Landmark Chambers

Age assessments

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Part 4 of the Nationality and Borders Act 2022 - Structure

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- Part 4 is intended to bring ‘age-assessments’ within the statutory immigration system. Previously, they had developed in response to case law (e.g. Merton hearings).

- Critically important to get right as detention of young people is only allowed in ‘very exceptional circumstances’, enhanced risk of trauma if young people are detained. In addition, there are numerous educational and social care rights which arise (particularly for unaccompanied young people).

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Part 4 of the Nationality and Borders Act 2022 - Structure

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- S.49 Definitions
- S.50 Assessments undertaken by Local Authorities (and other public bodies)
- S.51 Assessments for Immigration Purposes
- S.52 Use of Scientific Methods
- S.53 Power to make Regulations
- SS.54 & 55 Appeals
- S.56 New Information
- S.57 Legal Aid

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Part 4 of the Nationality and Borders Act 2022 - Definition

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- Age Disputed Person
  - An individual who requires leave to enter the UK
  - Who a Local Authority/Public Authority/Secretary of State has insufficient information to be *sure* of their age.

- Designated Person
  - An individual designated by the SOS to conduct an age assessment

- Key Points
  - These procedures apply to all people who require leave, not just asylum-seekers
  - What does 'sure' mean? How sure is sure? If you sure that the person is not a child (i.e. me) but don't know my age, am I an age disputed person?
  - What qualifications will this designated person have?

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Part 4 of the Nationality and Borders Act 2022 – S.50

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A s.50 assessment applies when:

a) A Local Authority needs to know the age of an age-disputed person
b) OR the SoS notifies the LA that it doubts the age of an age-disputed person that the LA has exercised functions under children's legislation

When that occurs, the LA **MUST** either

a) Refer the Age Disputed Person to a 'designated person'
b) Conduct an age assessment themselves
c) Confirm that an age assessment is not necessary

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Part 4 of the Nationality and Borders Act 2022 – S.50

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When the ‘designated person’ does the age assessment on behalf of the SOS that result is binding on the LA but not the other way round.

When an LA conducts an age assessment or confirms that one is not necessary, it must provide evidence to the SOS (on request) so that the SOS can ‘consider’ the decision.

Key Points

What happens when the LA give the Age Disputed Person an age that the SOS disputes. Does the SOS have a repeat power to direct that a ‘designated person’ takes over the decision.

What is meant by ‘consider’ by the SoS

The standard of proof is balance of probabilities, but what about burden of proof? (Under UNROC, the child is meant to be given the benefit of any doubt)

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Part 4 of the Nationality and Borders Act 2022 – S.51

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S.51 applies when the secretary of state needs to make a decision about 'immigration functions' in relation to that person.

A S.51 assessment can be taken where s.50 is not relevant (not sure how that is possible) OR before a LA has referred an individual to the SOS or if the SOS doubts the judgment of the LA

S.51 is binding on the SoS for 'immigration functions'.

Key Point

S.51 appears to allow the SoS to 'call-in' a decision, but it is not binding regarding LA functions on the face of legislation
Could the LA find the individual a child, but the SoS an adult?

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Part 4 of the Nationality and Borders Act 2022 – Scientific Methods

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S.52 allows the SoS to make regulations *specifying* scientific methods that *may* be used.

S.52(2) goes into considerable detail of what these may constitute including 'imaging technology' (Does that include X-Rays?) and
analysis of DNA derived from cells, saliva or 'other samples'

The SoS must 'seek scientific advice' before deciding that
a method is appropriate.

<u>Key Points</u>

- What is meant by imaging technology?
- What is meant by seek scientific advice mean in practice?
- Who has to be consulted?
- What if there is no scientific consensus?
- Does the SoS need to 'seek' scientific advice or is the duty going to be 'seek and act in accordance with' scientific advice?

Part 4 of the Nationality and Borders Act 2022 – Scientific Methods - Consent

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A Scientific Method can only be used with 'appropriate consent'

BUT

s.55(7) provides that:

In deciding whether to believe any statement made by or on behalf of the age-disputed person that is relevant to the assessment of their age, the decision-maker ***must*** take into account, as damaging the age-disputed person's credibility […] the decision not to consent to the use of the specified scientific method.

Part 4 of the Nationality and Borders Act 2022 – Scientific Methods - Consent

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In addition, s.55(9) confirms that s.55 does not prevent the 'decision-maker' from using another 'scientific method' if they consider it appropriate (but there may be other reasons not to)

The BMA are clear that the use of X-Rays is unethical:

'The use of ionising radiation for age assessment involves direct harms without any *medical* benefit to the individual and, as such, we do not believe it would be appropriate to expect doctors to participate in such a practice.' (emphasis added)

Part 4 of the Nationality and Borders Act 2022 – Scientific Methods - Other countries experiences

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Sweden uses two methods – dental x-ray of wisdom teeth and MRI scan of the femur bone

However, this is used to assess the probability that the individual is under 18 – not to provide an exact age.

Moreover, the accuracy (even taken into account its different purpose) and compatibility of this scheme with the ECHR has been doubted

The Council of Europe and the UNHCR both state that scientific methods have substantial margins of error (i.e. two years either way) and the British Association of Social Workers state that they are no more accurate than 'Merton' assessments.

Part 4 of the Nationality and Borders Act 2022 – Regulations

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s. 53 includes a general power to make regulations regarding age-assessments. However, this power is very broad and includes:

- evidence that must be considered and *the weight to be given to it*,
- the consequences of a lack of co-operation with the assessment by the age-disputed person, *which may include damage to the person's credibility*

<u>Key Issue</u>

- To what extent can or should the SOS 'front-load' an assessment of an individual's credibility which will require a fact specific assessment of all the circumstances?

Part 4 of the Nationality and Borders Act 2022 – Appeals and New Information

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SS.54 and 55 include the rights of Appeal

Now the Right of Appeal is to the First-Tier Tribunal.
Critically, they *must* assign the individual a date of birth.
In some cultures, they may be particularly challenging

If the individual leaves the UK, then there appeal is abandoned.

Pending the outcome of the appeal, the person is to be treated as the age they claim to be.

The decision by the FTT is binding on the LA and SOS

Under s.56 a fresh age assessment must be undertaken on receipt of 'significant new information' (that is there is a 'realistic prospect' that it would change the outcome of the original age assessment).

S.57 extends legal aid to age assessments.

Part 4 of the Nationality and Borders Act 2022 – Potential Challenges

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Given the potential invasiveness of a 'scientific' assessment and the potential for 'retraumatising' arising from an age assessment itself, there is the obvious possibility of challenges under at least Article 3 and 8 of the ECHR.

Any invasion into a person will directly engage Article 8 and an individual's right to privacy.

The compulsion to submit to examination may result in a breach of Article 3.

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Part 4 of the Nationality and Borders Act 2022 – Appeals and New Information

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In summary,

- A lot to be clarified
- What will age assessments actually look like and to what extent will they be 'scientific'? What weight will be given to 'holistic' assessments or 'scientific' ones.
- How will the impact of an age assessment be considered and balanced? Under Part 4, an Age Assessment is obligatory… Refugee and Migrant Children's Consortium notes: "Many young people […] do not understand the process, and feel humiliated and damaged by it. The process itself has the potential to be quite re-traumatising, and impact children and young people's sense of identity."
- Likely challenges under Articles 3 and 8 of the ECHR
- Any age assessment may continue to be social worker led will likely have to comply with the Merton guidelines so may not be that much change in practice.

- A lot we do not know at this stage.

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Thank you for listening

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