOGRAPHY

## A Articles/Books/Reports

Abdulraheem-Mustapha, Mariam A, 'Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa' (2016) 16(2) *African Human Rights Law Journal* 435

Asylum Information Database, *Detriment of the Doubt: Age Assessment of Unaccompanied Asylum-Seeking Children* (Legal Briefing, No. 5, December 2015)

Aynsley-Green, Albert et al, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control' (2012) 102 *British Medical Bulletin* 17

Belur, Jyoti and Brijesh Bahadur Singh, 'Child sexual abuse and the law in India: a commentary' (2015) 4(26) *Crime Science* 1

Cooper, Dr. Sharon and Damon King 'Effective Use of the Medical Expert in Child Pornography Cases' (2004) 52 *United States Attorneys' Bulletin* 2

Council of Europe, 'We are children, hear us out!: Children speak out about age assessment' (Report, May 2019)

Department of Homeland Security Office of Inspector General, 'Determination Practices for Unaccompanied Alien Children in ICE Custody' (Report, OIG-10-12, November 2009)

Department of Justice and Constitutional Development South Africa, 'Form 7 – Medical Report and Age Assessment of Child', (Government Form)  
<<https://www.justice.gov.za/forms/child/J772.pdf>>

European Asylum Support Office, *Practical Guide on Age Assessment* (2<sup>nd</sup> ed, 2018)

Feltz, Vivien, 'Age Assessment for Unaccompanied Minors: When European counties deny children their childhood' (Report, Doctors of the Word, August 28 2015) 5

Freckelton, Ian QC, 'Offenders with Intellectual and Developmental Disabilities: Sentencing Challenges after the Abolition of Execution in the United States' (2016) 23 *Psychiatry, Psychology and Law* 3

Gallinetti, Jacqui, 'What happened to the Child Justice Bill? The process of law reform relating to child offenders' (2006) 17 *South African Crime Quarterly* 7

Harris, Jasmine 'Sexual Consent and Disability' (2018) 93(3) *New York University Law Review* 480

International Federation for Human Rights and Human Rights Commission Pakistan, *Punished for being vulnerable: How Pakistan executes the poorest and the most marginalized in society* (Report, October 8 2019)

International Labour Organization, *Age verification - Protection for unregistered children from child labour* (Report, 2016)

International Secretariat Amnesty International, *Pakistan: Protection of Juveniles in the Criminal Justice System Remains Inadequate* (Report, September 30 2005)

Iqbal, Khurshid, 'Judging Juvenility: Determination of age of Juvenile Offenders under Pakistan's Juvenile Justice System' (2009) 1(3) *Pakistan Journal of Criminology* 105

Jayaraman, Jayakumar, Graham Roberts, Hai Ming Wong, Fraser McDonald and Nigel King, 'Ages of Legal Importance: Implications in Relation to Birth Registration and Age Assessment Practices' (2016) 56(1) *Medicine, Science and the Law* 77

Justice Protect Pakistan, *Death Row's Children: Pakistan's Unlawful Executions of Juvenile Offenders* (Report, February 2017)

Kenny, Marry Anne and Maryanne Loughry, 'Addressing the Limitations of Age Determination for Unaccompanied Minors: A Way Forward' (2018) 92 *Children and Youth Services Review* 15, 18

Kloess, Juliane et al, 'The challenges of Identifying and Classifying Child Sexual Abuse Material' (2017) 31 *ASTA Journal* 2

Liversidge, Helen M, 'Timing of human third molar formation' (2008) 35 *Annals of Human Biology* 294

Maguire, James, 'Children of the abyss: Permutations of childhood in South Africa's Child Justice Act' (2012) 15(1) *New Criminal Law Review* 68

Mishori, Ranit 'The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights' (2019) 6(7) *Children (Bansel)* 85, 87

Office of Refugee Resettlement, 'Children Entering the United States Unaccompanied: Section 1.6.2. (2015)

Pearson, Ross, 'What's my Age Again? The immigrant problem in the criminal justice system' (2013) 98 *Minnesota Law Review* 745

*Police Guidelines on the Implementation of The Children Act*, cited in Government of Uganda and UNICEF, *Prosecuting child related cases in Uganda* (Report, September 2016)

Redding, Richard, 'The Effects of Adjudicating and Sentencing Juveniles As Adults' (2003) 1(2) *Youth Violence and Juvenile Justice* 128

Sajid, Imran Ahmad, 'Juvenile Justice Policy: Gaps Identification and Role of Key Stakeholders in Pakistan' (2009) 1(3) *Pakistan Journal of Criminology* 119

Seattle DSA, 'Flores Settlement Public Comments Arguments: Toolkit on the Proposed Rules Changes to End the Flores Agreement' (Law Reform, 2016) 5  
Shiner, Fionn and Marta Petrosillo, 'Pakistan: Case of 'abducted' girl to be taken to Supreme Court', *Independent Catholic News* (Online Post, 28 March 2020) <<https://www.indcatholicnews.com/news/39218>>

Singh, Deepak, 'An Analysis of Section 15 of the Juvenile Justice Act, 2015' (2019) 8(2) *Christ University Law Journal* 3

Tiemensma, Marianne and V M Phillips, 'The dilemma of age estimation of children and juveniles in South Africa' (2016) 106(11) *South African Medical Journal* 1061

Unicef, *Birth Registration* (Report, June 2020)

Wells, Melissa et al, 'Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession' (2007) 8 *Police Practice and Research* 3

World Bank, *Completeness of birth registration (%)* (Web Page)  
<<https://data.worldbank.org/indicator/SP.REG.BRTH.ZS>>

## B Cases

*A v London Borough of Croydon and Secretary of State for the Home Department* [2009] EWHC 939

*Abdul Ghani and others v Mst. Yasmeen Khan and others* (2011) SCMR 837

*Atkins v Virginia*, 536 U.S. 304 (2002) 306

*B v Merton LBC* [2003] EWHC 1689

*Babar Ali v The State* (2007) PLD Lahore 650

*Bashir Ahmed v The State* (2004) PCrLJ 707

*BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872

*Biyela v S* [2011] ZASCA 43

*Gumede v S.* [2011] ZAECGHC 88

*Hall v Florida*, 572 U.S. 701 (2014)

*Janet Reno, Attorney General, et al. v Jenny Lisette Flores et al.* 507 U.S. 292

*Jarnail Singh vs State of Haryana* (2013) 7 SCC 263

*Jyoti Prakash Rai v State of Bihar* (2008) 15 SCC 223

*Kiiza v Uganda* [2014] UGCA 19

*Magee v Mississippi*, 056 So.2d (2020)

*Matter of Care and Treatment of Sebastian*, 556 S.W.3d 633 (2018)

Mississippi Rule of Evidence 803(25)

*Mohamad Ilyas v The State* (2017) YLR Note 71

*Muhammad Abdullah v Additional Sessions Judge* (2014) (Judgment Sheet)  
Writ Petition No. 237

*Muhammad Ayyaz v The State etc (Judgment)* Criminal Revision No. 706 of  
2016

*Muhammad Basit v The State* (2016) PCrLJ 1745

*Muhammad Raheel alias Shafique vs The State* (2015) (PLD SC 145)

*Penry v Lynaugh*, 492 U.S. 302 (1989)

*People of the State of Michigan v Robert Erwin Stumpmier* No. 330145 (Mich.  
Ct. App, 2017)

*R (NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin)

*Rajendran v State* Criminal Appeal No. 483 of 2016

*Ram Suresh Singh v Prabhat Singh* (2009) 6 SCC 681

*Razak Mohammad v State* (2018) 9 SCC 248

*Rimsha Masih v Station House Officer, Police Station Ramma* (2012)  
(Judgment Sheet) Writ Petition No .3172-Q/2012

*Russell v State*, 203 So.3d 750 (Miss. Ct. App. 2016)

*S v Dial* [2004] ZAECHC 34

*S v M* [1988] 4 All SA 456

*S v Mtolo and Others* [1993] ZASCA 180

*Shweta Gulati v State* (2018) 251 DLT 667

*State of Assam v Md. Abdul Kalam* POCSO case No. 23 of 2015



*State of Louisiana v Peter E. Haley*, 222 So.3d 153 (2017)

*State v Mohamed* (178 Ohio App, 3d 695, 2008)

*State v Varun* SC 108 (2013) decided on 29.10.2013

*Sulta Ahmed vs Additional Sessions Judge-I Mianwali and 2 Others* (2004) (PLD SC 758)

*Tajammul Abbas v The State & Another* (2019) (Judgment Sheet) Criminal Revision No. 64759 of 2017

*Uganda v Anyovi* [2018] UGHCCRD 70

*Uganda v Apunyo Hudson* [2004] UGHC 52

*Uganda v Asua Muhamed* [2018] UGHCCRD 66

*Uganda v Dradriga* [2016] UGHCCRD 76

*Uganda v Fualwak* [2018] UGHCCRD 110

*Uganda v Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*

*Uganda v Kakande Alias Ojara* [2019] UGHCCRD 30

*Uganda v Kavuma* [2018] UGHCCRD 145

*Uganda v Mayengo & 4 Ors* [2018] UGHCCRD 148

*Uganda v Oryem Bosco* [2020] UGHC 78

*Uganda v Muwanga* [2018] UGHCCRD 13

*Uganda v O.F (a juvenile)* [2018] UGHCCRD 173

*Uganda v O.R* [2019] UGHC 80

*Uganda v O.R. (a juvenile)* [2018] UGHCCRD 161

*Uganda v O.S. alias O.G. (a juvenile)* [2018] UGHCCRD 162

*Uganda v Ojara Stephen & Another* [2020] UGHC 64

*Uganda v Orem* [2010] UGHCCRD 50

*Uganda v Oryem Bosco* [2020] UGHC 78

*Uganda v Othieno* [2010] UGHC 175

*Uganda v Ssemwanga* [2018] UGHCCRD 147

*Uganda v Yindu* [2016] UGHCCRD 70

*Uganda Vs Kakande Alias Ojara* [2019] UGHCCRD 30

*United States of America v Jeffrey M. Scot*, 3:11-CR-104 JD (2013)

*United States v Katz*, 178 F.3d 368 (5th Cir, 1999)

*United States v Salgado-Ocampo*, 50 F. Supp. 2d 908, 909 (D. Minn. 1999)

*Van Der Bank v The State* [2014] ZAGPPHC 1017

*ZF v S* [2016] 1 All SA 296

### *C Legislation*

122 Stat. 5044, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, P.L. 110-457 (US)

18 U.S. Code § 2256 (US)

Alabama Code § 12-15-203(a), (d) (2012) (US)

Alaska Statute, §§ 11.41.410(a)(3)(A) (2017) (US)

*Borders Citizenship and Immigration Act 2009* (UK)

*Child Justice Act No. 75 2008* (South Africa)

*Children's Act No. 38 2005* (South Africa)

*Constitution of the Republic of South Africa Act 1996* (South Africa)

*Criminal Law Amendment Act No.105 1997* (South Africa)

*Criminal Procedure Act No. 51 1977* (South Africa)

*Flores v Sessions*, No. 2:85-CV-04544, 2017 WL 6060252, at 20-21 (C. D. Cal. June 27, 2017) as cited per Sarah Peck and Ben Harrington, 'The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions' (Congressional Research Service Report, No. R45297, 2018)  
9

*Immigration and Nationality Act 2020* (US)

*Juvenile Justice (Care and Protection of Children) Act 2015* (India)

*Juvenile Justice System Act 2018* (Pakistan)

*Juvenile Justice System Ordinance 2000* (Pakistan)

Louisiana Revised Statute Tit ch14, § 81.1 (US)

Mass Gen Laws ch 119 § 52 (US)

Michigan Penal Code § 750.145c (US)

*Modern Slavery Act 2015* (UK)

NC Gen Statute § 7B-1501(7) (US)

New Jersey Code of Criminal Justice § 2C:24-4 (2014) (US)

*Penal Code 1869* (Pakistan)

*Protection of Children against Sexual Offences Act 2012* (India)

*The Children Act 2019* (Uganda)

*The Code of Criminal Procedure 1898* (Pakistan)

*Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

United Nations Committee on the Rights of the Child (CRC), General Comment No. 14, CRC/C/GC/14 (29 May 2013)

*E Policy Manuals and Guides*

Department of Homeland Security, 'Processing, detention, and release of alien minors', 8 C.F.R. § 236.3

Home Office, *Age Assessment Joint Working Guidance* (2015)

Home Office, *Assessing Age* (23 May 2019)

United States Citizenship and Immigration Services, *Policy Manual, Volume 7 – Adjustment of Status*