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Negotiating childhood: Age assessment in the UK asylum system

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Glossary

AI	Amnesty International
AIT	Asylum and Immigration Tribunal
ADSS	Association of Directors of Social Services
BIA	Border and Immigration Agency
BID	Bail for Immigration Detainees
CLC	Children’s Legal Centre
CS	Children’s Society
DfES	Department for Education and Skills
DoH	Department of Health
ECRE	European Council for Refugees and Exiles
EU	European Union
EUAFR	European Union Agency for Fundamental Rights
EWCA	Court of Appeal (England and Wales)
EWHC	High Court (England and Wales)
ExCom	Executive Committee of the UNHCR
I1-I15	Interviewee 1-15
ILPA	Immigration Law Practitioners’ Association
IND	Immigration and Nationality Directorate
IR	Immigration Rules
JCHR	Joint Committee on Human Rights
NOAS	Norwegian Organisation for Asylum Seekers
RCC	Refugee Children’s Consortium
RCPCH	Royal College of Paediatricians and Child Health
RCR	Royal College of Radiologists
SCEP	Separated Children in Europe Programme
SSHJ	Secretary of State for the Home Department
UASC	Unaccompanied Asylum Seeking Child
UDI	Utlendingsdirektoratet (Norwegian Directorate of Immigration)
UKBA	UK Border Agency
UKSC	UK Supreme Court
UNCmRC	UN Committee on the Rights of the Child
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNHRC	UN Human Rights Council

Legal texts

AITCA04	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
BCIA09	Borders, Citizenship and Immigration Act 2009
CA89	Children Act 1989
ECHR	European Convention on Human Rights of 1950
IAA99	Immigration and Asylum Act 1999
INA06	Immigration and Nationality Act 2006
NIAA02	Nationality, Immigration and Asylum Act 2002

Introduction¹

The Committee recommends that the State party [...] Give[s] the benefit of the doubt in age-disputed cases of unaccompanied minors seeking asylum (UN Committee on the Rights of the Child (UNCmRC) 2008: para. 71(e)).

In November 2009, the UK Supreme Court unanimously allowed the appeals of two age-disputed unaccompanied asylum-seeking children (UASCs). Although the case, *A&M*,² concerned the independence and competence of social workers to assess the age of UASCs under the Children Act 1989 (CA89), its importance lies with age assessment's intrinsic link to asylum policy and the operation of the asylum system. *A&M* represents the culmination of a political controversy in which age assessment has been used to entrench, question and contest government asylum and child policy.

Faced with rising numbers of undocumented asylum seekers claiming to be minors, age assessment is increasingly conceived as an integral part of asylum determination in Europe (ECRE 1996; EU 1997, 2005; EUAFR 2010). Portrayed as a viable way to safeguard domestic asylum and welfare systems from adults posing as minors whilst concurrently ensuring that children are protected (Council of Europe 2005), age assessment has nonetheless been notoriously controversial in the UK. The appearance of 'age-disputed persons' as a discrete administrative category (Home Office 2005: 12) has fuelled existing debates around asylum-seeking children and triggered a highly politicised and progressively legalised process for assessing their age.³

The detrimental effect of this process upon UASCs' well-being and access to services is documented in social work literature (Kohli and Mitchell 2007; Wade *et al.* 2005). So are advocacy groups' claims that age-disputed UASCs are subjected to particular risks within the asylum system, such as detention (11 Million 2008; AI 2005; BID 2009; Crawley and Lester 2005; ILPA 2009a). While the impact of age assessment on welfare provision is undeniably critical to the individuals in question, the overall emphasis on welfare risks obscuring both the political function and effect of age assessment.

This paper therefore seeks to address the underlying issue of why age assessment is so politicised in the UK. How have 'age-disputed persons' become a salient *political* problem? Why does their age assessment remain contentious despite a number of policy amendments? Why has *A&M* reached the Supreme Court?

¹ This paper was submitted in partial fulfilment of the requirements for the Degree of Master of Science in Forced Migration at the Refugee Studies Centre, University of Oxford.

² *A, R (on the application of) v London Borough of Croydon* (Rev 1) [2009] UKSC 8.

³ Note that the age of accompanied asylum-seeking children may also be uncertain or disputed. However, these cases are not counted amongst 'age disputes' in the UK and trigger different legal and care responses. They are therefore excluded from the analysis.

A brief glance at public discourse⁴ shows that, on the one hand, the government maintains that age assessment is a vital tool in identifying an increasing number of adults posing as minors to access UK territory and welfare (BIA 2008; Home Office 2002, 2007b), whilst on the other hand, children's and refugee advocates blame the government for wilfully treating children as adults (11 Million 2008; CS 2008, 2009; RMJ 2009). Despite the plausibility of referring to exclusionary asylum politics to explain the emergence and politicised nature of age assessment, closer scrutiny reveals a more complex picture in which, for example, the government has also regularly amended policy and guidance to enhance safeguards for age-disputed minors. Indeed the overall process for assessing age does not appear to imply clear causation and intentionality.

Accordingly, my analysis takes as its starting point the age assessment process itself: the 'messy practice' of implementing policy in a changing political context. Drawing inspiration from the Foucauldian notion of 'conditions of possibility' (Foucault 1991; Walkerdine 1984), I seek to demonstrate how a range of domestic social, discursive, political and institutional factors impact and shape the seemingly technical process of assessing UASCs' age. Importantly, these conditions of possibility do not necessarily relate directly to age assessment. Nonetheless, their intersection can open, exacerbate or close spaces for contestation around age assessment. Hence the politicised nature of age assessment might meaningfully be understood as a response to shifting issues of age and asylum resulting from a particular conflation of conditions in the UK.

Deconstructing the 'technical' elements of the process is also necessary in order to comprehend how and why the disjuncture between aims and outcomes, policy and practice, arises. It is furthermore a key with which to reveal unintended and unforeseen consequences of the process (Foucault 1977; 1989). Thus, although the research conducted for this paper is insufficient to firmly conclude that age assessment prejudices UASCs in securing refugee status, the analysis draws attention to how the overall process for determining age nevertheless makes this likely. While clearly not intentional, a system in which a specific category of children may be less likely to gain protection damages the legitimacy and rationale of the asylum process. It is therefore critical to promote a political understanding of age assessment.

Most public sources relating to age assessment in the UK originate from the government and from refugee and children's organisations.⁵ These have been thematically and discursively analysed and largely reflect the actors' respective involvement with, and interpretation of, age-disputed UASCs and their age assessment. Academic comment is however scarce. Watters (2008), Giner (2007a) and Crawley (2009) have analysed discrete aspects, but Crawley's (2007) report for the Immigration Law Practitioner's Association (ILPA) remains the most comprehensive account. Hence the theoretical backdrop for

⁴ Parliamentary debates, policy statements, government's reports, guidance notes and instructions, public consultations, international and national organisations' reports, newspapers.

⁵ Reports of NGOs, government reports, consultations, policy statements, parliamentary debates 2003-2009, guidance notes and instructions.

contextualising and analysing policy draws on literature from a range of fields. Especially pertinent are the social studies of childhood, commentaries on asylum adjudication and credibility evaluation, social work literature, and domestic asylum and welfare legislation.

A significant analytical challenge with regard to both policy and practice stems from the ongoing legislative reforms, case-law and associated policy amendments which have and continue to result in changes to the age assessment process. Therefore, 15 in-depth interviews (I1-I15) were conducted with individuals from the Home Office, UK Border Agency (UKBA), refugee and children's organisation, legal representatives, and academics working directly with or on policy targeting UASCs. The interviews have been used to clarify and reflect upon policy and practice, as well as to elaborate on how concerns raised by the literature are manifested in the UK context. Despite providing valuable insights, no findings are based solely on the interviews due to the limited sample. Because asylum is a highly contentious policy area, the interviews are coded (I1-I15) to ensure anonymity; furthermore, the opinions expressed do not necessarily reflect the agency or organisation of employment.

I am, of course, aware of the risk of contributing to the systematic side-lining of children's and refugees' own voices and experiences. However the ethical concerns raised by interviewing age-disputed UASCs have not been warranted by the scope and analytical emphasis of this paper.

Exploring political and social issues around childhood, age and asylum through the process of age assessment has several analytical benefits. First, it avoids either discussing asylum policy at the macro-level with only generic references to the impact on individuals caught in the system, or conducting micro-level studies which can fail to take sufficient account of the underlying politics. Through the process of age assessment, it is possible to trace how the macro-level trends filter down and directly affect the individual. Second, age assessments in the UK are also conducted for the purpose of welfare provision, namely accommodation under the Children Act 1989 (CA89). By critically analysing how these age assessments subsequently impact the individual's asylum determination, age assessment provides a tangible example of the less-documented impact of welfare practice on the asylum system (Brown 2004; Geddes 2003; Ghorashi 2005; Ong 2003; Sales 2002). Third, age assessment brings into starker relief the issues which affect UASCs' ability to secure refugee status, specifically how children are conceptualised in terms of their political agency and how this agency is acknowledged, or why it is denied, in asylum adjudication.

This paper is framed within a child-centred perspective that neither presumes children's inherent vulnerability nor advocates the automatic grant of permanent immigration status to all UASCs. This provides an analytical entry-point, mid-way between the stance of children's advocacy groups on the one hand, and immigration law and policy on the other.

The analysis proceeds from the macro-level (policy context) to the individual level (individual asylum determination) and is divided into four parts.

Part 1 contextualises age assessment by analysing how the UK policy framework has enabled the age assessment of UASCs to emerge as a potentially contentious issue through the increasingly disparate treatment accorded to children and adults within the asylum system.

Whilst this policy context has rendered persons of questionable age problematic, Part 2 seeks to illustrate how both the use and implementation of age assessment has significantly increased its politicisation. It traces the development of the age assessment process as a complex, contested, multi-actor and reactive process in which age assessment for immigration purposes has been outsourced to Local Authorities in an attempt to bring procedural certainty to the process.

Part 3 focuses on Local Authorities and questions whether entrusting age assessment to Social Services impacts the actual decisions made on UASCs' ages. By drawing attention to a range of factors that *could* negatively impact decisions made on UASCs' ages, this part proceeds to evaluate the claim put forward by *A&M* that social workers are not impartial when determining age. Analysing the Courts' reasoning, Part 3 tentatively suggests why age assessment is likely to remain politically contentious despite the Supreme Court upholding the appeal.

Having traced the age assessment process from the policy level to the individual's age assessment, Part 4 brings the analysis back into the asylum system by considering how age assessment impacts the individual's asylum determination. Analysing institutional, procedural and legislative practice, this last part seeks to demonstrate how the cumulative effect of the age assessment process has unintended and unforeseen consequences when evaluating age-disputed UASCs' credibility. As a result, age assessment may ultimately negatively impact asylum adjudication and is therefore likely to remain politicised.

My hope is that this paper may serve as a theoretical and contextual basis for a further empirical enquiry into the impact of age and age assessment on asylum adjudication.

1 Contextualising age-disputed UASCs: UK policy frameworks and the emergence of a political problem

The emergence of age-disputed UASCs as a social and political problem emanates from a conflicting legal, policy and normative context in which specification of age mediates between various pressures and interests. The controversy of age assessment must therefore be located within and analysed in light of this context.

UASCs: Between asylum-seeker and child-centred frameworks

Separated minors are often viewed with scepticism (Bhabha 2000, 2001; Crawley 2009). Their status as separated from familial networks of support elicits “suspicion and hostility, [they are viewed as] delinquents, as ‘pseudo-children’, as more threatening than adults” (Bhabha 2004: 240); in short, they are seen as a social problem which requires managing. This scepticism is, as we shall see, exacerbated when they apply for asylum. Whereas for example France, Belgium and Spain possess several means to juridically integrate separated minors, their legal presence in the UK depends on their lodging an asylum claim (Hernández 2007: 26-30). ‘Separated minors’ become ‘UASCs.’ The ambivalence towards these minors is thereby reinforced by locating them within the asylum system.

Distinct discourses and different legal and policy frameworks surround asylum seekers and children (Crawley 2006; Giner 2007b). Whereas the asylum framework (discourse, legislation and policy) is centred on the alien or irregular status of applicants, the framework surrounding children is grounded in a specific understanding of ‘child’ as innocent, vulnerable, dependent and lacking adult capacities. Therefore children attract, and are deemed to deserve, strong protection and care from society and the state (Archard and Macleod 2002a; Griffin 2002; James and Prout 1997). While the asylum framework has given impetus to a policy of non-incorporation, the child protection framework has conversely triggered inclusive social care responsibilities. Policy towards UASCs, being both children and asylum seekers, is thus subject to tensions between these two frameworks.

The United Nations High Commissioner for Refugees (UNHCR) recommends that states minimise the differences in being categorised as either a child or an adult within the asylum system (UNHCR 1997: para. 5.11(c)). This can be done through both policy measures and practice (Crawley *et al.* 2004). In the UK, however, policy, legislation and discourse are characterised by both a general political consensus “in favour of inclusive protective measures for children” (Giner 2007b: 252), and a broad consensus surrounding the overall necessity of exclusionary asylum politics (Bloch 2000; Sales 2007; Schuster and Solomos 1999; Somerville 2007; Statham 2003). The subsequent failure to moderate the disparity between these two frameworks has resulted in highly polarised and increasingly irreconcilable policy aims and legislation.

On the one hand, as asylum policy has shifted towards reducing the number of total, rather than fraudulent, asylum claims, the government has sought to employ a broad array of tools to deter arrivals, to minimise and speed up procedures and to facilitate removals (Gibney 2008; Harvey 2000; Stevens 2004; Zetter *et al.* 2003). The casting of socio-economic rights as a ‘pull-factor’ for bogus applicants (Howard, HC Deb. 11/12/1995 col. 699) has, for example, triggered a policy of both reducing support and progressively excluding asylum seekers from mainstream services and society (Antoniou and Reynolds 2005: 157; Home Office 1998: para. 8.17-18). Indeed, several authors have claimed that this intimate connection between immigration control and welfare control is unprecedented (Cohen *et al.* 2002; Hayes 2002, 2004).

On the other hand, CA89 imposes statutory duties on Local Authorities to assist children ‘in need’ and provide accommodation for certain groups, holding that “the child’s welfare shall be the [...] paramount consideration” (Article 1). In recent years the inclusive and wide-ranging duty towards children has been further enhanced through the ‘Every Child Matters’ strategy (Great Britain Treasury 2003) and ‘Keeping Children Safe’ (DfES and DoH 2003), culminating in the Children Act 2004. The subsequent reorganisation and reform of children’s services reinforced CA89 and aimed “to ensure that every child and young person has the opportunity to fulfil their potential, and no child slips through the net” (DfES 2004: para. 1.3). This, it was confirmed, specifically included asylum-seeking children (Ashton, HL Deb. 17/06/2004 col. 996). By drawing attention to children’s vulnerability, the child-framework seeks to enhance their life chances through an inclusive use of generous social welfare and support (Williams 2004).

As a result, UASCs occupy an uneasy status, both conceptually and practically, between the asylum and child protection frameworks. As these have become progressively polarised through both the criminalisation of asylum and exclusionary politics, and the increasingly generous and inclusive child protection rights, UASCs, who are children but evince attributes of the asylum seeker category, have come to occupy an uneasy political status and ambivalent position in policy terms.

Aligning conflicting frameworks: policy and practice

The government believes it is important that the law and policy relating to asylum and immigration, and the law and policy relating to the welfare of children, should be in step with each other; whilst retaining the distinct functions and decision making roles of the agencies concerned (UKBA 2008b: para. 1.1).

Both ‘asylum seeker’ and ‘child’ categories are imbued with moral assumptions. The moral consensus against asylum seekers, forged through the language of ‘abusive claimants’ and an “undifferentiated association of all those attempting to cross the border without the correct papers with illegality and criminality” (Watters 2008: 66), has categorised asylum seekers as morally inferior and less deserving of social support (Collett 2004: 77; Humphries 2004: 38). The child-centred discourse of dependency and vulnerability has likewise “set the standards for [...] our expectations of policy and

provision in relation to the child” (Jenks 2001: 26). It accounts for the strong obligations felt towards children and why societies are evaluated by the treatment accorded to their children (Boyden 1997; Pupavac 2001). From the child protection perspective, it is morally wrong to extend the punitive treatment of adult asylum seekers to children. From the immigration control perspective, it is equally wrong to let ‘bogus’ asylum seekers (adults and UASCs) exploit the loophole in the asylum system which children’s rights are considered to represent. Balancing the need to cut down on the immigration of ‘bogus claimants’ while fulfilling obligations towards ‘vulnerable’ children is a precarious political balancing act (Boyden and Hart 2007: 240; Home Office 2007b: Foreword).

As might be expected from these seemingly incompatible aims, government discourse, law and policy towards children within the asylum system have fluctuated between prioritising immigration control and children’s rights.

On the one hand, mirroring the much criticised UK reservation to the United Nations Convention on the Rights of the Child, the government opposed amendments to the Children’s Bill (now Children Act 2004) that would have extended to the Immigration Service a responsibility to safeguard and promote the welfare of children. According to the Minister of State for Children, Young People and Families, Margaret Hodge, it “had to be absolutely clear that the primacy in this issue has to be immigration control and immigration policy” (quoted in Education and Skill’s Committee 2005: para. 207). Furthermore, such a duty “could severely compromise our [the government’s] ability to maintain an effective asylum system and strong immigration control” (Ashton, HL Deb. 17/06/2004, col. 996). On the other hand, despite this deference to immigration control, the government has concurrently maintained its overall political commitment and obligation towards children, including asylum-seeking children (Giner 2007b: 257). Every Child Matters (Great Britain Treasury 2003) and, more specifically, the UK Border Agency Code of Practice for Keeping Children Safe from Harm⁶ have confirmed both the child’s best interest as a primary consideration for asylum-seeking children and the government’s commitment to safeguarding and promoting their welfare (UKBA 2008b: para. 1.6). In light of such contradictory stances, it is not surprising that the new duty for the Immigration Service to safeguard children and promote their welfare contained in section 55 of the Borders, Citizenship and Immigration Act 2009 has been cautiously embraced by advocacy groups (CS 2009; ILPA 2009b).

Differentiating between accompanied and unaccompanied children

In practice, the punitive treatment of adult asylum seekers has progressively been extended to accompanied children (Cunningham and Cunningham 2007). Yet, as Giner (2007b) argues, the government never invoked the formal reservations to the Children Act 2004 and the UN Convention on the Rights of the Child to justify such treatment. For example, when in 2004 the government extended the right to terminate all benefits to failed asylum-seeking families deemed in a position to leave the UK (AITCA04, s. 9;

⁶ Issued under section 21 of UK Borders Act 2007, entered into force 6 January 2009.

NIAA02, sch. 3)⁷, it defended this policy by claiming that “the family put themselves in that position. If there is any fault, it is theirs” (McNulty, HC Standing Committee on Bills 25/10/2005 col. 237). By recasting parents as wilfully overriding their children’s best interest, the lower standards set for asylum-seeking adults have gradually been applied to accompanied children while the government discursively continues to maintain its overall commitment to asylum-seeking children (Giner 2007b).

In contrast to accompanied children, UASCs are in a direct relationship with the state: morally, economically and politically. With no parents to protect their interests, or blame for their destitution, UASCs should fall unambiguously within the child protection framework. Assumed to suffer from a three-fold vulnerability: as children, as separated from family and support networks and as subject to immigration control (UNCmRC 2005; ExCom 2007; UNGA 2003; UNHRC 2009; SCEP 2004), they are presumed to require care and support under CA89 (DoH 2003). Because the state is responsible for ensuring their well-being until the age of 18, asylum policy has so far not impinged directly on the welfare provision for UASCs. In fact the standards of care set by CA89 are higher than the EU Reception Directive requirements, suggesting that social care responsibilities emanating from the child protection framework are privileged over the immigration framework. Thus the government appears to have struck a balance between the divergent policy aims by differentiating between accompanied and unaccompanied children.

Nevertheless, social work literature has shown that, *in practice*, UASCs are routinely afforded lower standards of care than citizen children (Dennis 2005; Kohli 2007; Wade *et al.* 2005). For example, *Hillingdon* demonstrated the widespread practice of providing services for UASCs under the more circumscribed care regime of section 17 (services) rather than ‘looking after’ them under section 20 (accommodation) of CA89.⁸ Such practice, it seems, must be analysed in light of the specific position of UASCs. Whereas restrictive policies towards accompanied children have been legitimised discursively by criminalising their parents, their status as ‘children’ has not been questioned. UASCs, on the other hand, appear to occupy an ambivalent position both as children and as asylum seekers, affecting not only their welfare provision but also their asylum adjudication.

Neither child nor refugee

Recognition rates for UASCs in the UK suggest that the vast majority do not qualify for refugee status; indeed UASCs fare significantly worse than adults in asylum adjudication (Home Office 2004, 2005, 2006, 2007a, 2008, 2009). Three more empirical observations reinforce the presumption that their asylum claims are unwarranted. First, UASCs are increasingly over-represented as asylum seekers in Europe and in the UK (UNHCR 2001,

⁷ Schedule 3 of NIAA02 explicitly prohibits accommodating asylum-seeking families under section 17 of CA89.

⁸ *Berhe & Ors, R (on the application of) v Hillingdon & Anor* [2003] EWHC 2075 (Admin).

2004, 2009a).⁹ Second, they have a different demographic profile to the adult asylum seeker population in the UK. Third, this demographic profile varies considerably across Europe (Hernández 2007; UNHCR 2004), suggesting that other factors than immediate need for protection impact where they claim asylum. Such overrepresentation and skewed demographics coupled with low recognition rates lend themselves to a presumption that their claims for protection are groundless. Not qualifying as ‘genuine refugees,’ UASCs are easily conflated with ‘bogus asylum seekers’ evading immigration controls to gain access to UK territory (Bhabha 2001: 293).

Whether UASCs are genuine refugees or not, their status as ‘genuine’ children may nevertheless be questioned. Although they remain children under statutory duties, the passive victim status commonly attributed to children sits uneasily with their display of agency in travelling, arriving alone and seeking asylum independently (Crawley 2009). Surprisingly, the same display of adult capacities does not appear to significantly impact their chances of gaining refugee status; asylum adjudication largely fails to recognise children as political agents or targeted subjects of human rights violations (Dalrymple 2006; Edwards 2003; Gordon 2004; Thronson 2002; UNHCR 2009b). Refused refugee status and associated with the criminalised asylum seeker, whilst simultaneously failing to exhibit the traits expected of children, UASCs’ already ambivalent status as children is further reinforced; they fall outside the categories of both ‘refugee’ and ‘child.’

Thus, paradoxically, UASCs are recognised as particularly vulnerable children, yet at the same time, they are frequently associated with bogus claimants. In policy terms, a compromise has been made by granting Discretionary Leave to UASCs until they reach the age of 17 and a half. However, Discretionary Leave granted under UASC policy, as distinct from Discretionary Leave granted on humanitarian grounds, carries no expectation of extension. While the state recognises its specific obligations towards UASCs by incorporating them into the domestic child protection framework, “we [the government] intend to use those powers [reporting and residence requirements] for categories of people with whom we are keen to stay in close contact, such as unaccompanied asylum-seeking children, so that as they become removable, we can seek to remove them” (Byrne, HC Deb. 05/02/2007, col. 600).

As this section has highlighted, the policy task of aligning the immigration control and child protection frameworks is highly politicised. As a result, policy targeting children within the asylum system has been differentiated and ambiguous. Whilst protective care continues to be formally recognised for UASCs, it appears that in practice UASCs are

⁹ While 84,315 asylum-seekers lodged applications in the UK in 2000, only 35,930 were registered in 2008 (Home Office 2004, 2005, 2006, 2007a, 2008, 2009). In the same period, UASC arrivals remained fairly constant at approximately 3000 per year, representing an increase in the proportion of total asylum-seeker arrivals. Age disputed persons were included in the statistics for 2004, and represented 45% of persons claiming to be minors. However, aggregating age disputed persons and UASCs from the Home Office statistics, the total number of persons arriving claiming to be UASCs remain more or less constant 2004-2008.

frequently offered sub-standard care. Although “adults posing as children” (Home Office 2002: para. 4.56) is a newly-identified phenomenon, age disputes must be evaluated in light of the existing ambivalence towards UASCs as both refugees and as children.

The political problem of UASCs of uncertain age: the imperative of age assessment

Age demarcates the inclusionary child protection framework from the exclusionary asylum framework. Age triggers specific rights, processes and institutional responsibilities, independent of whether UASCs are deemed to be ‘genuine’ refugees or ‘bogus’ asylum seekers. Age determines the specific asylum determination route and accords enhanced rights and safeguards for minors.

Mirroring the different purposes of the asylum and child protection frameworks, responsibility for asylum seekers and domestic children falls under different public authorities. The central government provides support and accommodation for adult asylum seekers, whereas Local Authorities are implicated if the applicant is a minor and are thus responsible for the treatment accorded to UASCs. This institutional make-up reinforces the uneasy position of UASCs of questionable age. As several interviewees (I8-11) emphasised, they effectively fall in a ‘gap’ between institutional responsibilities and support-systems, frequently triggering contestation between Local Authorities and the central government with respect to their welfare provision (CS 2009: para. 4.2; IND & ADSS 2004: para. 7). The rigid categorisation of asylum seekers and UASCs resulting from administrative division of care responsibilities has fuelled the ‘problem’ (Zetter 1991: 41) of UASCs of questionable age and rendered their age assessment imperative.

In addition to the practical function of locating asylum seekers and children within their respective frameworks, age assessment has taken on a normative function. Because the welfare system continues to treat UASCs in a different manner to adults, assessing whether an applicant is a minor or not becomes an important task in itself (11 Million 2008: 12), both independent of, and integral to, the asylum system. It is also important to bear in mind that asylum seekers claiming to be unaccompanied minors increasingly arrive in the UK clandestinely, with inadequate documentation and no satisfactory proof of stated age (Home Office 2007b: para. 24). Given the punitive treatment of adult asylum seekers, there is a clear incentive of preferential treatment in being categorised as a minor. It would, according to Justice Stanley Burnton, “be naive to assume that the applicant is unaware of the advantages of being thought to be a child” (*Merton*: para. 29).¹⁰ The resultant growing suspicion on the part of the government surrounding the rise in UASC arrivals (Bentley 2008: para. 5), coupled with increasing incentives to be categorised as minors, has transformed into the political problem of adults assumed to be posing as minors (Home Office 2002: para. 4.15, 4.55-57; Oppenheim quoted in JCHR 2007a: para. 198). Age assessment increasingly seeks to ensure that these adults are identified.

¹⁰ *R (on the application of B) v Merton London Borough Council* [2003] EWHC 1689 (Admin).

Thus the link between asylum and welfare provision is critical to understanding the problem of UASCs of questionable age and to the contentious process for assessing age. According to an interviewee (I11), the discourse of ‘adults posing as minors’ appears only to have emerged after the restructuring of the asylum-support system which started in 1997. This restructuring resulted in increased polarisation between the two frameworks in terms of welfare provision, sharply dividing responsibilities between central government and Local Authorities, and consequently heightened incentives to be categorised as a minor.

Conclusion

The increasing number of UASC arrivals and polarised policy development have politicised the notion of age and consequently rendered the assessment of age integral to both alleviate immigration pressures and to fulfil obligations towards children. In addition to categorising UASCs for relevant service provision and asylum determination, age assessment has also taken on a new normative function; it seeks to moderate conflicting frameworks and interests. Maintaining the asylum system’s integrity by “detect[ing] those who lie about their age” (BIA 2008: para. 5.1) whilst simultaneously ensuring the protection of children is a precarious balancing act in which age assessment becomes the arbiter.

2 From age dispute to age assessment: evolving through contestation

Age assessment is pivotal to policy and law relating to both immigration and welfare, yet no anthropometric or other tests exist to determine exact age (Levenson and Sharma 1999). Because it is often impossible to establish whether a UASC is an adult posing as a minor, or a child unrightfully believed to be an adult, concerns have been raised that political considerations could impact decisions on UASCs’ ages. Consequently, how states implement age assessment procedures and use age assessments to categorise persons seems crucial to moderate or exacerbate the contentiousness of age assessment. Do, for example, age assessment procedures compensate for the inaccuracies of assessment techniques? And, importantly, who is charged with making the final decision? As the part below analyses, why has the implementation of procedures to determine UASCs’ ages in the UK failed to dispel antipathy and curb contestation?

Conceptualising age disputes

Age assessment for the purpose of asylum figured on the European agenda throughout the 1990s (ECRE 1996: para. 9-10; EU 1997: art. 4(3)) but has found a specific conceptualisation and associated discourse in the UK age dispute. Reflecting the suspicion surrounding the increase in UASCs, age disputes occur when an “applicant claims to be a child, but the UK Border Agency believes them to be an adult” (UKBA 2009: 3). It is important to note that an age dispute, as distinct from an age assessment, does not assess

the applicant's age but merely disputes the UASC's claimed age on the basis that physical appearance, demeanour or life account "very strongly suggest [that the person is][...] aged 18 or over" (UKBA 2009: 3 (emphasis in original)). Although age assessments are in principle conducted for the dual purpose of ensuring that adults do not abuse the asylum system *and* that children are protected (Council of Europe 2005: para. 28), the UK government has been overwhelmingly focused on the immigration control aspect. Age disputes are conceptualised and discursively framed as part of the overall effort to "challenge older applicants and divert them to the adult asylum process so that adults posing as children do not become a problem" (Home Office 2002: para. 4.56, see also BIA 2008: para. 5.1; Home Office 2007b: para. 24).

The presumption that age disputes target adults, rather than seek to establish the age of persons of uncertain age, has had consequences both for how the process of age assessment has evolved as well as for its controversy. In contrast to, for example, the Nordic countries (I6; NOAS & Redd Barna 2006), the UK has long had formal procedures for disputing the age of UASCs at screening interviews, but not for commissioning age assessments or for managing the overall process of determining age. The onus thus lies with the asylum seeker to provide credible evidence of minority and until then, she or he will be treated as an adult by the Home Office in terms of accommodation and services (Dainty 2000: para. 8.5; UKBA 2009: 9). Concurrently, policy on what type of age assessment is considered sufficient proof and how the results should be adopted has, as we shall see, developed in an overall *ad hoc* and reactive manner in response to contestation and legal challenges. As a result, the process of proving minority or establishing age has been uncertain and frequently protracted.

The imbalance between having guidelines to dispute but not to establish the age of UASCs has triggered considerable child protection concerns. For example, up to 60% of age-disputed persons in Oakington Immigration Reception Centre were found to be minors when age assessed in 2005 (CLC 2006: 2; Matthews 2006: 19). This suggested that UKBA's procedures to identify and protect children were not merely inadequate but also that policy to accord the benefit of the doubt was systematically breached (AI 2005: 18; JCHR 2007a: para. 203; Oakley and Crew 2006: 16; Owers 2008: 33). The ensuing high-profile litigations and compensation for unlawful detention of minors effectively illustrated the legal and moral hazards of treating age-disputed UASCs as adults until their age has been established or they proved their minority.¹¹

Subsequent amendment to processing instructions¹² in 2006 resulted in a significant drop in detained age-disputed UASCs¹³ and a gradual decline in UKBA recorded age disputes

¹¹ See for example *I & Anor, R (on the application of) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin).

¹² Age dispute cases were no longer deemed suitable for detained fast-track processing.

(CLC 2006; Home Office 2009; Ind 2007). Nevertheless, persistent criticism from advocacy groups continues to fuel the controversy surrounding age disputes (11 Million 2008; BID 2009; CS 2008, 2009; RMJ 2009). Hence, it is also necessary to examine the prevalence of age disputes and interpret these in light of the discourse surrounding them.

The significance of age disputes

Each year since ‘age-disputed persons’ appeared as a discrete category in 2004, 41 to 45% of those claiming to be UASCs have had their age disputed by UKBA (Home Office 2005, 2006, 2007a, 2008). The government maintains that this number is “illustrative of a serious level of abuse of the [asylum] system” (Home Office 2007b: para. 24) and necessitates the introduction of deterrent restrictions on welfare for UASCs (Home Office 2007b: para. 54-56; Oppenheim in JCHR 2007b: Ev91). In contrast, advocacy groups and independent inspectors continue to draw attention to the persistence of children being treated as adults within the asylum system, thereby questioning, or even discrediting, the government’s stated commitment to ensure their protection (11 Million 2008; BID 2009; CS 2008; 2009; ILPA 2009a; Owers 2009a,b; RMJ 2009; UK Children’s Commissioners 2008).

It is nevertheless important to note that the scope of adults posing as minors or children unrightfully believed to be adults is uncertain. UKBA records only the number of UASCs initially age-disputed and does not subtract those considered minors after age assessment and appeals (Aynsley-Green 2006: para. 2.1.3; UNCMRC 2008: para. 70(b); RMJ 2009: 5). My requests have also confirmed that the Refugee Council Children’s Panel does not keep an overview of the outcomes of age disputes referred to them by UKBA.¹⁴ Responding to repeated calls for such statistics, Lord West replied on behalf of the government:

Information about the proportion of age-dispute cases subsequently found to be aged under 18 years [...] is not held centrally and could be obtained only through the examination of individual case records at disproportionate costs (West, HL Deb. 29/09/2008 col. WA336).

Because there has been no well-established process to determine the age of UASCs upon arrival, age disputes occur in various arenas and at various stages of the asylum process: at the screening interview, upon immigration detention and in connection with Local Authorities’ service provision. Several interviewees (I7; I9-10) stressed the bureaucratic difficulties of providing statistics on the outcomes of age disputes in such a fractured process, particularly since the age assessment process is frequently protracted. However, the outcome of an age dispute will impact a UASC’s immigration status. Therefore the lack of statistics on the outcomes for those disputed upon arrival, combined with the

¹³ Whereas 251 disputed cases were referred from Oakington detention centre to Cambridgeshire Social Service for age assessments in 2005, the number dropped to 47 in 2006 (CLC 2006). A note of caution is due as detention statistics are still based on snap-shots so that if a UASC is detained between two snap-shot recordings, s/he will not enter into the statistics (*Hansard HC*, Committee, 16/06/09, cols. 197-199).

¹⁴ The UKBA processing guidelines on ‘Disputed Age Cases’ state that “[a]ll disputed age cases must be referred to the Refugee Council Children’s Panel of Advisors [...] as soon as possible and at the latest within 24 hours of the application being made” (UKBA 2009: 8).

government's insistence that the majority of age disputes concern abusive claimants, continues to fuel protection fears (HC Committee 16/06/2009, cols. 197-199).

Conceptualising age disputes as primarily a tool to protect the asylum system appears to have influenced the initial institutionalisation of age assessment, notably by the absence of clear procedures for assessing age following a dispute. It has also raised protection concerns for potential minors and triggered broad criticism of the government. Moreover, framing age disputes in this manner has led to a significant politicisation of age assessment. Not only are age assessments needed to establish UASCs' ages, but they have also effectively become the tool to challenge age disputes, thereby enhancing the protection of children. Thus immigration control and child protection concerns are reflected in conceptually and procedurally distinct aspects of the process to determine UASCs' age: age disputes and age assessments. Balancing these two aspects may shed light on why, despite the gradual decline in recorded age disputes, determining age remains contentious.

Institutionalising age assessment: from immigration to welfare

It's been a long slow process whereby the Home Office has delegated the decision making power [on age] to Local Authorities (14).

Age assessment is a means to both establish age and to challenge UKBA age disputes, but age assessment is also necessary in order to determine if, and to what extent, Local Authorities have a duty to provide services to minors under social welfare legislation. A clearly-established process to assess and make an authoritative decision on age has, until recently, been lacking. Therefore the institutional division of responsibility for services has resulted in age assessments being conducted independently for the asylum and social welfare systems. Furthermore, with no hierarchy between divergent age determinations, both practical disarray and contestation between public authorities have arisen (Home Office 2007b; IND & ADSS 2004). Given that a single specified age is required and that that no accurate test exists to determine age, the development of the age assessment process cannot be meaningfully understood as merely a means to determine age for immigration purposes. Rather, age assessment concerns who has the right, and by what means, to make the final decision on age for *both* the immigration and welfare systems. Bearing in mind the varied interests, actors and consequences hinging on such a decision, the establishment of a predictable age assessment process has been disputed, reactive, has involved numerous actors and has shifted over time.

Medical age assessment for immigration determination

Until recently age assessments by paediatricians have commonly been obtained by applicants to challenge UKBA age disputes. However, according to the Royal College of Paediatricians and Child Health, determining chronological age, especially for those aged 15 to 18 years, is "virtually impossible [...] [and] should not be attempted" (Levenson and Sharma 1999: 13). Thus while the EU Asylum Procedures Directive allows Member States to use medical examinations to determine the age of UASCs (Article 17(5)), it does not address the controversial issue of what type of assessment, and Member States therefore

employ a variety of techniques (EUAFR 2010; Halvorsen 2003).¹⁵ Although the Procedures Directive considers medical assessments to be viable, the specialised professions and child rights lobby in the UK have been unequivocally opposed to the use of both paediatric and X-ray assessments (see for example Blake and Kilroy 2007; RCC 2007; RCPCH 2007; RCR 2007).

The strong opposition to medical age assessments must be understood not only in light of the inaccuracy of such assessments, but also in light of how age assessments are used to categorise individuals and the implication of this. Due to the inherent inaccuracy of medical age assessments, an interval is normally specified by paediatricians (I4-5; I7; I9-10). This age interval then serves as the basis for the Home Office to determine the age of UASCs for immigration purposes, but so far my research has failed to find any guidance which specifically takes into account the technical inaccuracies of age assessments, such as adopting the lower-bound age as is done in for example Norway (UDI 2004). Not surprisingly, the politicised context and disputatious understanding of age assessment has raised concerns about the procedural fairness and safeguards when the Home Office uses medical assessments to designate an exact age (Levenson and Sharma 1999: 14). The adverse inferences that might also be drawn from a UASC who refuses to undergo such an assessment (Home Office 2007b: para. 30) has heightened unease (RCC 2007: 5).

It also seems plausible that the subsequent legal challenges have further cautioned the medical profession to participate in an institutionalised process for assessing age. As a policy advisor interviewed summarised: “[...] most want to stay out of it. It’s far too political, it’s too dangerous, it’s far too risky” (I5). Whereas the conceptualisation of age disputes as primarily targeting adults may have hindered the Home Office in managing the overall process of establishing age, the opposition from the medical profession to play a part and the vocal criticism may well have delayed the institutionalisation of a predictable procedure to assess age for immigration purposes.

Social Service age assessment for welfare provision

To establish age is crucial for immigration purposes, but also for determining applicable statutory duties and institutional responsibility related to welfare provision. How should Local Authorities approach persons who claim to be UASCs, and thus are legally entitled to their services, but whom the Home Office claims are adults with no rights to the same services? Evaluating whether an age-disputed UASC is entitled to services as a child ‘in need’ under CA89, requires first to establish whether the person is indeed ‘a child.’ Therefore, as long as the Home Office age-disputes, but does not commission age assessments, the problem of UASCs of questionable age has effectively shifted to Local Authorities. Age assessment has become a ‘staging post’ on the way to a broader needs assessment for the purpose of welfare provision (IND & ADSS 2004: para. 4(2)).

¹⁵These include X-rays of the wrist (France, Belgium, Lithuania, Finland), various odontological assessments (Norway, Sweden, Denmark), general paediatric assessment (parts of Germany), psychosocial assessment (Germany), inspection interview (Austria).

Whereas the Home Office has specific powers to determine age for the purpose of immigration (IAA99, s. 94(7)), no statutory or procedural guidance has been issued to Local Authorities. Procedures vary between and within Local Authorities, evolving through practice and legal challenges (Calvo *et al.* 2007; Kralj and Goldberg 2005). Croydon and Hillingdon's (2003) practice guidelines for assessing age through an interview were, for example, assessed in *Merton*¹⁶ and *Enfield*¹⁷ to conform to constitutional principles of procedural fairness. They have subsequently provided a benchmark for conducting and evaluating Social Service age assessments.

A lawful assessment is, per *Merton*, a reasoned assessment based on a minimum of procedural and substantive criteria for conducting the interview. In contrast to UKBA age disputes, a Social Service age assessment cannot be based solely on the applicant's appearance but should be based on relevant and available material and conducted in a fair and open-minded manner (Latham 2004: 3-9) by qualified and experienced social workers (*A&WK*: para. 41).¹⁸ Importantly, there should be no presumption of majority or minority prior to the assessment (*Merton*: para. 37-38). These criteria ensure a minimum of questioning and fact-recording that in turn might guarantee a reasoned estimate of age; nevertheless a *Merton*-compliant age assessment is not necessarily accurate:

In the morning you might get a statement from a social worker saying 'Oh he fidgeted a lot during the assessment, so I think he was lying', and in the afternoon you get a different social worker with a different child 'he fidgeted a lot in the assessment so I think he is young and nervous' (15).

This quote clearly points to a fundamental problem that *Merton* cannot remedy: the subjective interpretation of UASCs' behaviour as an indicator of actual age.

The Children Act 89 is, as seen, based on a particular understanding of children as vulnerable, lacking adult capacities and deserving special protection. This understanding encompasses both normative and descriptive elements: characteristics attributed to children, how they are treated and expected to behave (Ansell 2005). Yet childhood "is neither a natural nor universal feature of human groups but appears as a specific structural and cultural component in many societies" (James and Prout 1997: 8). Observing demeanour and exploring a child's life history and experience with a view to establishing age may therefore fail to match the social worker's expectation of age-based experiences (Bentley 2005; Das and Reynolds 2003). Indeed a *Merton*-compliant age assessment conducted with the best intentions is still likely to conflate the socio-cultural meaning of age in the UK with the chronological age of UASCs (Boyden 1997). For example, a young Angolan woman arriving with her niece claimed to be 16 but was assessed to be over 18 by Social Services on the grounds that her knowledge and capacity to look after her niece suggested she was older (Toomey 2007). While *Merton*, in light of the significant extension in scope of judicial review and public law litigation, sought to

¹⁶ *B, R (on the application of) v Merton London Borough Council* [2003] EWHC 1689 (Admin).

¹⁷ *C, R (on the application of) v London Borough of Enfield* [2004] EWHC 2297 (Admin).

¹⁸ *A, R (on the application of) v London Borough of Croydon* [2009] EWHC 939 (Admin).

remedy Social Service age assessment by ensuring that it is lawful, it is questionable whether it can adequately compensate for this underlying issue.

Nevertheless, the judiciary has endorsed Social Service age assessments and used these to overturn UKBA age disputes; it is consequently now UKBA policy to accept a *Merton*-compliant age assessment as sufficient proof of age (UKBA 2009: 3). In fact, anecdotal evidence suggests that applicants are encouraged to approach Social Services for an age assessment before the lodging of an asylum claim, and at major screening units, social workers are employed to conduct age assessments on-site should a dispute arise (UKBA 2009). Thus the *Merton* case effectively shifted the location of age assessment for *the purpose of immigration* towards Local Authorities.

Age disputes within Social Services

[A paediatrician] still uses a two-year span, and often concludes that someone is between 17 and 19 or 16 and 18. It simply doesn't help us. We get an assessment like that, we will mostly conclude that they are adults (Social work manager quoted in Crawley 2007: 121).

Whether a person is a 'minor or not' is the main concern for processing the asylum claim. However, Social Services regularly provide services according to age (Dennis 2005, 2007; Wade *et al.* 2005) and several age thresholds become significant for rights, duties and treatment under social welfare legislation. For example, UASCs assessed to be 15 are likely to be placed in foster-homes, whilst those assessed to be 16 or over are usually offered semi-independent accommodation. In contrast to medical age assessments, the practice of social workers is therefore to state a specific age, not an age interval. By assessing age against a range of thresholds, the potential for incorrect determinations clearly increases. Indeed, interviewees from both advocacy groups and UKBA (I1-2; I4-5; I7; I9-10) underlined that the outsourcing of age assessment to Social Services has been accompanied by a parallel emergence and subsequent rise in age disputes within Local Authorities. Thus, although Local Authorities frequently accept both UKBA-disputed and UKBA-accepted UASCs to be minors, their stated ages may nevertheless be disputed. While these age disputes pertain only to services and do not concern whether the person is a 'child or not,' they need to be considered because, as we will see, they can nevertheless impact asylum determination.

Despite the fact that chronological distinctions are impossible to ascertain, it is, according to a policy advisor interviewed, "very difficult in the current climate to trigger any re-assessment [from Social Services]" (I5). Therefore, where paediatricians were previously commissioned to assess age and directly challenge UKBA age disputes, the policy to accept *Merton*-compliant age assessments as sufficient proof of age has shifted this trend. Increasingly, independent paediatric assessments have instead been employed to challenge Local Authorities' decisions (see for example A&WK).

In failing to take sufficient account of paediatric assessments, age-disputed claimants have sought judicial review of Local Authorities' decisions that they are ineligible for support

under CA89.¹⁹ The subsequent case law relates principally to the relative importance to be attached to medical and Social Service assessments in determining the age of an asylum seeker for both welfare and immigration (Blake and Kilroy 2004). Although Justice Stanley Burnton stressed the undesirability of judicialising the age assessment process in *Merton*, the judiciary has nevertheless clearly been brought into the age assessment process.

Towards an authoritative decision on age for immigration and welfare?

The predictability and procedural certainty of the age assessment process was ameliorated recently by *A & WK* which established a hierarchy between paediatric and Social Service age assessments.²⁰ Justice Collins held that a report from a paediatrician cannot generally “attract any greater weight than the observations of an experienced social worker” (para. 33). Although Social Services may not completely disregard a paediatric age assessment produced by the UASC, “it is for them to decide how much weight to attach to such a report and it is in a given case open to the decision maker to attach no weight” (para. 34). According to the Royal College of Paediatricians and Child Health, *A & WK* “may be seen as saying that a social worker’s view should always take precedence” (Tyler and Vickers 2009). Hence, in contrast to the majority of European states, ‘expert’ age assessment in the UK has firmly shifted to Social Services.

Two important consequences flow from the judgment. First, given the Home Office policy of accepting Local Authorities’ age assessments conducted for the purpose of welfare provision, paediatricians, with no institutional or financial interest in the outcome of an age assessment, have been removed from the age assessment process. Second, as Social Service assessments cannot be challenged with reference to medical reports, Local Authorities are likely to be increasingly subject to litigation. Whilst predictability has been conferred on the age assessment process by a hierarchy of assessment methods, it is quite another matter whether this is perceived as more legitimate and will reduce the level of contestation.

Conclusion

The asylum and welfare systems are based on age distinctions which are impossible to ascertain accurately, yet remain crucial to differentiate policy. Despite the centrality of age, the process for assessing the age of ‘age-disputed’ UASCs has only evolved reactively and in an *ad hoc* manner to contestation and legal challenges. It seems reasonable that implementing any age assessment process would need to consider the inherent inaccuracy of assessment techniques to curb potential contestation. However the discursive use of age disputes and the lack of not only predictability, but in fact *any* initial process for determining the age of age-disputed UASCs, has allowed their age assessment to develop into a highly complex, politicised and increasingly judicialised process straddling several

¹⁹ The High Court procedure where persons with ‘sufficient interest’ can challenge decisions of public authorities on the grounds that authorities have failed to meet their legal obligations or have acted unfairly or have exceeded or abused their powers.

²⁰ *A, R (on the application of) v London Borough of Croydon* [2009] EWHC 939 (Admin).

institutions. Not only are decisions on age itself challenged, but age assessment has become the centre for wider disputes on competence, institutional responsibilities, rights and immigration control. Successive attempts to close the space for contestation around age assessment through judgments or policy amendments have triggered new forms of challenges and brought in new actors. Whether the procedural certainty conferred on the process by entrusting Social Services to determine the age of disputed UASCs is likely to halt the ongoing controversy will be analysed in Part 3.

3 Questioning social service age assessment

The presence of social works teams helps facilitate timely and accurate decision on age that offers absolute clarity about the path of the individual through the appropriate asylum and support system (Home Office 2007b: para. 26).

What they are supposed to do is grant the benefit of the doubt, but I don't think that happens. They just make up ages (I5).

Local Authorities are not responsible for asylum and immigration policy and thus have no direct interest in the outcome of an asylum claim. Tasking social workers to assess and determine age within a needs assessment, rather than immigration officers at a screening interview, should appease child protection critics (Home Office 2007b: para. 25-26). Yet the out-sourcing of age assessment seems not to have lessened, but merely shifted the location and character of age disputes. Why is this so? Are rising numbers of age disputes within Local Authorities simply due to “more doubtful cases now being picked up by their [Social Service] processes” (I9)? Or, may it be due to other considerations influencing social workers and negatively impacting the decisions on UASCs' ages? If the latter is correct, as claimed by the two UASCs, A and M, litigation against Local Authorities are unlikely to subside. Indeed, the case of *A & M* is highly significant because it questioned the whole rationale of entrusting age assessment to Social Services and could also force a restructuring of the age assessment process.²¹ This part therefore analyses and evaluates core arguments put forward by the claimants and the Courts' reasoning in order to reflect upon current age assessment arrangements and the future development of the age assessment process.

Assessing needs and providing services under CA89: age as a differentiating tool

In order to contextualise and evaluate A and M's claim that social workers may be partial in their age assessment, it is first necessary to examine the context in which social workers conduct age assessments in order to identify *what* concerns, and *how* these might impact social workers, before proceeding to consider whether they in fact do so.

²¹ *M & Anor, R (on the application of) v London Borough of Lambeth & Ors* [2008] EWHC 1364 (Admin); appealed before Court of Appeals [2008] EWCA Civ 1445; appealed before UK Supreme Court [2009] UKSC 8.

Lack of competence and experience in assessing age

The judiciary has consistently held that there is no reason why age assessments conducted by qualified and experienced social workers should be any less accurate than paediatric assessments (*A&WK*: para. 33-38). Age assessment is, however, unforeseen by CA89. Consequently, interviewees (I1-2; I4-5; I7-10) stressed that experience, procedures and capacity to conduct age assessments, as well as their quality, differ significantly among Local Authorities (see also Home Office 2007b: para. 19; Wade *et al.* 2005: 27). Furthermore, whereas the judiciary presumed social workers to have the necessary expertise, assessing age is a new task for most social workers for which they are in fact neither sufficiently nor specifically trained. A few gateway authorities have developed their own guidelines to assess the age of UASCs, but Calvo *et al.* (2007: 35) concluded that overall there is “no single uniform process for assessing age and authorities tend to adopt their own approach without much regard to experience elsewhere.” Therefore, although *Merton* sought to ensure the lawfulness of Social Service age assessments, its implementation was found to be patchy (Calvo *et al.* 2007) and precise guidance on how to assess age is still lacking. Not surprisingly, Wade *et al.* (2005: 57) observed that social workers frequently found “decisions made at the time of referral or initial assessment [...] difficult to work with.”

Access to services on the basis of age rather than need

Need is not directly related to age, but age is, as seen in Part 2, often employed as a determinant of need (Dennis 2007). Assuming that needs are inversely correlated to age, older UASCs, and by extension those age-disputed, frequently experience only a cursory needs assessment and a standardised and circumscribed service response (Audit Commission 2000: 66; Wade *et al.* 2005: 59). Clearly, the reliability of an age assessment conducted within such a ‘procedural’ needs assessment is questionable (Mitchell 2007). By employing standardised age-based services, a paradoxical situation may arise where the age of a UASC is in fact determined on the basis of the services he or she is perceived to require. As a UKBA employee aptly explained:

If you have somebody between 14 and 16, if they are really ready to go into semi-independent living then you would want to say, ‘This person is I think 16’, rather than ‘I think they are 14’. You don’t want to put somebody who is keen for semi-independent living into 2 years of foster care (I10).

Within the logic of welfare provision and for the immediate purpose of accommodation, such a well-meant decision may be appropriate. However, bearing in mind that the age assessments are also used for asylum determination and immigration purposes,²² it becomes, as we shall see, much more problematic in the longer-term perspective.

Despite the use of standardised services accorded to specific ages and the possibly well-meant decisions to accord age in order to supply appropriate services, social work and organisational literature indicates that, overall, UASCs are habitually afforded lower

²² For example, there is no right of appeal for UASCs who are granted Discretionary Leave for less than one year, i.e., after the age 16 and a half.

standards of care than citizen children (CS 2008; Dennis 2002; Kohli 2007; Wade *et al.* 2005). Although the *Hillingdon* judicial review reversed the widely-held presumption that UASCs over 16 should be ‘assisted’ under section 17 of CA89 rather than ‘looked after’ under section 20, several interviewees (I3; I4; I7) pointed to the recent practice of de-accommodating UASCs before the age of 18 (see also Children’s Commissioner 2007; JCHR 2007a: para. 188). De-accommodation, the practice of taking children out of the ‘looked after’ system and providing them with support under the ‘leaving care’ provisions of the Children (Leaving Care) Act 2000 (JCHR 2007a: para. 187), may be regarded as an example of Local Authorities’ continuing practice to limit their responsibility towards UASCs, especially for those over 16.

Shortage of resources within Local Authorities

Social work literature argues that the prevalence of such practice is due to insufficient funding, specifically “differences in age-related funding [...] through the Home Office special grant” (Wade *et al.* 2005: 64). Although “Local Authorities can apply to the UKBA for reimbursement of the costs incurred in supporting each child” (Bentley 2008: para. 21), reports by Save the Children and the Refugee Council found a significant gap between Local Authorities’ obligations towards UASCs and the grants provided by the Home Office (Dennis 2005; Free 2005). Local Authorities’ financial commitments were further extended when the judiciary expanded eligibility for section 20 services (*Hillingdon*), as UASCs then became entitled to Leaving Care services under the Children (Leaving Care) Act 2000 until the age of 21 rather than 18 (Dixon and Wade 2007).

In relation to funding, it is important to bear in mind that the Local Authority where a UASC first presents him- or herself as ‘in need’ is under a duty to conduct the needs assessment and to provide services.²³ Therefore, a few London boroughs bear a disproportionate burden. According to a children’s rights policy advisor interviewed, the expanded eligibility for Leaving Care had budgetary implications “the government departments were not prepared to fund [...] and some Local Authorities became very indebted” (I4). Indeed, London Borough of Hillingdon claimed that “if greater funding was available there is no doubt that services to children and young people could be improved and enhanced” (quoted in JCHR 2007a: para. 188).

Conversely, UKBA maintains that their reimbursement is sufficient to cover the costs incurred by Local Authorities in supporting UASCs under 18, and that other funding is available for Leaving Care costs (Bentley 2008: para. 20-23). This is supported by Calvo *et al.* (2007: 41), who rather identified organisational, cultural, instrumental and legal aspects affecting Local Authorities’ ability and capacity to implement *Hillingdon* and *Merton*. Nevertheless, for younger UASCs, Leaving Care services and section 20 duties also entail substantial non-financial resources such as the availability of foster homes, schools and qualified social workers. Wade *et al.* (2005: 225) therefore conclude that it “is difficult to escape the conclusion that these overall patterns [use of section 17] were linked to the lack of statutory obligations for visiting, care planning and review when

²³ UASCs are not dispersed.

providing section 17 accommodation and support.” Hence the resource implications of caring for UASCs should be understood more broadly than merely pertaining to financial costs. Coupled with a generalised suspicion towards older UASCs, this may better account for the difficulties voiced by Local Authorities and for the lower standard of services offered to UASCs.

Scarce resources, age-based services, and a lack of experience and guidance in assessing age can all potentially impact the outcome of the age assessment. As eligibility for Local Authorities’ services has progressively expanded through guidance and case law, Social Services’ discretion in assessing needs and moreover in deciding responses has simultaneously been restricted. As a result, age has effectively become the differentiating tool when determining service responses.

The case of *A&M*: can social workers make an impartial age determination?

Age-dependent services within tight resource constraints may create incentives to assess the age of undocumented UASCs upwards. However, whether or how the overall pressures on Local Authorities are felt by the individual social workers and impact their individual age assessments is another matter. Several interviewees (I1; I4-5; I7) suggested that social workers may be directly pressured to classify applicants as adults to avoid incurring costs (see also Crawley 2007: 78). Others, such as the Children’s Commissioner, consider it “naïve to think that [...] [the pressure of scarce resources] doesn’t impact and filter down to practice” (Aynsley-Green 2008: para. 21). Entrusting the final decision on age to the Local Authority responsible for providing the services, subject only to judicial review, was therefore challenged in *A&M*.

A and M claimed to be UASCs upon arrival but were disputed by immigration officers and referred to Social Services for age assessments. Both were interviewed and assessed by two social workers to be over 18. After providing medical reports determining them to be under 18, they sought judicial reviews of the decisions that they were not entitled to services under CA89 claiming that the social workers, given the financial consequences for the Local Authority of their employment, were not impartial in determining their ages.

Although both the High Court and Court of Appeal “had no sympathy for the claim” (I9), asserting that financial scarcity does not impact individual social workers’ age assessments, *A&M*’s subsequent journey to, and being upheld by, the Supreme Court, is symptomatic of the disquiet with current procedures. However, the Courts’ different reasoning and failure to engage with fundamental concerns of the age assessment process suggests that the controversy of age assessment is unlikely to be settled.

Two legally distinct but conceptually linked preliminary issues were to be determined in the judicial review. First, are Social Service procedures to assess age compatible with the requirements of Article 6(1) of the 1950 European Convention of Human Rights (ECHR)? If not, can judicial review remedy such a defective process? Second, is the

question of whether an individual is a ‘child or not’ for the purpose of CA89 one of precedent fact, i.e. is the decision ultimately for the authority administering the services to make, or is it for the Court to make? Whereas the first question concerns whether domestic procedures are compatible with international legal obligations, and the second to the construction of the CA89 text, both stem from a concern with social workers’ potential lack of impartiality.

The issue of Article 6(1) of ECHR

Pursuant to Article 6(1) of ECHR, “[i]n determination of his civil rights and obligations [...], everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law.” As employees of the Local Authority, social workers are clearly not independent when determining whether UASCs are to be accommodated under CA89. Whether they are impartial is therefore crucial. However the Courts declined to rule that accommodation under section 20 of CA89 amounts to a civil right within the meaning of Article 6(1) of ECHR, and hence that Social Service age assessment is affected by the procedural requirements therein. Nevertheless, the High Court and Court of Appeal reasoned that, even assuming that section 20 gave rise to a civil right subject to the guarantees of Article 6(1) of ECHR, an age assessment is merely a ‘staging post’ and not an assessment of this substantive right (EWHC: para. 87; EWCA: para. 49, 60). Thus the procedural fairness of age assessment as such was side-stepped.

Whilst the courts are tasked to pronounce on precise matters of law, assumptions made in passing about the overall functioning of the age assessment process warrant comment. Brushing aside any incentives for social workers to adjust age upwards, Lord Justice Ward held that, even assuming Article 6(1) were to be engaged:

the social workers were merely employees [...] It cannot realistically be said that a lack of independence and impartiality arising from no more than the organisational structure of employment can so infect the social workers decisions as to be incapable of cure by judicial review (EWCA: para. 68, 71).

However, judicial review is concerned with process: whether public authorities’ decisions are made in a legal, reasonable and fair manner. It may cure actual bias (where a decision-maker takes irrelevant considerations into account or disregards relevant ones; in this case a medical report), but it cannot redress apparent unconscious bias (UKSC: para. 43). Consequently, if impartiality at the first stage has practical content, i.e. the age determined, it affects the whole process. Denying that scarce financial resources can lead to even the possibility of unconscious bias on the part of social workers (EWHC: para. 117; EWCA: para. 68-71), by reference to the organisational structure of employment, fails to engage with the serious concerns voiced by a range of actors. For example, in reaching this conclusion, Lord Justice Ward presupposed social workers to have both professional training and experience in conducting such assessments (EWCA: para. 68-69). Although the social worker may well possess strong integrity and professional experience in assessing *needs*, age assessment is, as discussed above, unforeseen by CA89. A combination of scant instruction, guidance and experience, as well as the practice of age-based services within overall tight resource constraints, cannot easily be overlooked

as factors that could cause unconscious bias when assessing *age*. While these concerns may not in fact impact social workers, the Courts' assumptions are nevertheless problematic.

Justice Bennett also declined to rule that social workers may be seen as partial because “[i]t really must be understood that Parliament has plainly laid upon social workers the obligations inherent in section 20 [...] one of which is to make an assessment of a young person’s age” (EWHC: para. 117). As one interviewee summarised:

if age assessment is part of an evaluative needs assessment and they [Local Authorities] make such evaluative assessments on all their public services, you can’t possibly say that they are partial on every decision (15).

Thus, if a breach of Article 6(1) of ECHR were to be invoked each time a claimant disagrees with an age assessment, it could, according to Justice Bennett, effectively paralyse Local Authorities in fulfilling their duties (EWHC: para. 118).

Are section 20 services owed to a ‘child in need’?

The ‘staging post’ argument and need for efficient administration was also invoked by the High Court and Court of Appeal in holding that whether a person is a ‘child or not’ for the purpose of section 20 of CA89 is ultimately for the Local Authority to decide.

Under section 20(1) of CA89, “[e]very local authority shall provide accommodation for any child in need within their area.” Both the High Court and Court of Appeal considered the jurisdictional threshold to be a ‘child in need,’ a composite and evaluative term (EWCA: para. 25). Consequently, because assessing needs and administering benefits under CA89 has been entrusted to social workers, evaluating whether there is a ‘child in need,’ of which age assessment is merely a staging post, falls within the remit of Local Authorities (EWHC: para. 31, 117). Any other construction of section 20 would according to the Courts be contrary to good administration (EWCA: para. 30). For example, if a specialist panel were to make the determination of age as suggested by UKBA and ILPA (BIA 2008: para. 5.2-3; *Crawley* 2007), Justice Collins concluded that:

the cost [...] will be considerable, there will be significant delay, urgent decisions will have to be taken in the interim and all of this uncertainty and delay will be inimical to the welfare of young people (EWCA: para. 28).

Therefore, for section 20 to operate effectively, it is the social worker who must decide the age of the applicant (EWCA: para. 30). The consequence of constructing Local Authorities’ duties under section 20 of CA89 to a ‘child in need’ is that Local Authorities’ duties are owed only to a person who *appears to the Local Authority* to be a child and in need.

The problem with age assessment as part of a needs assessment within the context of section 20 of CA89 is that social workers have become competent to make an authoritative decision on age because they are competent to assess needs. The conflation of age and needs assessments for CA89 may be legally feasible and a prerequisite for a swift service response (EHC: para. 118). But it has arguably come to be seen as such

because the specific age assessment process in the UK has shifted the imperative of age assessment to Local Authorities in the first instance. Bias resulting from any combination of scarce resources, age-based services, lack of competence and experience, urgent decisions on age and a generalised suspicion towards UASCs could influence age assessments. Yet the decision on age could, prior to the Supreme Court upholding the appeal, only be brought to judicial review. As a policy advisor interviewed summarised:

[W]e wanted Social Services to be making decisions on age, we felt they had the expertise and it was within their remit to make those decisions. But after so many years of seeing so many court decisions and such variety across the country, we finally, reluctantly came to the conclusion that actually we didn't think social workers should be making those decisions, because of the pressures on them, their lack of training, their lack of skills, lots of reasons (15).

Because the reasoning of the High Court and the Court of Appeal largely side-stepped or failed to engage with fundamental concerns with the age assessment process in holding that social workers are not partial, *A&M*'s subsequent journey to the Supreme Court is symptomatic of the disquiet with current age assessment procedures.

A child 'in need' is not a 'child in need'

Tacitly acknowledging the potential inadequacies of age assessment procedures, but refraining from commenting on social workers' impartiality, the Supreme Court unanimously held that whether a UASC is a 'child or not' for section 20 of CA89 is a question of jurisdictional fact, not of evaluative judgment. As such it may be determined by the Court on the balance of probabilities (para. 27-32). According to Lord Hope, "whether the child is 'in need' is for the social worker to determine [...] [but] it was not Parliament's intention to leave this matter [whether the person is a child or not] to the judgment of the Local Authority" (para. 53). Thus the qualifying threshold for triggering section 20 services is now a child who is 'in need,' not "a person whom the Local Authority has reasonable grounds to believing is a child" (para. 47).

The Supreme Court decision may alleviate some concern regarding the possible pressures impacting social workers' age assessments by entrusting the Courts with the ultimate decision in cases of protracted dispute. Yet age assessment as such is hardly improved. Decisions on age still rest with Local Authorities, and if appealed it is doubtful whether judges are more competent to make a final decision. Furthermore, age disputes within Social Services do not merely concern whether a person is a 'child or not' for CA89. Rather age disputes increasingly concern the specific age of a UASC recognised to be a child. Whilst these age disputes may also influence the asylum determination process, it is unclear if and how the Courts will approach the rising number of UASCs who are recognised as minors but nevertheless have their stated age disputed by Social Services. Whether *A&M* will dampen criticism and curb future contestation waits to be seen.

Conclusion

Social workers have been delegated the thankless task of assessing the age of UASCs. Although the Supreme Court recently entrusted the ultimate decision to the courts in cases of protracted dispute, age assessment remains linked to accommodation and services under CA89 and will continue to be conducted by social workers in the context of

needs assessments. Factors that could impact the actual decision on age, or at least limit the scope for granting the benefit of the doubt, have not been remedied by *A&M*.

However, a social worker's decision on age is, according to a policy advisor interviewed:

absolutely not a decision under the Children Act [CA89]; it is a decision about how they [UASCs] can be treated in the immigration system, it could be a decision about whether they are removed from the country or remain here, whether they are detained or not (17).

A year's inaccuracy may be of little consequence within the welfare system but decisive within the asylum system. Hence the legal challenges to age assessments discretely contained within the welfare system must be understood in a broader context. Social workers' impartiality in assessing and deciding age to provide services is not the issue at stake, but rather their impartiality in making a decision on age for the purpose of determining immigration status. It is questionable whether an adequate standard for granting the benefit of the doubt to age-disputed UASCs for the purpose of asylum (UNCmRC 2008: para. 71(e); UNHCR 2009: para. 7; ExCom 2007: para. (g)(ix)) is attainable within age assessments currently conducted by Social Services for welfare provision. The crucial issue underlying *A&M*, the effect of non-immigration age assessment upon immigration status and asylum determination, remains unresolved.

4 Age assessment, credibility and asylum determination

[G]enerally when people are [age] disputed, I think it's a lack of understanding about how to use credibility. I think it's a lack of understanding about where they come from and what's happened to them, a lack of ability to analyse information, often huge generalisations and sweeping statements made in these assessments (15).

Age may impact procedural and substantive aspects of asylum determination (Edwards 2003; McAdam 2006). Clearly, the outcome of an age assessment is important for both the claimant and the adjudicator, and may be decisive for a decision to grant immigration or protection status. However, it is pertinent also to analyse if and how the process of age assessment itself may impact individuals' asylum determination. This last part therefore brings the age assessment process back into the asylum system by analysing how the cumulative effect of the age assessment process may have unintended and unforeseen consequences for UASCs' credibility evaluation and asylum determination.

UASCs and credibility assessment in the UK

The success of an asylum claim often hinges on the general credibility, or trustworthiness, of the asylum seeker. As asylum law adopts a lower standard of proof due to the

difficulties in substantiating a claim for protection, the applicant's overall credibility becomes decisive in separating 'genuine' refugees from 'bogus' asylum seekers.²⁴

A claim's credibility and the applicant's (general) credibility are interlinked. Because asylum determination in the UK relies "heavily on the assessments of the credibility of applicants" (Drudy 2006: 88), policy makers have turned to, and sought to condition, both assessment of evidence and credibility evaluation (Harvey 2005; Thomas 2005; Zahle 2005). For example, as part of the overall attempt to restrict the number of asylum seekers, primary legislation has been passed establishing presumptions that certain behaviour and information external to the asylum account, such as the failure to produce a passport or answer questions upon request (AITCA04, s. 8), damage the reliability of evidence submitted and the credibility of the applicant (AI 2004: 27; Thomas 2006: 93). In this way, the claim's credibility is linked to overall policy aims through presumptions about the applicant's credibility. In light of such presumptive scepticism and emphasis on negative credibility evaluation, it is not surprising that Drudy (2006: 89) found adverse credibility findings to be decisive in a large proportion of denials in the UK.

Nevertheless, child protection concerns dictate that whilst children must show the same standard of well-founded fear of persecution, "the benefit of the doubt must be applied more liberally" (UKBA 2007: 22). Therefore, even though UASCs have neither been exempted formally, nor in practice, from legislated presumptions of negative credibility (JCHR 2009: Ev108; RCC 2008: 6), the decision-maker should not draw adverse inferences as to the claim's credibility when evidence is unreliable or inadequate (UKBA 2007: 22-23; 2008a: 8-10). Despite these more lenient standards, UASCs have, as seen in Part 1, a statistical disadvantage in securing refugee status in the UK. It seems that their status as children and unaccompanied may negatively impact their personal credibility, rendering their claims non-credible and themselves ineligible for refugee status.

Although guidance and law stipulate both assessment of credibility and granting the benefit of the doubt (UKBA 2008a: 9-10), credibility evaluation remains characterised by a high level of discretion and subjectivity on the part of the individual adjudicator (Noll 2005a: 1). Since the account's consistency and plausibility as well as the applicant's demeanour are commonly used as proxies to evaluate credibility (Millbank 2009: 6), an applicant's perceived credibility is frequently based on the adjudicator's personal sympathy and stereotypical expectations that certain behaviour, risk, demeanour and action are credible (Crawley 2001; Good 2007; Keith and Holmes 2009; Rottman *et al.* 2009). The credibility evaluation can be positively or negatively biased. For example, the Refugee Convention has long been criticised for its gender-insensitivity, yet Spijkerboer (2000) found that women's traditional 'victim status' has positively biased their being granted the benefit of the doubt.

²⁴ A "coherent and plausible" claim "not contradicted by available information relevant to his claim" is to be considered credible (IR 3391 (iii); UNHCR 1992: para. 204).

The credibility of UASCs often hinges on whether their actions and experiences can be acknowledged by the adjudicator as plausible for a child. Because immigration and asylum law has traditionally focused on adults, with scant attention to children's experiences (Bhabha and Young 1999; Dalrymple 2006; Thronson 2002), Western asylum adjudication has overwhelmingly mirrored the stereotypical understanding of children as vulnerable, dependent and lacking agency (see Part 1). For example, UNHCR guidelines caution that UASCs may not be 'sufficiently mature' (1992: 215) to make the conscious choices or engage in the political action or activist behaviour perceived to trigger the targeted and individualised persecution commonly assumed to be the basis of the Refugee Convention (Bentley 2005; Estrada 2008; Goodwin-Gill 1995; Halvorsen 2004, 2005a, 2005b; Hart 2008; McAdam 2006). Thus UASCs' minority can effectively disqualify their claims with reference to their immaturity, whilst at the same time "their life experience [...] [may be] so at odds with decision makers' conceptions of what constitutes 'childhood,' [...] the category 'child' is viewed as inapplicable" (Bhabha 2001: 294). In both cases the divergence between UASCs' experiences and claims of persecution and adjudicators' age-based expectations may render the claims implausible, and by extension, the UASCs non-credible.

Credibility evaluation in the UK is increasingly politically conditioned, but nevertheless remains characterised by discretion. In the case of UASCs, however, the exercise of discretion seems to be moderated by the strength of the prevailing understanding of 'child' and 'childhood.' Successful claims, such as victims of trafficking or child soldiers, are often premised on a 'pure' victim status (Grover 2008) whilst UASCs claiming some attribute of political agency fare worse than adults (Bhabha 2001, 2004). Coupled with the overall predisposition towards negative credibility evaluation and a political scepticism towards UASCs, UNHCR (2009c: 4) found only a "limited application of the 'benefit of the doubt' principle" to UASCs in the UK.

Age-disputed UASCs: a general lack of credibility?

If UASCs occupy an ambivalent position in terms of asylum determination, mirrored in their credibility assessment (AI 2004), it is necessary to question how age-disputed UASCs' credibility is perceived and evaluated. Not only do age disputes exacerbate the intrinsic tensions in the adult-child dichotomy, but they also link age-disputed UASCs directly to the discourse of 'adults posing as minors.'

Whereas all UASCs may face considerable scepticism in presenting their claims as plausibly those of a child, for age-disputed UASCs, the disjuncture between the claimant's appearance, demeanour or experience and the adjudicator's age-based expectations is frequently starker, to the extent that their minority, or age, is disputed. Demeanour and appearance are acknowledged to be unreliable indicators for credibility, but several interviewees (I1; I5; I7; I9) pointed to the inclination to age-dispute those who act 'street-wise' or display disproportionate capacities (see also Crawley 2007, 2009), aptly illustrating how such traits influence the conceptions of 'child' and directly impact their perceived credibility. Therefore, although age disputes are initiated by immigration officers or social workers and age assessments should be completed prior to the asylum

interview, the case-worker interviewing the age-disputed UASC is nevertheless faced with the same mismatch of age-based expectations that may have triggered the initial dispute. Whilst the case-worker should adhere to the pre-determined age, it is likely that such traits may also unconsciously bias the evaluation of the UASC's general credibility and the claim's plausibility.

Underpinning the inclination to doubt age-disputed UASCs' credibility based on demeanour and experience is the discourse on adults seeking to exploit the generous protection mechanisms in place for children. As seen, the culprits, age-disputed persons, have been discursively framed as *de facto* abusive adults *before* any age assessment has been conducted. Thus all age-disputed UASCs are discursively associated with a suspect category, irrespective of their age assessment. An age-disputed UASC assessed to be an adult is thereby morally discredited in addition to being judged untrustworthy because lying about his or her age is considered to "conceal information, mislead, obstruct or delay the asylum processing" (AITCA04, s. 8). Yet, because falling within the age-dispute category is suspicious, if not proof of abuse, it is also probable that UASCs accepted as borderline minors may still be viewed with suspicion, especially if their appearance suggests they are older. The discourse surrounding age disputes may taint the credibility of all those singled out and categorised as 'age-disputed,' irrespective of the outcome of age assessment.

It therefore seems plausible that this punitive discourse on adults posing as minors, coupled with a disjunction between case-workers' age-based expectations and traits displayed by age-disputed UASCs, can negatively bias an evaluation of their credibility. According to Kohli, "[t]he chain of ambivalence [towards asylum seekers] is extended in such a way that it links national policies with local procedures and practices" (2007: 53). Especially, perhaps, since the discourse on adults posing as minors emanates from the same institution determining asylum claims.

Using age assessment to test credibility?

The above section was premised on a clear divergence of age-based expectations that could impact a UASC's credibility evaluation irrespective of whether or not the case-worker interviewing knew the person to be age-disputed. However, age disputes, as seen, increasingly occur within Social Services and concern age determination below 18. Many of these age-disputed UASCs do not exhibit traits that "very strongly suggest [...] they are aged 18 or over" (UKBA 2009: 3 (emphasis in original)). Yet is their credibility also tainted? Does the age assessment process *as such* negatively impact credibility evaluation of all age-disputed persons?

Given the inaccuracy of age assessment techniques, the credibility of a UASC should ideally not be tarnished if he or she is determined to be a borderline adult or to be a minor but with a different age to that claimed. Certainly such age disputes should not be used to question the general credibility or disclaim the asylum-account on the grounds that the UASC has provided untruthful information. Yet several interviewees (I1-2; I4-5; I7) suggested that this is frequently the case. As we shall see, however, this may be neither

intentional nor due to an ingrained distrust amongst case-workers towards all formerly age-disputed UASCs. Rather, it appears to result from a series of well-meant managerial improvements which, coupled with assumptions about UASCs' eligibility for refugee status and negative credibility evaluation, causes age disputes to join the list of information external to the asylum account which may damage an applicant's credibility (Thomas 2006: 93).

A new information-sharing duty: The implication of *A&WK*

The UK legislative design requires the Home Office to make an independent decision on age for the purpose of immigration (IND & ADSS 2004: para. 7; Latham 2004), although in practice the decision has been devolved to Local Authorities. Therefore, in order to:

avoid litigation or confusion that arises from the Local Authority and Home Office taking a different view,²⁵ then we need to see the whole [Social Service] assessment [...] if we're going to base our decision on the assessment [...] otherwise our decision is very much in danger of being overturned by any court that comes to look at it (I15).

While Justice Collins held that it was therefore "entirely reasonable that it [Social Service age assessment] should be disclosed to the Home Office" (*A&WK*: para. 39), this information-sharing duty may have created unforeseen effects on asylum determination because of its use in evaluating credibility.

When evaluating a claim's credibility, considerable emphasis is placed in practice on consistency between and within statements (Doornbos 2005: 103; Spijkerboer 2005: 68; UKBA 2008a: 8). As documentary evidence is frequently lacking, case-workers need to base their decisions on asylum seekers' own testimonies and habitually scrutinise their consistency. For example, significant inconsistencies between information contained in the self-evaluation form and from the asylum interview have been found to weaken an asylum seeker's credibility (Asylum Aid 1999: 26-32, 1995: 15).²⁶ Consequently, several interviewees (I1-2; I7) voiced concern that disclosing the full age assessment to the Home Office might not only increase the potential for discrepant information, but also its use for discrediting applicants.

With respect to such information-sharing concerns, Social Service age assessments do not in principle pertain to the same issues as the asylum-interview and self-evaluation form, such as reasons for flight and seeking asylum. Nonetheless, Zahle (2005: 20) argues that "doubts as to the credibility of the statement are often based on supplementary information from the authorities." Bhabha & Finch (2006: 103) also found that in the UK, "the content of screening interviews [meant only to establish identity and travel route] is

²⁵ For example, where an immigration judge in an asylum appeal asserts that an applicant is a minor and the Local Authority claims s/he is an adult, the Home Office may adopt the former.

²⁶ For commentary on inconsistency in asylum testimonies see for example Coffey, G. (2003) "The Credibility of Credibility Evidence at the Refugee Review Tribunal", *International Journal of Refugee Law* 15(3): 377-417; Cohen, J. (2001) "Questions of credibility: omissions, discrepancies and errors of recall in the testimony of asylum seekers," *International Journal of Refugee Law* 13(3): 293-309.

heavily relied upon when IND makes a decision on an unaccompanied or separated child's application for asylum." Thus, the contention that age assessment may constitute supplementary information which can be used to discredit the applicant may well be warranted.

Nevertheless, access to the full age assessment in order to make a decision on age for immigration purposes is not the same as using an age assessment to contrast information with that of the asylum claim. As a legal officer interviewed observed:

Mr. Collin's comment wasn't suggesting that [the Home Office] ought to be using it [Social Service age assessment] for asylum purposes. I think he was confining his comment to age disputes (I15).

However, under current asylum determination procedures, a single case-worker should follow the case from its lodging throughout the entire asylum process. The interviews (I1-2; I4-5; I7-10) further suggested that there is 'no policy' specifying whether or not this same case-worker should also make the age decision for the Home Office. In any case, several interviewees (I5; I7-10) confirmed that the age assessment follows the case file. Therefore, according to a UKBA employee, "if you have evidence, [...] especially if it contradicts something else you've been told or has been submitted to you, it is difficult to see how you could ignore it" (I9) when making a decision on the asylum seeker's credibility and claim.

Assessing age or evaluating credibility?

According to Amnesty International UK (AI 2004), relying on information given in a different context for assessing the consistency and credibility of an asylum claim is problematic. Yet in principle it is not unreasonable to assume that an asylum seeker should provide the same information to different public authorities, provided it is recorded accurately. Can the anxiety to share age assessments also be attributed to the range, type and detail of information elicited by social workers and its potential overlap with the information gathered in the asylum interview? This seems plausible in light of the variable quality of age assessments and possible partiality of social workers, the lack of verbatim records and, in particular, an increasing tendency to question UASCs' asylum-grounds and to test their credibility.

Guidance issued to Local Authorities has consistently stated that UASCs, being both children and unaccompanied, are presumed to be 'in need' and thereby entitled to services under CA89 (DoH 2003). Consequently, social workers must assess the age of UASCs to determine whether they are children. However, commonly overlooked is the necessity for Social Services also to verify that they are indeed unaccompanied asylum seekers (Wade *et al.* 2005: 42). Possibly because of this, the UASC's history of persecution and reasons for claiming asylum are often questioned within Social Service age assessments, and according to several interviewees (I1-2; I4-5; I7; I9-10), clearly beyond that necessary to verify identity. Coupled with the need to elicit the general background of the UASC in order to clarify his or her age (*Merton*: para. 37), age assessments seem to slip easily into territory not pertinent to establishing age, identity or needs. As a UKBA

policy advisor exclaimed: “why does a social worker need to interview someone about issues to do with persecution?” (I9).

This confusion regarding the role and purpose of age assessment, as opposed to eliciting and testing the asylum grounds, was given impetus by the well-meant but possibly misplaced advice offered by Justice Stanley Burnton in *Merton*. Holding that “appearance, behaviour and the credibility of his [the UASC’s] account are all matters that reflect on each other” (para. 28), he went on to state that “[i]f there is reason to doubt the applicant’s statement about his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility” (para. 37). According to a number of interviewees (I1-2; I4-5; I7; I9) this guidance has “encouraged some Local Authorities to focus disproportionately on the credibility of an asylum-seeker’s account” (Crawley 2007: 99). Taking a life history, including a history of persecution, may be relevant to establish the chronological age. However, the practice of testing UASCs’ credibility based in part on the asylum claim, and, in particular, drawing inferences about a UASC’s *age* from the perceived credibility of the asylum claim, is plainly not within social workers’ competence. Thus according to a UKBA policy advisor, “a lot of assessments are a curious mix-and-match of quasi-objective sort of criteria [...] mixed up with credibility” (I9). According to another UKBA employee, “[w]e’ve given credibility decisions to people who aren’t used to making credibility decisions [...] and it impacts their decisions on age” (I10).

The information about disputed UASCs’ asylum claims and the possible inferences drawn by social workers feed directly back into the asylum system under the information-sharing duty. As credibility testing is routine in asylum interviews (Doornbos 2005: 104), and the consistency of and between statements is used as proxy, age-disputed UASCs’ credibility is more likely to be questioned and doubted even if they are assessed to be minors. In the current political climate, where the government believes that lying about age is used to benefit from generous provisions and where credibility evaluation is overall negatively biased, being age-disputed and age-assessed by Social Services for the purpose of welfare provision is likely to taint the asylum determination:

If they are minors, but they’re not the age they said they are, then the Home Office will straight away latch onto that and just say ‘you said you were 15 but Social Services have said you are 16, therefore you are not being truthful about your claim, therefore we don’t believe you about anything else you’ve said’ [...] There is definitely an advantage to not being age-disputed and just be a minor (I1).

Conclusion

Stanley (2001) has argued that it is helpful for the asylum adjudication of UASCs that Social Services intervene with information to the Home Office. However, age assessment in its current form constitutes neither helpful nor, in many cases, relevant information. Assumptions about the relationship between age and refugee status already appear to render UASCs largely ineligible for refugee status, and their claims are furthermore perceived to undergo a more ‘perfunctory’ assessment (RCC 2007; UNHCR 2009c). Underscored by increasingly negative incentives to recognise refugees, the unreliability of

Social Service age assessments and the inadequacies of the assessment process render their use for evaluating UASCs' general credibility highly questionable. Although discrepancies in recorded age may indicate untruthfulness and wilful obstruction of the asylum process, this is not necessarily the case. Nevertheless, the cumulative effect of being age disputed and age assessed may prejudice age-disputed UASCs in securing refugee status.

Concluding remarks

Unauthorised entries by undocumented minors claiming asylum appear unlikely to abate in the near future, and neither will the exclusionary orientation of current asylum policy. Hence age assessment will remain integral to UK asylum determination and warrant independent scrutiny.

Age assessment is portrayed as a technical issue, but its function and effect is profoundly political. A system based on a distinction which is impossible to ascertain accurately, yet crucial to differentiate policy towards minors and adults, lends itself to contestation. Nevertheless, this analysis has sought to demonstrate how the controversy surrounding age assessment is neither the result of an intentional use of such assessments nor, it would seem, is it entirely inevitable. Rather, the UK age assessment process should be viewed as a response to shifting concerns related to children and asylum resulting from a particular conflation of conditions which has enabled age assessment to become, and remain, contentious.

Whilst age assessment is shaped by a disputatious conceptualisation and underscored by a discourse of 'adults posing as minors,' the fractured institutional and legislative set-up has also impeded a clear management and consensual implementation of age assessment procedures. As age is central to both welfare and immigration, a range of actors with diverse interests has become involved in the process, gradually transforming age assessment to a pivot around which wider disputes on competence, institutional responsibilities, children's rights and immigration control take place. Successive attempts to close spaces for contesting age assessment and to confer predictability upon the process, for example by creating hierarchies between assessments, have only triggered new challenges and perpetuated the process.

Currently, age assessment is entrusted to Social Services for the purpose of providing accommodation under CA89. However, the ongoing controversy and litigation against Local Authorities must be understood to concern the right to designate age for the purpose of immigration, rather than for providing services. The apprehension voiced that factors external to age assessment, such as scarce resources, lack of training and age-based services, may limit the scope for granting the benefit of the doubt to age-disputed UASCs, cannot be easily brushed aside. Because the subsequent impact of the assessed age within

the asylum system may be far-reaching, the age assessment process is likely to fuel new challenges despite the recent Supreme Court decision.

Most problematically, the process as a whole may directly or indirectly negatively impact age-disputed UASCs' asylum determination, irrespective of the outcome of their age assessment. The process for assessing age and the discourse surrounding age assessment has effectively rendered those categorised as 'age-disputed' suspicious in terms of the genuineness of their asylum claims. Coupled with the access to, and use of, age assessments to compare and test credibility in the context of asylum determination, it is reasonable to believe that age-disputed UASCs will be negatively impacted in light of the emphasis on presumptive negative credibility. The mere fact of having been through the age assessment process can affect the asylum decision and thus reinforce the politicised nature of assessing age in the UK.

By scrutinising age, largely irrelevant to a claim for international protection yet in practice decisive, simplistic assumptions about UASCs, their claims and the reasons for age disputes may be repudiated. Age assessment in its current form is neither designed to be an immigration tool, nor to ensure the protection of children. It is not an extension of anti-immigration, anti-human rights and anti-judiciary sentiments in the UK, nor is it simply a result of more adults posing as minors. Age assessment is a response to various pressures that require a decision on age to categorise UASCs for the purposes of immigration and welfare: it is a problematic process located at the intersection of contending discourses and policies surrounding asylum and childhood and which seeks to guard society's morality vis-à-vis asylum seekers and children. However, in seeking to reconcile these conflicting normative agendas, the cumulative effect of the process has paradoxically created a distinct category within the asylum regime which may be systematically prejudiced from securing refugee status.

Promoting an understanding of age assessment as a product of discursive, institutional, financial, legislative and conceptual forces, this paper seeks to dispel some antipathy between advocacy groups and state authorities in the UK. Whereas the belief that age disputes are used as an immigration tool may hold true for the initial decision to dispute, the potential negative impact of age assessment on asylum adjudication filters through numerous actors and institutions not directly working with asylum and immigration. Grasping this process, and thus also why age-disputed UASCs may not be granted the benefit of the doubt within the asylum system (UNCmRC 2008: para. 71(e)), should elicit a less emotive and demonising critique of the government, which as a result cannot be as easily brushed aside with a view to rectifying the age assessment process.

This paper has specifically sought to elucidate a range of prevalent political and social factors which could explain the politicised nature of age assessment in the UK. It has also argued that the likely outcome of the current age assessment process will negatively impact asylum determination for age-disputed UASCs. There is an urgent need to fill the statistical void over the outcomes of age disputes to better grasp the scale of 'adults posing as minors' or children unrightfully treated as adults, as well as to gather empirical data on

the effect of the age assessment process on the asylum determination of those persons subjected to the process. Some headway has been made regarding gender-sensitivity in asylum adjudication, but there is still scarce empirical analysis of the impact of age on asylum adjudication. Combined with age-sensitive analysis of immigration hearings and Reasons for Refusal letters, scrutinising age assessment and its impact on asylum determination would hopefully contribute to this limited material. By concretely and starkly exemplifying the issues relating to age and credibility, such analysis might uncover tacit and explicit assumptions about age, asylum and childhood. It may also draw attention to the hazy boundary between denying childhood and denying protection claims.

Age-disputed UASCs defy the strict separation between adults and children. Claiming to belong to one category while possessing attributes of the other, they unsettle our notions of both children and asylum seekers. The passing of the Borders, Citizenship and Immigration Act 2009 instituted the much-anticipated duty for the Immigration Service to safeguard the welfare and promote the best interests of children (s. 55). If, and how, this new duty will impact the age assessment process remains to be seen. By re-inscribing the strict separation and understanding of children and adults, such a duty might solidify the gap between adults and children in which age-disputed UASCs already fall and further exacerbate their uneasy position. Thus *A&M* may not represent the culmination of a political controversy but rather the opening of a new avenue for contestation surrounding the interrelationship and mutual influence of age, welfare provision and asylum adjudication.

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- 12 **ANONYMOUS** (Legal Representative, Refugee Organisation A) Interview with author, London, 16 July 2009.
- 13 **ANONYMOUS** (Legal Representative, Solicitor’s firm) (2009), Interview with author, Oxford, 16 July 2009.
- 14 **ANONYMOUS** (Policy Advisor, Children’s Organisation A) (2009), Interview with author, London, 20 July 2009.
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- 19 **ANONYMOUS** (Children’s Policy Advisor, UKBA) (2009), Interview with author, London, 16 October 2009.
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