

Detriment of the doubt

AGE ASSESSMENT AND AGE REGISTRATION IN EU MEMBER STATES OF PREVIOUS STAY

A report

The **Advisory Committee on Migration Affairs (ACVZ)** is an independent advisory body established by law to advise the government and Parliament on migration issues. It examines policy and legislation and indicates possible areas of improvement. The ACVZ issues practical recommendations aimed at solving both existing and anticipated problems.

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Summary

For the purpose of the asylum procedure, it is important to know whether an asylum seeker is a minor or an adult, since age is the determining factor when deciding which rules and procedures to follow. It is therefore important that age is established with care and in accordance with international standards. Age assessment is complex because asylum seekers are often not in the possession of identification documents. In this case, another method must be found to establish an asylum seeker's age. In the past few years, increasing attention has been given to improving the age assessment process in the Dutch asylum system.

The ACVZ has called attention to a specific aspect of age assessment, namely the role of the age registration of asylum seekers in another EU Member States in the Dutch asylum procedure. Because this registration is sometimes carried out without further investigation, it may occur that minors have indeed been incorrectly registered as adults in the Netherlands.

In drafting this report, in addition to performing desk research and studying the case law, the ACVZ conducted interviews with relevant actors with practical experience in this area, as well as lawyers and social organisations. The ACVZ also carried out an exploratory study into implementation practice around identification, age assessment and registration in Italy and Greece, since these are the first countries of arrival where asylum seekers often stay before migrating to the Netherlands.

Age assessment: dealing with doubt

If an asylum seeker cannot substantiate his or her age with documents, a first non-medical age assessment is conducted (IND work instruction 2018–2019). This consists of two interviews: the first conducted by the Royal Netherlands Marechaussee (KMar) or the Aliens Police, Identification and People Trafficking Department (AVIM) and the second by the Immigration and Naturalisation Service (IND). In these interviews, questions are asked to determine the person's age, such as questions about family composition, living environment, education and/or work experience, and the officials look at behaviour and physical characteristics. After these sessions, if KMar/AVIM or IND have doubts about a claimed minority status, a closer investigation is conducted. If the registration of fingerprints and other data in Eurodac shows that the asylum seeker has previously stayed in another EU Member State, the IND's Dublin Unit will send a questionnaire to that Member State. If the asylum seeker is registered as an adult there, that age is adopted, even if the registration was not based on documents, age assessment or any other further investigation.

Case law of the Council of State: mutual trust between states

This policy is in line with the settled case law of the Administrative Jurisdiction Division of the Council of State ('Council of State') concerning the application of the principle of mutual trust. This means Member States of the European Union can assume that other Member States are meeting their obligations under EU law and international conventions, including human rights conventions, given that they have signed them and are bound by them. This principle is important for effective and efficient cooperation within the European Union: Member States can assume that decisions have been made with care and in accordance with the rules. Likewise, in relation to age registration in the Member State of previous residence, the starting point is the application of the principle of mutual trust..

An exception to mutual trust?

Member States may be bound to observe conventions and EU law in theory, but compliance is sometimes lacking in practice. It should therefore be possible to rebut the application of this principle in individual cases. The burden of proof lies with the asylum seeker to make clear that application of the principle of mutual trust is not justified. According to the current position taken in the Council of State case law, a further investigation by the government should be conducted only if general country information shows *systematic* deficiencies in the identification and registration processes in Member States of previous residence. According to the Council of State, this is currently not the case. The burden of proof that the age registration in the Member State of previous residence was incorrect lies thus entirely with the asylum seeker, and this can only be rebutted by officially recognised and authentic documents. Fact is however that such documents are often not available.

Problems identified

The ACVZ has identified that the current application of the principle of mutual trust makes it virtually impossible for young asylum seekers to provide the necessary evidence and that the principle of the benefit of the doubt is largely being ignored. The study into the process of registration, identification and age assessment in Italian and Greek asylum practice was too limited to be able to draw the general conclusion that incorrect registration of personal data is *systematic* in these countries. However, there are real grounds for concern about the age registration process and risks of irregularities.

Potential solutions

The ACVZ therefore makes a number of suggestions to ensure greater balance in the allocation of the burden of proof based on the duty to cooperate and investigate

pursuant to European Union law.⁰The government should more actively investigate the manner of registration in the other Member State, particularly where there are concerns about relevant aspects of the asylum system. Alternatively, greater consideration could be given to the efforts made by the asylum seeker to produce evidence. In the context of the 'benefit of the doubt', more attention should be paid in the asylum process to explanatory statements made by young asylum seekers for previous registration as an adult in another EU member state.

Benefit, not detriment, of the doubt

The age assessment procedure in Dutch asylum practice includes safeguards to ensure an impartial and independent interviews, specific training for the officials involved, monitoring of the practice and processes for improvement. If, after the first age assessment interviews, there is still doubt about the age of an asylum seeker, that doubt should not automatically be set aside on the basis of registration in another Member State that is not substantiated with documents or age assessments. In view of the necessary diligence, the ACVZ considers that the Dutch government should give greater weight to the judgement of its own officials than to such a registration by another Member State.

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Introduction

1 Introduction

1.1 Background

In 2019, over 675,000 asylum applications were made in the European Union. Around a quarter of the asylum seekers who came to Europe in 2019 were children.¹ That includes unaccompanied minors (UAMs),² of which there were over 14,000 in 2019.³ This is a vulnerable group who are entitled to specific legal protection, also within the asylum procedure.⁴ Not only are they minors, but they have no parents to care for and take responsibility for them; they have therefore been granted special rights.⁵ For example, a guardian is appointed to them, there are specific procedural safeguards within the asylum procedure, they have a right of reception and care in children's facilities until they reach the age of eighteen and they have a right to family reunification with parents, brothers and sisters. Age is also relevant when determining which Member State is responsible for processing the application,⁶ for access to education, for registration in the Personal Records Database and thus also for access to resources to build a new life.

Statistical information

As at 30 September 2020, 626 UAMs have arrived in the Netherlands this year. The numbers for 2018 and 2019 were 1,225 and 1,046 respectively. Due to the coronavirus, the number of applications in the spring of 2020 was significantly lower. Proportionally, most UAMs still come from Syria (42% as at September 2020, 40% in the previous year). In the past year, Morocco (14%), Eritrea (9%), Afghanistan (7%) and Algeria (6%) were the other countries of origin in the top five.

Source: IND Asylum Trends, accessed via www.ind.nl.

Age assessment refers to the procedures used by the competent authorities to establish a person's chronological age. Based on these procedures, they determine what residence status procedures and rules must be followed.⁷ The chronological age of an asylum seeker is difficult to establish because official identity documents are often lacking. However, determination of the most accurate age assessment possible, in conformity with international norms and scientific standards, is extremely important, given the consequences of an age assessment for both the asylum seeker and the government. An incorrect age assessment, resulting in a minor being treated as an adult, violates the rights of the child. If an adult is mistaken for a minor, this could lead to undesirable situations in which an adult is

housed in an environment intended solely for children, age assessment is conducted unnecessarily as is the appointment of guardianship .

1.2 Motivation

The reason for the ACVZ to draw attention to a specific aspect of age assessment is based on signals from practice and developments in jurisprudence. This refers to the situation in which asylum seekers claim to be minors on arrival in the Netherlands, whereas subsequently it became known that they had been registered as adults in another EU Member State.

Various studies and publications provide a worrying picture of the situations in which young unaccompanied asylum seekers find themselves, within and along the borders of the EU.⁸ Research shows that, once they arrive in the EU, UAMs often travel from the country of first arrival to other Member States.⁹ The media has recently highlighted cases in which, on arrival in the Netherlands, young asylum seekers claimed to be minors, whereas they had been registered as adults in another EU Member State.¹⁰ Asylum seekers themselves provide various explanations hereto.¹¹ They say that they inadvertently gave the incorrect date of birth because they were tired, sick or scared. It had been a chaotic situation upon arrival, and they did not understand exactly what the authorities wanted to know. Sometimes, they were not even aware of having been asked for their date of birth, it was simply filled in for them. In some cases, the asylum seekers have tried to have their correct date of birth recorded, but these attempts have failed.¹² Asylum seekers often say that their smuggler or trafficker ordered them to pretend to be adults.¹³ This makes it easier for them to travel onwards; they then end up in the reception facility for UAMs in the destination country, after which their departure is 'arranged' by human traffickers and they wind up in prostitution or similar situations.¹⁴ In addition, asylum seekers themselves sometimes choose to be registered as adults in the country of arrival in response to stories about closed child reception facilities, which would limit their ability to travel onwards within the EU.¹⁵

On this point, the UN refugee organisation UNHCR says: *'Age determination is also complicated by some children trying to avoid being identified as being under the age of 18 due to the perception that being identified as an adult may makes it easier for them to move onwards, such as for children arriving in Spain, to speed up transfers from overcrowded centers in the enclaves to the mainland or when the country they arrived in is not their intended destination.'*¹⁶

In the Dutch asylum system, an incorrect age registration can have serious consequences. If there are doubts about the age of the alleged minor asylum seeker, officials try to find a way to determine their age. A previous registration in another EU Member State may provide a solution. According to the settled case law of the Administrative Jurisdiction Division of the Council of State ('the Council

of State'), the State Secretary may assume, on the grounds of the principle of mutual trust, that the age registration by the Member State of previous residence is correct.¹⁷ The burden of proof then lies with the asylum seeker to demonstrate that the previous registration is incorrect. In practice, however, this is extremely difficult (see paragraph 2.2).

Due to their age and their corresponding psycho-social of development, young asylum seekers cannot always be expected to predict and assess the implications of certain decisions or actions. A previous, incorrect registration as an adult is difficult to correct and thus has major consequences for their asylum procedure and legal stay. A further complicating factor is that, in the case of adults, claims for transfer are made to the country of previous residence under the Dublin Regulation. It appears to be partly for this reason that these young people leave the asylum reception centers. Out of a fear of being returned to the Member State of previous residence, they disappear into illegality, running the risk of exploitation.¹⁸

At the same time, it is important to prevent adults from claiming rights and gaining access to facilities to which they have no right, especially if they are not entitled to international protection. Irrespective of this, it is important and in the interests of the minors to separate adults from minors during the asylum procedure and in the reception center.

Determining age in the absence of identity documents is complex. Establishing that an asylum seeker is an adult has major consequences for the procedure and the level of legal protection provided. It is therefore all the more important that the age assessment be done with care and in accordance with international standards.

1.3 Purpose and methodology

In this report, the ACVZ explores the role in national asylum practice of age registration in a Member State of previous residence. We draw attention to the problematic consequences of current practical implementation and the line taken in the Council of State case law, particularly for the allocation of the burden of proof, in relation to current practice in the most common Member States of previous stay. We also identify a number of potential solutions, as a contribution to policy development and optimisation of practical implementation.

In drafting this report, in addition to performing desk research and studying the case law, the ACVZ conducted interviews with relevant actors involved in practical implementation, such as civil servants, lawyers and civil society organisations.¹⁹ We also carried out an exploratory study into practical implementation with regard to identification, age assessment and registration in Italy and Greece. From publications about age assessment and registration known to the ACVZ, the

interviews and the case law, it follows that Italy and Greece are the most common countries of previous residence where alleged minors are registered as adults.

Unfortunately, there was not sufficient quantitative information available that could provide further insight into the extent of the problems. To date, the IND has not (automatically) recorded how many non-medical age assessments take place in UAM cases each year, in how many cases there is still doubt about the age after these assessments, in how many cases a further investigation is conducted, what the outcomes of those investigations are and to what extent the age is adjusted on the basis of investigations. Accordingly, where possible, the ACVZ has chosen to formulate 'best estimates' of the number of cases in which there is doubt about the alleged age and in which a further investigation is performed, based on interviews with civil servants. However, the number of cases in which medical age examinations has been performed is indeed known. In 2019, there were 56 such examinations. In 6 cases the subjects were proven to be adults; in the other 50 cases adulthood was not established.²⁰

1.4 Reading guide

In Chapter 2, we describe the relevant policy framework and implementation practice of the age assessment process. In Chapter 3, we discuss the principle of mutual trust and the application thereof. Finally, in Chapter 4, we formulate a number of potential solutions for the problems identified.

Fictitious case, inspired by a report by Amnesty International²¹

Ali is a young asylum seeker from Syria. His family remained in a refugee camp in Jordan, while he fled with the help of a trafficker via Turkey by boat to Lesbos. In his hand, he was holding a Greek registration certificate which stated that his date of birth was 1 January 2002. Ali recounted that, in the interview with a Frontex officer and the Greek police, he had said that he was born on 3 April 2006, and that he had also given them a copy of his birth certificate. In spite of the fact that he was a minor, he was registered as an adult and was unable to claim entitlement to the facilities for minors or extra safeguards in the procedure, to the extent that that is possible in Greece. To undo or change the registration, he needed help – in fact, he needed legal assistance. However, there was a shortage of lawyers and the waiting times were long. He was unable to correct the registration, which means that, in all registration systems, including Eurodac, he is registered as an adult.

The age assessment process

2 The age assessment process

In the past few years, efforts have been made to improving the age assessment process in the Dutch asylum system. Partly in response to developments in case law,²² additional policy implementation rules were laid down in IND Work Instruction 2018/19.²³

The policy rules were adjusted because there was uncertainty among front-line staff about the process for non-medical age assessments (see Section 2.1.1 below). That process now consists of two separate interviews: one with the Royal Netherlands Marechaussee (KMar) or the Aliens Police, Identification and People Trafficking Department (AVIM) and the other by the IND. An 'Age assessment working group' was set up to facilitate the exchange of information between the various organisations involved, such as the IND, the Central Agency for the Reception of Asylum Seekers (COA), the Nidos foundation and AVIM. A separate training module was also created for conducting age assessment interviews, which emphasised a more multidisciplinary view by involving behavioural experts. This module will be evaluated and developed further.²⁴ Completing this training module is a precondition of conducting such interviews.²⁵ Finally, the Inspectorate of Justice and Security plays a supervisory role with regard to medical age examinations, the final step in the age assessment process.²⁶ In this role, the Inspectorate also looks at the overall process, and further process improvements are proposed and implemented where necessary.²⁷ It is also important to mention that the Netherlands Forensic Institute (NFI) is currently carrying out an investigation into the methods used in medical age testing, with the aim of updating them.²⁸

In this chapter concerning the age assessment process, the ACVZ focuses on the role of age registration in the country of previous residence and the 'closer investigation' in cases where doubts about age persist.²⁹

2.1 IND Work Instruction 2018/19

Work Instruction 2018/19 on age assessments contains details on the implementation policy for dealing with doubt about the age of alleged minor asylum seekers.

2.1.1 Age assessment interviews

If an alleged minor cannot produce documents to prove their age, a non-medical age assessment interview is conducted. This consists of two sessions, the first conducted by a single KMar/AVIM officer and the second by two IND officials, or vice versa.

As part of the registration and identification process of alleged minors, the KMar/AVIM officer takes fingerprints and registers all data in Eurodac (the European fingerprint database). Unless a match is found in EUVIS (the European system for granting visas), the KMar/AVIM officer proceeds with the age assessment session immediately after the identification interview. A visa can only be granted on the basis of identifying documents, so this registration serves as evidence of identity. During the session, the officials consider physical characteristics, behaviour and statements by the asylum seeker, as well as any other relevant circumstances.³⁰ Because the age assessment process is based on an assumption that the subject actually is a minor, the next step is a registration interview with the IND designed specifically for UAMs aged 12 and over. The age assessment is part of this. The KMar, AVIM and IND each use their own lists of questions, although all are based on the same policy.

An unbiased and independent age assessment process is ensured in a number of ways. From the interviews conducted by the ACVZ, it followed that, if there is a hit in Eurodac, this is noted in the file along with the Eurodac number, without the underlying personal data. The first age assessment interview is conducted by two KMar/AVIM officers and the second by one IND official (or one KMar/AVIM officer and two IND officials). Following changes in the case law, the structure of these separate sessions was further tightened and clarified in the work instruction.³¹ KMar/AVIM set out their conclusion about the age in a written report. The IND official does not see a copy of this report before conducting the second interview. Although the report is loaded into the IND's registration system (INDIGO), it is assigned a specific reference rendering it temporarily inaccessible.³² After the second interview, the report 'marking' can be removed at the request of the IND official who conducted the interview, making the report accessible. The IND official can then compare the own conclusion with that of the KMar/AVIM officer. If necessary, for instance if the report refers to the existence of documents of other forms of documentary evidence, the IND can contact the KMar/AVIM for a further discussion.

The IND official then notifies the presupposed UAM and their guardian of the outcome of the age assessment interviews. The person concerned may be found to be 'clearly an adult' and will be referred to the general asylum procedure or 'clearly a minor' and be scheduled for a further UAM asylum hearing. This will only happen if both agencies reach this conclusion.

Another option is that doubt might still persist about the person's age. The IND estimates that doubts persist in approximately 65–70% of the cases in which an age assessment interview is carried out.³³ If one or both of the agencies involved

still have doubts after the interview, the IND will explain to the alleged minor that a further examination will be conducted and that he or she will be considered a minor during this examination.

If there is no hit in Eurodac, the IND will explain that medical age assessment will be conducted and that an interview with a physician will take place before a referral to the Netherlands Forensic Institute (NFI). If the Eurodac search does produce a hit, the file will be forwarded to the Dublin Unit for closer investigation.

2.1.2 Closer investigation

Sometimes, the Dublin Unit of the IND will conduct a closer investigation into a possible registration (including an age determination) in another EU Member State. In accordance with the Dublin Regulation and the work instruction, this is not conducted solely in the event of doubt about age. Such an investigation is initiated following the registration interview in every case where there is a Eurodac hit or indications that the asylum seeker has previously stayed in another Member State. This happens not only in cases in which the person concerned is clearly a minor (particularly to find out whether any family members are residing elsewhere in the EU, and if so where), but also in cases where the person is clearly an adult (in the context of a possible Dublin transfer request).

The further investigation consists of a questionnaire, which is sent to the authorities of the Member State of previous stay. The questions cover a range of aspects, including age, possible aliases, how the personal data (including age) were established and the availability of documents. Interviews with the IND show that most further investigations of this kind are directed at Spain, Italy and Germany. Further investigations in Greece are also common, but those for the purpose of submitting a transfer request only take place on a limited scale, since transfers to Greece under the Dublin Regulation are rare. However, further investigations in the context of determining age (and/or in relation to whether the person has residence status as a minor in Greece) do occur.³⁴

The information received about the age registration varies: sometimes, it is extremely comprehensive and explicit; in other cases, the answers are somewhat sparse. In most cases, the information on the age assessment in the Member State of previous residence shows that it was not based on documents. Sometimes, this information shows that medical age assessment was conducted, for example in Switzerland, Austria, Sweden or Denmark. In the majority of cases, and particularly where there was a previous age registration in Italy or Spain, the age assessment is done on the basis of the asylum seeker's own statements, as the ACVZ learned from interviews with the IND. In principle, this information is sufficient for the IND to complete the age assessment in the Netherlands, and no further information is requested. Only when multiple aliases are known are further enquiries made in the Member State concerned about which was the main alias used for registration.³⁵

If the age registration in the Member State of previous residence shows that the asylum seeker was registered in that state as an adult, the AVIM officer or IND official who launched the Dublin investigation changes the date of birth in the identifying report.³⁶ According to the work instruction, if there is any doubt after the inspection, the age registration in the country of previous residence prevails.³⁷

Furthermore, when making a conclusion of 'clearly an adult' or 'clearly a minor' based on the interviews, a previous different registration may still prevail. In these cases, the age registration in the country of previous residence must be based on identifying documents or medical age testing. Such evidence is not necessary in a situation where there is doubt about the age; in that case, the asylum seeker's statement alone is sufficient.

The following table illustrates the relationship between inspection and further investigation. This report focuses exclusively on the situations described in the bottom row.

AVIM/KMar + IND age assessment interview	Result of investigation in other Member State (MS)	Consequence with regard to age registration
Clearly a minor	Minor	The age registered in the other MS is applied.
Clearly a minor	Adult	The age registered in the other MS is applied, unless that age is based on authentic and identifying documents or medical age assessment.
Clearly an adult	Minor	Registered as an adult, unless the age in the other MS is based on authentic and identifying documents or age testing.
Clearly an adult	Adult	Registered as an adult
Doubt	Minor	The age as registered in the other MS is applied
Doubt	Adult	Registered as an adult on the basis of the case law.

Source: IND Work Instruction 2018/19

According to the IND, several times a year, in the context of an appeal procedure or pursuant to a court decision, the IND litigation officer asks the Dublin Unit to do a further investigation and request additional information from the country of previous residence. Legal representatives of the claimant also make similar requests occasionally. In that case, according to the work instruction, it is up to the asylum seeker to prove his or her identity and age, which means producing documentary evidence to rebut the previous registration.

Each year, closer investigations are carried out in several hundred UAM cases; in approximately a third of the files, the age is changed on the basis of this investigation.³⁸ The majority of these are cases in which there were doubts about the age/claimed minor status and the asylum seeker was ultimately registered as an adult. In almost all cases, this was followed by a Dublin transfer request.³⁹ It is not known whether or to what extent the transfer requests in these cases actually lead to a transfer.

2.2 Case law of the Council of State: mutual trust

Age registration in a Member State of previous stay thus plays a significant role in the age assessment process in Dutch asylum system. This approach is in line with the settled case law of the Council of State, particularly the notion that the State Secretary may assume, on the grounds of the principle of mutual trust, that the age registration by the Member State of previous stay is correct.⁴⁰ In the event of persistent doubt about the age of an alleged minor asylum seeker after an age assessment session, age data retrieved from a Eurodac search, whether or not in the context of a further investigation, prevails. This is the case not only if the previous registration confirms the claim of minor status, but also if it differs. The burden of proof then lies with the asylum seeker to rebut this registration.

Even if the Eurodac search reveals multiple aliases, including a registration as an adult, adult status can be assumed, because the principle of mutual trust allows the IND to assume that the registration was created with all due care.⁴¹ This means the IND does not have to offer further age assessment. The burden of proof lies with the asylum seeker to dispute this presumption and demonstrate that the registered date of birth is incorrect.⁴²

Asylum seekers can prove that a previous registration is incorrect only with authentic and identifying source documents or another form of evidence, such as medical age examinations.⁴³ Documents must be official documents issued by the authorities in the country of origin, with a passport photo.⁴⁴ A birth certificate without a passport photo cannot rebut adult status registered in another Member State, since this cannot be considered an identifying document, even if it is found to be authentic by the Documents Office.⁴⁵ A copy of a baptism certificate is also insufficient, since its authenticity cannot be established and it is not issued by the government.⁴⁶ These requirements (related to the requirement that asylum seekers must identify themselves with official documents) create a high standard of proof for the rebuttal of previous age registration.

If asylum seekers are considered not able to support their statements by documentary or other proof, further age assessment, such as a medical age examination is offered by the officials.⁴⁷ In practice, however, this rarely occurs.

Principle of mutual trust

3 Principle of mutual trust

In this chapter, we focus in more detail on the principle of mutual trust. First, in Section 3.1 the ACVZ reviews the meaning and scope of the principle, both in EU law in general and in relation to age assessment in particular. In Section 3.2, we discuss the possibilities for rebutting the application of the principle. What consequences does the application of the principle have to the determination of the age within the current policy framework of and practice and the weight given by the Netherlands to a previous age registration in the Member State of previous residence?

3.1 Application of the principle of mutual trust

3.1.1 Principle of mutual trust in EU law

The principle of mutual trust means that EU Member States may assume that other Member States have complied with their obligations under EU law and international human rights conventions, and that they have therefore made decisions that are in line with these obligations, which other Member States should mutually trust upon.⁴⁸ That trust is based on the fact that the Member States have signed these conventions and are bound by EU law, including the norms and values on which the Union is based (Article 2 TEU).⁴⁹

This trust also underlies the operation of the European asylum and migration policy. It is not explicitly stated in the CEAS, but it does follow from the applicable legal framework, as the Court of Justice of the EU ('the ECJ') concluded in the case of *NS v United Kingdom*: '*it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the Charter, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951*'.⁵⁰

In European asylum law, the principle of mutual trust primarily plays a role in the application of the Dublin Regulation, which determines which Member State is responsible for processing an asylum application.⁵¹ The idea is that it should not matter where or by which Member State an application is processed. Since every

Member State is bound by the same legal norms and standards in relation to asylum, there should be a 'level playing field'. Accordingly, it should not be possible to impede transfers under the Dublin Regulation based on arguments about the level of protection and access to the asylum procedure. The basic principle is that any breach of rights must be challenged in the Member State where the breach occurred, since effective legal protection may be assumed based on the principle of mutual trust.⁵²

The principle of mutual trust is also applied in other areas of European migration law. For example, mutual recognition of return decisions and entry bans under the Return Directive and the exchange of information about the registration of persons who have been denied entry and/or residence. With regard to these alerts in the Schengen Information System (SIS), there is mutual trust that national legislation and practical implementation have been followed prior to the entry ban and SIS alert. In principle, recognition of this registration by another Member State is an obligation: upon entry, the border control authorities must check the systems and comply with any registration found. That mutual trust, is not explicitly mentioned in the applicable EU legal framework, but it follows from the objectives of European border control, specifically the monitoring and protection of the external borders in light of the removal of the internal Schengen borders.⁵³

3.1.2 Principle of mutual trust and age assessment

EU law contains no explicit provisions on how age assessments should be conducted if there is doubt about the minor age of the asylum seeker. Article 25(5) of the Asylum Procedures Directive does list medical age examination as a component of or method to be used in an age assessment but leaves considerable scope for interpretation by Member States. Various reports about age assessments have concluded that there are significant differences within the EU and have called for harmonisation of the use of medical age examination.⁵⁴

As part of the new package of European asylum legislation, the European Commission has proposed explicitly including mutual recognition of the results of medical age testing in EU law: paragraph 6 of draft article 24 of the proposed Asylum Procedures Regulation (a revision of the current Article 25 of the Asylum Procedures Directive) states: *A member state shall recognise age assessment decisions made by other Member States on the basis of medical testing performed in accordance with this article and based on methods recognised under its national law.*⁵⁵ Negotiations around the revision are still ongoing.

However, the age assessment process is part of the registration and identification process in the registration phase of the asylum procedure. Provisions concerning this process are included in the Asylum Procedures Directive, among others. For the purpose of this report we take the application of the principle of mutual trust as a starting point.

3.1.3 No absolute effect

However, the application of the principle of mutual trust can be disputed, limiting its effect. To call into question the application of the principle of mutual trust, there must be a 'legitimate reason' to doubt the legal safeguards in place in the EU Member State concerned. In general, this is the case where the application of the principle of mutual trust would lead to a violation of fundamental rights.⁵⁶

For the purpose of the application of the Dublin Regulation, the ECJ has elaborated on the principle of mutual trust and the circumstances in which it cannot be assumed that the other Member State has respected the safeguards in EU law.⁵⁷ For example, it is not inconceivable in practice that a Member State could be confronted with such major operational challenges that asylum seekers are treated in a way that conflicts with their fundamental rights.⁵⁸ In that case, the principle of mutual trust, on the basis of which asylum seekers can be returned to the receiving Member State, will not be observed if there are 'systematic deficiencies' in the national asylum procedure and national reception system.⁵⁹ In the M.S.S. case, the European Court of Human Rights (ECtHR) found that the situation in Greece was so serious that asylum protection was systematically deficient and would place asylum seekers in a situation that is in violation of Article 3 of the European Convention on Human Rights (ECHR).⁶⁰ This ultimately resulted in a long-term suspension of Dublin transfers to Greece. Other decisions of the ECtHR have found that transfers of certain groups should not be permitted⁶¹ or only on a case-by-case basis and subject to specific guarantees.⁶² In its decision in the *Jawo* case, released on 19 March 2019, the ECJ described another example of systematic deficiencies 'of a particular high level of severity', where someone risks being sent back to a situation of extreme poverty, leaving them unable to meet their basic needs.⁶³ In this, the ECJ follows the arguments of the ECtHR in the M.S.S. case.⁶⁴ In other areas of migration, too, such as SIS registration, there are explicit exceptions in EU law to the automatic adoption of previous decisions.⁶⁵

3.2 Rebutting mutual trust

There may be reasons for assuming that the age as registered in the country of previous residence is not correct. For example, irregularities may have occurred in the Member State of previous stay when the age was registered. Or the presupposed minor asylum seeker may have stated an incorrect age (see Section 1.1 for possible reasons) and wish to correct it.

'Among the many challenges children may face once in Europe is actually being recognised as a child. Across the region, unreliable and inconsistent age assessment procedures are used, resulting in a number of children being considered to be adults and therefore unable to access national child protection systems and other important services. However, across Europe, few countries apply a holistic approach, with age assessment procedures varying significantly both within countries and across the region. For example, in Spain, age assessment procedures differ by region. In the south, where most arrive by sea, a wrist Xray, which has a margin of error of up to four years, is generally used without the involvement of other experts such as social workers or psychologists, even when children provide valid identity documents. In some regions, children are even examined to check the development of their sexual organs. In Italy too, the use of wrist Xrays remains common in cases where an age assessment is still required, while the use of a multidisciplinary approach is more limited. Similarly, in the Evros region of Greece along the land border with Turkey, children are usually referred for wrist Xrays without the necessary medical and psychological assessment prescribed by Greek law, a situation that also happens on the islands. Those wrongly identified as adults risk being placed in accommodation facilities with adults and are unable to access the mechanisms designed to protect children, including social work support. When children move onwards to other EU countries, incorrect registration as an adult in the country where they first arrived can make it very difficult for them to receive support later on.' (UNHCR 2019)

Based on the principle of mutual trust, in theory, the asylum seeker should challenge an incorrect registration in the country of previous stay, unless due process is illusory there.⁶⁶

In this Section, the ACVZ addresses the practice of identification and registration in Member States of previous stay to assess whether this has consequences for the application of the principle of mutual trust, and if so, what these consequences are (Section 3.2.1). The ACVZ then considers the abilities of the respective parties to produce evidence and the allocation of the burden of proof in the context of disputing the application of this principle (Section 3.2.2), particularly the duty to cooperate and examine (3.2.3).

3.2.1 Practice in Member States of previous stay

According to current Council of State case law, the application of the principle of mutual trust is justified since, according to sources of country information, it cannot be claimed at present that there are any *systematic deficiencies* in the registration process in Member States of previous stay.⁶⁷

The ACVZ has therefore conducted an exploratory study into the process of identification, age assessment and registration in Italian and Greek asylum practice. Our findings are described in Annex 2 of this report. Based on these findings, we note the following.

Previous registration as an adult in these Member States is usually based on statements by asylum seekers and not on documents or age assessments. This is apparent from the information received by the Netherlands from foreign authorities in response to 'closer investigation' requests in the context of the Dublin Regulation.⁶⁸ Age assessment is only conducted in those Member States if an asylum seeker claims to be a minor and the competent authority doubts that claim. If an asylum seeker claims to be an adult, this is accepted in practice, even if the claim is not supported by identifying documents. Only in very exceptional cases will a vigilant authority open an investigation, such as where very young children who are clearly minors claim to be 19 years old.⁶⁹

Minors may deliberately give an untrue statement claiming to be an adult, with the intention of making it easier to travel onwards within the EU. But this could also be an indication that human trafficking is involved. In addition, irregularities sometimes occur in other EU Member States with regard to the registration of asylum seekers' personal data.⁷⁰

The scope of the exploratory study was too limited to allow us to draw general conclusions about whether incorrect recording of personal data systematically occurs in Italy or Greece. However, based on the exploration of implementation practice in the selected Member States, it can be concluded that the risk of irregularities in age registration is high. The procedures for identification, age assessment and registration are not up to par in all areas, some parts are insufficiently harmonised and, in practice, the procedures do not always or completely comply with EU standards.⁷¹ In practice, it seems to be very difficult for asylum seekers to correct an age registration, regardless of whether the incorrect registration is due to an intentional untruth on the part of the asylum seeker or a mistake on the part of the authorities. It is for good reason, therefore, that Italy and Greece are receiving long-term support from the EASO with regard to these aspects of the procedures.⁷²

3.2.2 Burden and assessment of proof

Based on the work instruction, the Dutch government considers the age assessment process in itself as providing an alleged minor with the benefit of the doubt. Indeed, if the alleged minor cannot provide for official and authenticated documents to substantiate their minor age, the government conducts an age assessment interview and, if there is still any doubt about the age, looks at whether this doubt can be removed in some other way. During the age assessment process, it is assumed that the asylum seeker is a minor. However, as soon as a further investigation in another EU Member State reveals a registration as an adult, the burden of proof shifts and then lies solely on the alleged minor asylum seeker to rebut the previous age registration. Stringent requirements are imposed on the 'rebuttal evidence' to be provided; for example, it must consist of official source

documents showing the correct age. Only in cases where it is confirmed that documentary evidence is unavailable can age testing be offered. See Section 2.2 above for further information.

Fictitious case, inspired by the case law

Meskerem is from Eritrea. She travelled to Italy in 2016 via Libya and across the Mediterranean. She was then 16 years old. Along the way, she had heard from other migrants that it would be best if she pretended to be an adult, because children in Italy were detained in closed shelters. During registration by the Italian police, she said she was 19 years old. Through contacts she had met on her journey, she soon had an opportunity to travel onwards to the Netherlands. In early 2017, she arrived in Ter Apel and told the authorities she was still 16 years old and had been born in 2000. The AVIM did indeed believe she was a minor, but the IND had doubts about her alleged age. It was decided that a closer investigation should be performed, and because her data produced a match in Eurodac, the Italian authorities were contacted. The data showed two different age registrations: one with a date of birth in 1997 and one in 1994. According to the Italians, both were based on Meskerem's statements. Invoking the principle of mutual trust, Meskerem was registered as an adult and her age in the file was adjusted. Her asylum application was rejected and a Dublin transfer request was sent to Italy. From the decisions, it appeared that the IND was using the date of birth of 1 January 1994 – six years older than Meskerem claimed to be. Appealing the decision, she said she did not know where the birth year of 1994 came from. She acknowledged that she had said she was 19 instead of 16, but she had done so because she was afraid. To prove that she was really born in 2000, she produced a number of documents, including a baptism certificate with her name and date of birth, a family residence card, various written declarations and a copy of her parents' ID documents. These documents showed that her mother was born in 1985. However, because none of these were official documents, she did not succeed in rebutting the incorrect registration. Meanwhile, it was unclear why the Italian government had registered two different ages.

In the Netherlands the age registration is not subject to appeal at its own stance (in contrast to Italy and Greece, for example). Accordingly, rebuttal of an age assessment is done in the context of the applicable immigration law proceedings. For example, there may be an appeal against the inadmissibility of the asylum application because another Member State is considered responsible or appeal against the non-processing of the asylum application of a parent who stayed behind in the country of origin in the context of family reunification.

There are two notions in European asylum law that are important in the context of disputing the principle of mutual trust between states. First, there must be effective legal remedies. The asylum seeker must be able to assert his or her rights in court if those rights are breached due to the application of the principle of mutual trust. For further discussion on this point, see Annex 1: Legal framework. Second, the duty to cooperate and examine must be fulfilled. We discuss the latter notion in more detail in the next section.

3.2.3 Duty to cooperate and examine

The basic principle of asylum law is that the applicant provide the relevant facts and circumstances for assessment of the asylum claim, including his or her own identity.⁷³ However, the final assessment of all aspects of the protection claim involves cooperation between the applicant and the government; in other words, the burden of proof is shared.⁷⁴

This shared burden of proof is expressly enshrined in EU law. Article 4 of the Qualification Directive (2011/95/EU) states that the applicant must submit all elements to substantiate the asylum application as quickly as possible and that the Member State must assess the relevant elements *in cooperation* with the applicant. The second paragraph of that article makes clear that these elements include statements and documents concerning age. The fifth paragraph of Article 4 then states that, even if certain evidentiary documents are missing, the benefit of the doubt should be given to the applicant when a number of conditions are met (including making genuine efforts to substantiate their story, presenting relevant elements, making declarations about the lack of documents and, in a general sense, providing a credible and coherent account).

The ECJ interprets the duty to cooperate to mean that, if the elements put forward by the asylum seeker are not complete, up to date or relevant, regardless of the reason, the Member State concerned must actively cooperate with the asylum seeker to collect all elements necessary to substantiate the application. The ECJ also notes that the Member State may find it easier to access certain types of documents than the asylum seeker.⁷⁵

Multiple courts have expressed an opinion on the interpretation of the *duty to cooperate and examine* in the context of age registration.⁷⁶ According to the court, although significant weight should be accorded to the principle of mutual trust,⁷⁷ this cannot result in the asylum seeker never being able to rebut their age registration.⁷⁸ With reference to the above EU law interpretation of the duty to cooperate in Article 4 of the Qualification Directive, the courts have stated that the principle of mutual trust does not mean that investigations no longer have to be conducted into the manner in which the age registration was done in the Member State of previous residence.⁷⁹ A 'closer investigation' in the context of a Eurodac match is not sufficient.⁸⁰ In this regard, it is relevant that the asylum seeker must also make efforts to substantiate his or her alleged age or to correct a previous, incorrect registration.⁸¹

In the *M.S.S.* case, cited above, the ECtHR held that, if information based on general, current and reliable sources is available that points to systematic deficiencies in the asylum system, this demands a more active attitude from the government, which must satisfy for itself ('duty to investigate') that the rights of the individual are not being breached in this specific instance.⁸² If the reports

conclude that the state of the asylum system (in certain areas) is concerning but not systematically deficient, the balance should shift in any event towards a more balanced responsibility.⁸³

The UN Committee on the Rights of the Child, too, in a non-binding opinion in the case of *O.Y.K.A. versus Denmark*, stated that Denmark should have conducted its own investigation into the age of the asylum seeker before making a decision about the transfer to Greece, as a transfer without an investigation would conflict with fundamental rights.⁸⁴

Identification of problems and potential solutions

4 Identification of problems and potential solutions

Problem: the principle of mutual trust imposes high burden of proof

The principle of mutual trust is an important principle for European cooperation and efficient implementation of European laws and regulations. However, the principle is not absolute and can be rebutted. To ensure effective compliance with international treaty obligations and fundamental rights, it is important to avoid a formalistic approach of the principle of mutual trust.

The ACVZ holds the opinion that the right balance must be struck between the interests of a properly functioning European and national asylum system and the interests and fundamental rights of individual asylum seekers, including the best interests of the child. An asylum seeker must have an effective legal remedy to rebut the age as registered in the other Member State.

Invoking the principle of mutual trust in the case of age registration in the Member State of previous stay leads to a complete shift of the burden of proof to the asylum seeker. The asylum seeker certainly bears responsibility for substantiating the facts and circumstances of the asylum story and producing supporting information. Based on case law, however, it can be concluded that, for an asylum seeker to dispute a previous, incorrect registration on the basis of their own statement is practically impossible. From the case law, it is also evident that asylum seekers are seldom deemed to be unable to provide documentary evidence. For this reason, the IND does not conduct or offer further investigations or age assessments. The possibility that some minors in the Netherlands may have been incorrectly registered as adults and thus treated as adults, cannot be ruled out. The consequences of such an eventuality may have been that minors were deemed ineligible for facilities to which, as minors, they should have been entitled, that they were unable to make a claim for family reunification with their parents, and that they may have been wrongly transferred to another EU Member State.

In this context, we emphasise the importance of further elaboration of the EU law duty to cooperate and examine. The allocation of the burden of proof must do justice to both the interest of the government in providing the correct facilities and applying the distribution of responsibility criteria from the Dublin Regulation and the interest of the alleged minor in a correct age assessment.

Potential solution: more and better investigations where there is doubt about age

The following elements are relevant to the question of how much weight should be accorded to the principle of mutual trust and the determination of the implications for the allocation of the burden of proof:

- **the availability of relevant country information:** it is not only general country information revealing systematic deficiencies in the asylum system that demands a more active investigative attitude from the government. A conclusion that certain areas of the asylum system are concerning should also lead to a more shared responsibility between an asylum seeker and the government for the assessment of an application in which the age of asylum seeker has an impact on the rights he or she can claim;
- **the degree of harmonisation and understanding of actual practical implementation:** the less harmonisation of asylum practice, and the less knowledge about actual practical implementation, the less weight should be given to the principle of mutual trust, and the greater the government's duty to ascertain/investigate must be. In this regard, the ACVZ refers to the standards enshrined in EU law, such as Article 4 of the Qualification Directive.
- **the efforts of the asylum seeker:** the extent to which the asylum seeker has attempted to prove his or her identity by any means, has attempted to correct the incorrect registration in the Member State of previous stay or has a legitimate reason for the previous incorrect statement. It should be accepted at an earlier stage than is currently the practice that an asylum seeker is unable to provide documentary evidence.

Problem: the principle of the benefit of the doubt is insufficiently applied

It is clear from international standards and EU law that specific legal protection is granted to children and more particularly to unaccompanied minors. The weight given to the best interests of the child is also an important principle in our international legal system. One of the ways in which the interests of individual minor asylum seekers are supported is through the principle of the benefit of the doubt.

Based on Work Instruction 2018/19, the government considers the age assessment process in itself a means of giving an alleged minor the benefit of the doubt. Indeed, if the alleged minor cannot produce official and authentic documents to substantiate their minor age, the government assumes there is doubt and looks at whether this doubt can be removed in some other way. During the age assessment process, it is assumed that the asylum seeker is a minor. However, as soon as a further investigation reveals that the asylum seeker is registered as an adult somewhere else, this benefit is set aside in the basis of in

of the principle of mutual trust. This means that the principle of the benefit of the doubt is not being sufficiently implemented.

Possible solutions: pay more attention to the best interests of the child and the benefit of the doubt

The ACVZ has a number of suggestions for better implementation of the principle of the benefit of the doubt and for safeguarding the best interests of the child. Firstly, more attention could be given to the underlying reasons why UAMs allow themselves to be registered as adults elsewhere in the EU. Other people (including human traffickers and smugglers) often advise minors to pass themselves off as adults. Minors' immaturity and inability to assess the consequences for their right of residence of these kinds of decisions, in all their complexity, must be taken into account in the process, including when determining the burden and standard of proof.

Secondly, the alleged minor can be treated as a minor until it is legally determined that he or she is not a minor. This means being treated as a minor until after the appeal phase,⁸⁵ given that no separate decision is made about age and this aspect instead forms part of the overall asylum decision. This would only apply to cases where there is doubt about age, to prevent applicants who are obviously adults from being housed with minors simply because they have lodged an appeal.

Age registration in a Member State of previous residence and the role this later plays in an age assessment for the asylum procedure in the Netherlands has provoked considerable discussion. If, after an age assessment interview, there is still doubt about the age of a presupposed minor, it should not automatically be assumed that an age registration in another Member State is correct. Age assessments are subject to procedural safeguards, including the two interviews being conducted independently of each other, training of the officials who conduct the interviews, and monitoring by independent officials. If, after the age assessment interviews, there is still doubt about whether an asylum seeker is a minor or an adult, that doubt should not automatically set aside on the basis of another registration that is not substantiated. In light of the finding that irregularities can occur in the registration of asylum seekers, it would be recommended that the Dutch government considers giving more weight to the judgment of its own officials than to a registration by another Member State based solely on unconfirmed statements.

¹ UNHCR, *Desperate Journeys: Refugee and Migrant Children arriving in Europe and how to strengthen their Protection*, 2019.

² Definition used by Statistics Netherlands: 'An unaccompanied minor (UAM) is a child who submits an asylum application and, upon arrival in the Netherlands, is not accompanied and/or cared for by his/her parents and/or by an adult relative (whether related by blood or by marriage)'.

³ According to Eurostat figures, viewed on 22 October 2020.

⁴ UN Committee on the Rights of the Child, General Comment No. 14, Section 6; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, 12 October 2006, Section 55; ECtHR, *Rahimi v Greece*, No. 8687/080, 5 July 2011, Section 87; ECtHR *Popov v France*, No. 39472/07, 39474/07, 19 April 2012, Section 91; ECtHR, *Tarakhel v Switzerland*, No. 29217/12, 4 November 2014, Section 99.

⁵ See also ECtHR, *Mahamad Jama v Malta*, No. 10290/13, 26 November 2015, Section 150.

⁶ Article 8 of the Dublin III Regulation (604/2013).

⁷ This description is derived from the Separated Children in Europe Programme, *Position Paper on Age Assessment in the context of Separated Children in Europe*, 2012.

⁸ See, for example, UNHCR, Note 1 above; Amnesty International, 'Ze noemen het The Game. Maar het leven van deze kindmigranten staat echt op het spel' [They call it 'The Game'. But these migrant children are playing for their lives] via <https://www.amnesty.nl/wordt-vervolgd/kindmigranten-ze-noemen-het-the-game>, January 2020; Refugees International, *Seeking asylum in Greece: Women and Unaccompanied Minors struggle to survive*, February 2020.

⁹ Ministry of Justice and Security, *APM-Analyse: Alleenstaande minderjarige vreemdelingen die met onbekende bestemming vertrekken* [Analysis by the Migration chain analysis testing ground (APM): Unaccompanied foreign minors who leave without a fixed destination], March 2020, p. 3; on this point, see also ACVZ, *Secondary Migration Advisory Report*, November 2019.

¹⁰ Ibid. See also Amnesty International, Note 8 above; J. Cramer and H Kooy/*Groene Amsterdammer*, *Geboortedatum onbekend* [Date of birth unknown], No. 4, 22 January 2020, accessed via <https://www.groene.nl/artikel/geboortedatum-onbekend>; See also an Argos news report from 4 May 2019, <https://www.nporadio1.nl/argos/onderwerpen/499671-vluchtelingenkinderen-op-straat-door-verkeerde-registratie>, and the response of the Ministry of Justice and Security, see <https://zoek.officielebekendmakingen.nl/ah-tk-20182019-3162.html>

¹¹ For a summary, see the case law discussion in M. Klaassen and G. Lourens, *Journaal Vreemdelingenrecht* [Journal of Immigration Law], No. 3, 2018, p. 45–53.

¹² This was confirmed in interviews conducted by the ACVZ with relevant parties in the field, including asylum lawyers and the Dutch Council for Refugees (VWN).

¹³ IND Zevenaar interview on 19 June 2020.

¹⁴ Expertise Centre for Human Trafficking and Human Smuggling, *De vermissing van Vietnamese amv's en de relatie van Vietnamezen met mensenhandel en mensensmokkel in Nederland* [The disappearance of Vietnamese UFM's and the Vietnamese relationship with human trafficking and human smuggling in the Netherlands] (2015–2018), March 2020; Ministry of Justice and Security, *APM-Analyse: Alleenstaande minderjarige vreemdelingen die met onbekende bestemming vertrekken* [APM Analysis: Unaccompanied foreign minors who leave home without a fixed destination], March 2020; National Rapporteur on Trafficking in Human Beings, *Human Trafficking Victims Monitor 2014–2018*, 2019.

¹⁵ Amnesty International, Note 8 above; J. Cramer and H Kooy/*Groene Amsterdammer*, Note 10 above.

¹⁶ UNHCR 2019, Note 1 above.

¹⁷ See inter alia AJDCS 17 January 2017, ECLI:NL:RVS:2017:134; AJDCS 19 December 2018, ECLI:NL:RVS:2018:4131; AJDCS, 11 April 2019, ECLI:NL:RVS:2019:1165.

¹⁸ Ibid. See also the news report from the journalists' collective Lost in Europe at www.lostineurope.org; Argos, Note 10 above.

¹⁹ See also the Action Plan for this report, which can be found at www.adviescommissievoorvreemdelingenzaken.nl.

²⁰ Inspectorate of Justice and Security, *Toezicht op Leeftijdsonderzoeken. Gecombineerd jaarbericht 2018-2019* [Monitoring of age assessments. Combined annual report 2018–2019], June 2020, p. 10. See also the further explanation about the figures.

²¹ This example is fictitious, but is broadly based on an example from the article by Amnesty International, see Note 8 above.

²² See inter alia Amsterdam District Court, 13 July 2016, 16/13578; Haarlem District Court, 12 February 2016, 16/833; Arnhem District Court, 16 June 2016, 16/10627.

²³ IND Work Instruction 2018–19 on Age assessment, which can be found at https://ind.nl/Documents/WI_2018-19.pdf.

²⁴ Interview with IND Den Bosch, 18 June 2020.

²⁵ IND Work Instruction 2018/19, and confirmed in the interview with IND Den Bosch on 18 June 2020.

²⁶ Since 8 July 2016, responsibility for oversight of the age assessment process has lain with the Inspectorate of Justice and Security (coordinating state inspectorate), the Health and Youth Care Inspectorate and the Authority for Nuclear Safety and Radiation Protection. From 27 April 2004 to 8 July 2016, oversight of the age assessment process was the responsibility of the Age Assessment Commission. Prior to that, there was no age assessment oversight.

²⁷ In this context, see also the recent conclusions by the Inspectorate concerning the implementation of the improvement plan by the IND, Note 20 above, p. 16.

²⁸ Inspectorate of Justice and Security, see Note 20 above, p. 14–15.

²⁹ For a comprehensive description of the process, see the ACVZ Age Assessment Process Fact Sheet, which can be found at www.adviescommissievoorvreemdelingen.nl. Annex 1 of the 2018–2019 Age Testing Annual Report issued by the Inspectorate of Justice and Security also contains more details about the age assessment process. See Note 20 above.³⁰ Section C1/2.2 of the Aliens Act Implementation Guidelines 2000 (Vc 2000).

³¹ See, for example, the Den Bosch District Court, 3 March 2017, 17/2521.

³² KMar interview on 8 June 2020, AVIM interview on 17 August 2020, IND Ter Apel/Den Bosch interview on 18 June 2020.

³³ IND Ter Apel/Den Bosch interview on 18 June 2020; IND Zevenaar interview on 19 June 2020.

³⁴ IND Zevenaar interview on 19 June 2020.

³⁵ Ibid.

³⁶ See the Identification and Labelling Protocol at <https://www.rijksoverheid.nl/documenten/richtlijnen/2019/01/07/protocol-identificatie-en-labeling-pil>

³⁷ IND Work Instruction 2018/19.

³⁸ IND Zevenaar interview on 19 June 2020.

³⁹ Ibid.

⁴⁰ See inter alia AJDCS 17 January 2017, ECLI:NL:RVS:2017:134; AJDCS 19 December 2018, ECLI:NL:RVS:2018:4131; AJDCS, 11 April 2019, ECLI:NL:RVS:2019:1165.

⁴¹ See inter alia AJDCS 9 November 2017.

⁴² See AJDCS 29 March 2017, 2017/00567/1; AJDCS 9 August 2017, 201704419/1; AJDCS 15 August 2017, 2016908024/1.

⁴³ AJDCS 30 May 2017, 201603474/1.

⁴⁴ Section C1/4.3 Vc 2000.

⁴⁵ AJDCS 14 July 2017, 201703289/1.

⁴⁶ AJDCS 17 January 2017, 201604688/1.

⁴⁷ See also the Division, 1 November 2018, [ECLI:NL:RVS:2018:3743](https://ecli.nl:RVS:2018:3743), grounds for decision 7 and Vc Section C1/2.2.

⁴⁸ For a detailed analysis, see the Meijers Committee (H. Battjes, E. Brouwer, P. DeMorree and J. Ouwerkerk), *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights*, December 2011.

⁴⁹ See also H. Battjes, *Verblijfblog: interstatelijk vertrouwensbeginsel in het Dublinstelsysteem* [Residency blog: The principle of mutual trust between states in the Dublin system], 5 December 2018, which can be found at <http://verblijfblog.nl/interstatelijk-vertrouwensbeginsel-in-het-dublinsysteem/>, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, Section 35.

⁵⁰ Ibid., Sections 79–80. The existence of ‘systematic deficiencies’ was then included in the Dublin III Regulation (604/2013) as a legitimate reason not to transfer someone to a country of previous residence (see Article 3(2)): it can thus be necessary to make an exception to the principle of mutual trust between states.

⁵¹ See H. Battjes, Note 48 above, p. 9. ff.

⁵² ECtHR, *K.R.S. v United Kingdom*, No. 32733/08, 2 December 2008.

⁵³ See E. Brouwer, Note 48 above, p. 21 ff.

⁵⁴ Fundamental Rights Agency, *Age assessment and fingerprinting of children in asylum procedures. Minimum age requirement concerning children’s rights in the EU*, 2018; EASO, *Practical Guide on Age Assessment*, 2018. See also UNHCR, Note 1 above.

⁵⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU (Procedures Regulation), COM (2016) 476, 13 July 2016. In the context of the negotiations on the Regulation, the European Parliament has proposed an amendment relating to the last part of this article, namely that testing must be performed in accordance with international

standards. See European Parliament Resolution A8-0171/2018, Report on the proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467 – C8-0321/2016 – 2016/0224(COD), 22 May 2018, amendment 168, p. 84.

⁵⁶ See <https://acelg.blogactiv.eu/2015/11/11/mutual-trust-before-the-court-of-justice-a-view-from-cjeu-judge-sacha-prechal/>.

⁵⁷ See H. Battjes, Note 48 above, p. 12 ff.

⁵⁸ CJEU, Joined cases of N.S. v United Kingdom, C-411/10 and C493/10, 21 December 2011, ECLI:EU:C:2011:865, Section 81.

⁵⁹ *Ibid.*, Section 106.

⁶⁰ ECtHR, M.S.S. v Belgium and Greece, No. 30696/09, 21 January 2011,

⁶¹ ECtHR, Ilias and Ahmed v Hungary, No. 47287/15, 14 March 2017.

⁶² ECtHR, Tarakhel v Switzerland, No. 29217/12, 4 November 2014.

⁶³ CJEU, jawo v Germany, C163/17, 19 March 2019, ECLI:EU:C:2019:218, Section 91. See also <https://europeanlawblog.eu/2019/05/13/the-jawo-case-the-limits-of-the-principle-of-mutual-trust/>.

⁶⁴ The question of the circumstances under which application of the principle of mutual trust between states is no longer justified has also arisen for the European courts in cases unrelated to asylum. For example, the case of Aranyosi and Caldăraru v Austria concerned surrender to Hungary in the context of criminal proceedings, which was disputed due to the poor detention conditions in Hungary. CJEU, *Aranyosi and Căldăraru*, C-404/15 and C-659/15, 5 April 2016.

⁶⁵ See also Annex 1: Legal framework.

⁶⁶ See Note 52 above.

⁶⁷ AJDCS, 14 November 2018, ECLI:NL:RVS:2018:3743.

⁶⁸ IND Zevenaar interview on 19 June 2020.

⁶⁹ Interviews with ASGI, Refugee Support Aegean and UNHCR, among others. See Annex 2: Country information.

⁷⁰ See Annex 2: Country information.

⁷¹ *Ibid.*

⁷² *Italy Operating Plan 2020* of the EASO, which can be found at www.easo.europa.eu/italy-operating-plan-2020; ECRE, *The Role of EASO Operations in National Asylum Systems*, November 2019,

⁷³ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, which can be accessed at <https://www.refworld.org/docid/4f33c8d92.html>, Section 195.

⁷⁴ *Ibid.*, Section 196.

⁷⁵ CJEU, M v Ireland, C-277/11, 22 November 2012, p. 66.

⁷⁶ See Annex 1: Legal framework.

⁷⁷ District Court of The Hague, 24 December 2019, ECLI:NL:RBDHA:2019:14251, grounds for decision 2.4.7 and 2.4.8.

⁷⁸ See also the District Court of The Hague sitting in Den Bosch, ECLI:NL:RBDHA:2019:13122, 10 December 2019. Because Eurodac registration constitutes formal evidence for the purpose of determining responsibility for processing an asylum application, in light of the principle of mutual trust between states, the government may assume that the registration and its creation occurred with all due care. Because the likelihood of the foreign national being able to provide rebuttal evidence through statements or documents alone is minimal, the court held that the conclusion from the Eurodac search can be contested only by means of a second expert opinion. If the foreign national is not given an opportunity to obtain a second expert opinion, he or she is being deprived of an essential piece of evidence and thus of the right to effective legal protection, grounds for decision 11.

⁷⁹ Haarlem District Court, 19 March 2020, NL20.4689, grounds for decision 3.3 ff.

⁸⁰ District Court of The Hague, 24 December 2019, Note 74 above.

⁸¹ These rulings have since been overturned by the Division. See inter alia AJDCS, 5 August 2020, ECLI:NL:RVS:2020:1888.

⁸² ECtHR, M.S.S. v Greece and Belgium, 21 January 2011, Section 359.

⁸³ See H. Battjes, Note 48 above, p. 16 ff.

⁸⁴ UN Committee on the Rights of the Child, O.Y.K.A. v Denmark, 30 November 2017, JV 2018/69, with a note by H. Battjes; see also M. Klaassen and G. Lourens, Note 11 above, p. 52.

⁸⁵ See for example European Network of Ombudsman persons for Children (ENOC), *Children on the Move: Children First*, ENOC Position Statement, 27 September 2013, Section 4.

Glossary

Amnesty International. (January 2020). *Ze noemen het The Game. Maar het leven van deze kindmigranten staat echt op het spel*. [They call it 'The Game'. But these migrant children are playing for their lives.]

Asylum Information Database (AIDA). (June 2020). *Country Report Italy*.

Asylum Information Database (AIDA). (June 2020). *Country Report Greece*.

Battjes, H. (5 December 2018). *Verblijfblog: interstatelijk vertrouwensbeginsel in het Dublinsysteem* [Residency blog: The principle of mutual trust between states in the Dublin system].

Meijers Committee. (December 2011) *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights*.

Cramer J. and Kooy H. (22 January 2020) *Geboortedatum onbekend* [Date of birth unknown], in *De Groene Amsterdammer*, No. 4.

Danish Refugee Council. (December 2017), *Fundamental Rights and the EU Hotspots Approach*.

European Asylum Support Office (EASO). (2018), *Practical Guide on Age Assessment*.

European Asylum Support Office (EASO). (2020), *Italy Operating Plan 2020*.

European Council for Refugees and Exiles (ECRE). (December 2016). *A study on the implementation of the hotspots in Italy and Greece*.

European Council for Refugees and Exiles (ECRE). (November 2019). *The Role of EASO Operations in National Asylum Systems*.

European Network of Ombudsman persons for Children (ENOC). (27 September 2013). *Children on the Move: Children First*, ENOC Position Statement.

Expertise Centre for Human Trafficking and Human Smuggling. (March 2020). *De vermissing van Vietnamese amv's en de relatie van Vietnamezen met mensenhandel en mensensmokkel in Nederland (2015-2018)* [The disappearance of Vietnamese UFM's and the Vietnamese relationship with human trafficking and human smuggling in the Netherlands (2015-2018)].

Fundamental Rights Agency (FRA). (2018). *Age assessment and fingerprinting of children in asylum procedures. Minimum age requirement concerning children's rights in the EU*.

Fundamental Rights Agency (FRA). (4 March 2019). *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, 3/2019*.

Greek Ombudsman. (2017). *Migration flows and refugee protection: Administrative challenges and human rights, Special Report.*

Humanrights360. (21 August 2019). *No end in sight – The mistreatment of asylum seekers in Greece.*

Inspectorate of Justice and Security. (June 2020). *Toezicht op Leeftijdsonderzoeken. Gecombineerd jaarbericht 2018-2019* [Monitoring of age assessments: Combined annual report 2018–2019].

Klaassen, M. and Lourens, G. (2018). *Gestelde alleenstaande minderjarige vreemdelingen en de (automatische) erkenning van de leeftijdsvaststelling in een andere lidstaat* [Alleged unaccompanied foreign minors and automatic recognition of age assessments in another Member State] in: *Journaal Vreemdelingenrecht* [Journal of Immigration Law], No. 3.

Ministry of Justice and Security. (March 2020). *APM-Analyse: Alleenstaande minderjarige vreemdelingen die met onbekende bestemming vertrekken* [APM Analysis: Unaccompanied foreign minors who leave home without a fixed destination].

National Rapporteur on Trafficking in Human Beings. (2019). *Slachtoffermonitor mensenhandel 2014-2018* [Human trafficking victims monitor 2014–2018].

Refugees International. (February 2020). *Seeking asylum in Greece: Women and Unaccompanied Minors struggle to survive.*

Separated Children in Europe Programme. (2012). *Position Paper on Age Assessment in the context of Separated Children in Europe.*

UNHCR. (2019). *Desperate Journeys: Refugee and Migrant Children arriving in Europe and how to strengthen their Protection.*

UNHCR. (2019). *In eerste plaats een kind* [First and foremost a child].

UNHCR and UNICEF. (2014). *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe.*

UNHCR, UNICEF and IRC. (2017). *The way forward: to strengthened policies and practices for unaccompanied and separated children in Europe.*

UNICEF. (2013). *Age Assessment. A Technical Note.*

UNICEF. (2013). *Every Child's Birth Right: Inequities and Trends in Birth Registration.*

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Annexes

Annex 1 Legal framework

International law

A number of guiding principles follow from international treaties and standards that must be observed when determining whether an asylum seeker is a minor or an adult. Here the ACVZ lists those of greatest relevance to this report.⁸⁶

Best interests of the child

Article 3 of the UN Convention on the Rights of the Child states that the best interests of the child should be given primary consideration in all measures concerning children.⁸⁷ This means, among other things, that it is necessary to look at the possible impact a particular decision might have on the best interests of the child.⁸⁸ Minors, including unaccompanied minors, are entitled to specific procedural safeguards during the assessment of their asylum application.⁸⁹

In the context of the asylum process, it is of great importance, particularly for unaccompanied minors, that they are identified and registered quickly and in a child-friendly procedure.⁹⁰ An age assessment is only carried out if there is doubt about the age.⁹¹ Lowering the age limit or the restrictive application of age examinations aimed at treating minors as adults for the purposes of the asylum procedure can be in violation of their fundamental rights.

Benefit of the doubt

The benefit of the doubt is a particularly important principle in refugee law, where there is a significant degree of uncertainty with regard to establishing the facts and circumstances that will form the basis for a decision on who is entitled to protection and who is not. The protection in question is that of a 'weaker' individual against the 'stronger' government, in the context of the 'equality of arms' principle.⁹² Age is an 'uncertainty' if no evidence is available on the basis of which age can be established. International law requires that every person's birth must be registered in order to prove who he or she is, where he or she comes from and how old he or she is (Article 7 of the UNCRC). In practice, this does not always happen, or the documents that prove a person's age are not always issued (or are not issued correctly).⁹³ If age cannot be established, the benefit of the doubt must be given to the presupposed minor.⁹⁴ Based on the principle of the benefit of the doubt, it follows that the applicant must be considered and treated as a minor throughout the age assessment process, until the age is legally determined.⁹⁵

Multidisciplinary approach

An age assessment process may not exclusively consist of medical age examinations. Given the far-reaching nature of the process and the lack of scientific proof with regard to certainty about the conclusions (in other words, the large margins of error), medical examinations should be a last resort.⁹⁶ Age assessments should not solely consider physical appearance; experts should be brought in to consider psychological, cultural, environmental, behavioural,

developmental and other aspects.⁹⁷ *'As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise the child's age.'*⁹⁸ In short, the assessment should be based on a multidisciplinary approach.⁹⁹

European law

Principle of mutual trust

The principle of mutual trust means European Union Member States may assume that other Member States have complied with their obligations under EU law and international conventions, including human rights conventions, and that they have therefore made decisions that are in line with these obligations, which other Member States should mutually recognise.¹⁰⁰ That trust is based on the fact that the Member States have signed these conventions and are bound by EU law, including the norms and values on which the Union is based (Article 2 EU Treaty).¹⁰¹

Although this principle is not explicitly stated in the EU Treaties, it is an important building block of the EU legal system. As the Court of Justice stated: *'the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained.'*¹⁰²

This trust also underlies the Common European Asylum System (CEAS). Although it is not explicitly stated in the CEAS either, it follows from the applicable legal framework, as the Court of Justice concluded in the case of NS v United Kingdom: *'the raison d'être of the European Union and the creation of an area of freedom, security and justice [...] [are] based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.'* And:

'Accordingly, in the context of the Common European Asylum System, and in particular the Dublin III Regulation, which is based on the principle of mutual trust and which aims, by streamlining applications for international protection, to accelerate their processing in the interest both of applicants and participating States, it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the Charter, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951'.

¹⁰³

Although the principle of mutual trust is a very important EU legal principle, it has no inherent legal consequences. It is used when interpreting a particular legal text or when a Member State has a certain freedom of action in relation to the

implementation of that provision.¹⁰⁴ For example, this means that various guarantees for the safeguarding of fundamental rights do not have to be given for every individual case or request.

However, the principle of mutual trust is not always invoked in full by all Member States. The basic principle is that states can trust that other Member States will comply with EU law and fundamental rights. However, the application of the principle of mutual trust between states can still be disputed, thereby limiting its effect. In general, this is the case when there are real risk that fundamental rights are being breached. In the first instance, the basic principle is that any violation of rights should be remedied in the Member State where the breach occurred, unless effective legal remedies are not available in that state.¹⁰⁵

In Dublin cases, the issue is often whether Article 3 of the ECHR or Article 4 of the Charter has been violated in cases involving a transfer to another Member State. See Section 3.3.3 of the report for a more detailed discussion of this point. In other areas of migration, too, such as SIS registration, there are explicit exceptions in EU law to the automatic adoption of previous decisions, such as issuing a visa on humanitarian grounds to enable an application for residence, on the basis of the right to asylum under Article 18 of the Charter of the Fundamental Rights of the European Union ('the Charter'). Furthermore, automatic recognition of registration may be rebutted by invoking fundamental rights such as the right to family life (Article 8 of the ECHR, Article 7 of the Charter, EU Family Reunification Directive, 2003/86)¹⁰⁶ or someone's rights as a long-term resident of the EU.¹⁰⁷ Alternatively, the principle of proportionality could be invoked: weighing a relatively minor immigration law offence against the consequences of an entry ban for the life of the individual, for instance if it will mean long-term separation from family members.¹⁰⁸

Effective legal remedies

The right to effective legal remedies is a fundamental principle that is firmly embedded in European law and EU law (Articles 6 and 13 of the ECHR, Article 47 of the Charter). This includes the right to appeal a decision: at a given stage of the procedure, a legal remedy should be available that allows the court to test all relevant facts.¹⁰⁹ The right to effective legal remedies also means the right to due process¹¹⁰ – in other words, the right to equal chances of success in court (*equality of arms*) and the right to a procedure in which both sides are heard (*adversarial proceedings*).

The essence of '*equality of arms*' is that there must be a balance between the parties with regard to the possibility of producing evidence.¹¹¹ This basically means that, once an individual can objectively be said to be unable to produce rebuttal evidence to counter the formal evidence of the opposing party, i.e. the state, the individual must be permitted or enabled to supply it via an investigation or second

expert opinion, for example. If this is not done, the individual will be deprived of an essential ability to produce rebuttal evidence.

Procedures Directive and EASO Practical Guide

Article 25(5) of the Asylum Procedures Directive (2013/32/EU) states that Member States *may* conduct medical age examinations if, after general declarations or other relevant information have been submitted, there is doubt about the age of the asylum seeker. The benefit of the doubt is an important principle here: where there is persistent doubt, Member States must assume that the asylum seeker is a minor. This article also lists a number of procedural safeguards that largely correspond to the international standards discussed above.

The *method by which* the age of an asylum seeker is determined is not harmonised; it is left to the discretion of the Member States.¹¹² However, age assessment is crucial for the application of EU asylum law. Indeed, application of the additional procedural safeguards, rights and facilities for minors provided for under EU law¹¹³ on the basis of a presumed vulnerability depends on the age that is determined. From the general legal principle of effectiveness, it follows that the method used to make this determination must be consistent with the same EU laws, including the Charter of Fundamental Rights.¹¹⁴

The EASO has drafted guidelines that may support Member States to create clearer age assessment policies. The guidelines are based on the best interests of the child, the principle of the benefit of the doubt and the importance of a multidisciplinary and holistic approach to age assessment, given that no clear scientific method exists for determining age.¹¹⁵ This 'Practical Guide' explicitly states that there is a disparity in current practice between the various Member States and that not all countries have chosen a reliable, rights-based method.¹¹⁶ The document also contains information about the various practices in Member States and about developments there.

Qualification Directive

This shared burden of proof is expressly enshrined in EU law. Article 4 of the Qualification Directive (2011/95/EU) states that the applicant must submit all elements to substantiate the asylum application as quickly as possible and that the Member State must assess the relevant elements *in cooperation* with the applicant. The second paragraph of that article makes clear that these elements include statements and documents from the applicant about his or her age. Paragraph 5 then states that, even if certain evidentiary documents are missing, the benefit of the doubt should be given to the applicant if a number of conditions are met (including making genuine efforts to substantiate their story, presenting relevant elements, making declarations about the lack of documents and, in a general sense, providing a credible and coherent account). Moreover, Article 13 of the Asylum Procedures Directive, concerning the obligations of asylum seekers,

explicitly refers in paragraph 1 to this duty to cooperate; this duty applies to both asylum seekers and the government, which holds the decision-making power.

Dutch law and policy

Aliens Act 2000 and regulations: medical age examination

Article 25(5) of the Procedures Directive is implemented in Section 3.109d(2) of the Aliens Decree 2000 (Vb 2000). This states that, in the context of the processing of the asylum application (Section 28 of the Vw 2000) of an unaccompanied foreign minor and where there is doubt about the person's minor status, medical age examinations may be conducted to establish the person's age. Section C1/2.2(d) of the Aliens Act Implementation Guidelines 2000 contains a further explanation of the specific circumstances in which age examinations must be offered.

IND Work Instruction 2018/19: age assessment

In line with international standards, medical age examination is only performed if doubt about the age of the asylum seeker remains. Work Instruction 2018/19 on age assessments contains details on the policy for dealing with doubt about the age of alleged minor asylum seekers.¹¹⁷

Case law regarding the duty to cooperate and examine

Several courts have ruled on the interpretation of the *duty to cooperate and examine* in the context of age registration.

A case before the District Court of The Hague involved a presupposed minor asylum seeker from Eritrea with a previous registration as an adult in Italy.¹¹⁸ While in Eritrea, the asylum seeker had never held official identity documents but had made an effort to provide other information and documentation that could confirm the minor status he claimed. The court held that, if the precedent set by the Council of State case law was followed, the asylum seeker would never be able to rebut his registration as an adult.¹¹⁹ According to the court, based on the EU law interpretation of the duty to cooperate in Article 4 of the Qualification Directive,¹²⁰ although significant weight should be accorded to the principle of mutual trust, if the elements put forward by the asylum seeker are not complete, up to date or relevant, regardless of the reason, there is a duty to cooperate with the asylum seeker *to collect and assess other relevant elements*.¹²¹ This may include looking at other documents provided, carrying out an investigation into how the age was determined in the Member State of previous residence or even carrying out age testing. The court explicitly stated that a 'closer investigation' in the context of a Eurodac match is not sufficient.

In a decision dated 19 March 2020, the District Court of The Hague, sitting in Haarlem, held that, besides the fact that, based on the file of the asylum seeker, all policy conditions for conducting an age assessment had been met, the principle

of mutual trust did not mean that no investigation should be conducted at all into the method by which the age registration had been done in the Member State of previous residence, which again was Italy.¹²² In this case, the asylum seeker had made consistent statements about the manner of registration in Italy, which corresponded with what was known from general sources. From the duty to investigate, it follows that it is not enough for the government to simply invoke the principle of mutual trust without providing further reasons. Incidentally, the court observed that this case differed from the cases that formed the basis for the settled Council of State case law on this topic, because the person concerned had repeatedly told the Italian authorities that his registered age was not correct. Both cases were appealed.¹²³

Another noteworthy decision is that of the court in preliminary relief proceedings, District Court of The Hague sitting in Den Bosch, dated 10 December 2019. This decision was not about age assessment but about the right to a second expert opinion regarding data in Eurodac. Because Eurodac registration constitutes formal evidence for the purpose of determining responsibility for processing an asylum application, in light of the principle of mutual trust, the government may assume that the registration occurred with all due care. The court considered that the likelihood of the foreign national being able to provide rebuttal evidence through statements or documents alone was minimal. Accordingly, the conclusion from the Eurodac search can only be contested through a second expert opinion. If the foreign national is not given an opportunity to obtain a second expert opinion, he or she is being deprived of an essential piece of evidence and thus of the right to effective legal protection.¹²⁴ This reasoning is comparable to that regarding the interpretation of the duty to cooperate in the Qualification Directive.¹²⁵

Annex 2 Country Information

Italy

*Identification and registration: the registration process*¹²⁶

In Italy, an asylum application may be put forward to the border police (at the border), to the provincial immigration service (*Ufficio immigrazione*) or to the police (*Questura*) (if the asylum seeker is already present in the territory).

The registration process has two phases. First, photos and fingerprints are taken for the purpose of registration and verification in Eurodac (*fotosegnalamento*). This is done both in the border procedure and in the *Questura* procedure.

Following the *fotosegnalamento*, the asylum seeker is invited to appear before the *Questura* to formally submit the application (*verbalizzazione*).¹²⁷ This is a power held by the *Questura* and involves the completion of Form C3 (*Modello C3*). On this form, the personal information, route of travel and reasons for requesting asylum are recorded. The asylum seeker signs this application form and receives a copy. The *Questura* then sends the application and any documents to the 'Territorial Committees'. These are spread around the country and are empowered to run the asylum hearings and make decisions at first instance. The asylum seeker is subsequently informed by the *Questura* of the date of the committee hearing.¹²⁸ In the meantime, the asylum seeker receives a residence document (*permesso di soggiorno per richiesta asilo*). Since 2017, the *Questura* has been supported by EASO experts during the *verbalizzazione* process.¹²⁹

Since 2018, Italy has also had a border procedure, whereby the border police do not redirect asylum seekers to the *Questura*; instead, the entire procedure is accelerated at the border or in the transit zone. This procedure applies to asylum seekers who have been detained following 'illegal' entry or who have come from a safe country of origin.¹³⁰ The border procedure is applied not only at ports and airports but also at the internal borders of Friuli Venezia Giulia (for overland arrivals) and along the coast (for those landing in small boats).

Italy also has a 'hotspot procedure'.¹³¹ Although relocation has stopped, the hotspot locations still function as registration centres. By the end of 2019, four were still operational: Apulia (Taranto) and Sicily (Lampedusa, Pozzallo and Messina). At that point, there were 78 people in the hotspot locations, all on Sicily. In 2018, there were around 14,000 arrivals at the hotspots, primarily from Tunisia (more than 5,500), Eritrea (around 2,500) and Sudan (around 800).

Hotspots

In 2015, these procedures were set up for Italy and Greece at the initiative of the European Commission, to help them deal with substantially higher numbers of arrivals. In these procedures, asylum seekers were registered and identified, after which a fast and careful assessment could be made of their need for protection (based on nationality). Until September 2017, it mainly functioned as a procedural vehicle for the relocation of Syrian and Eritrean asylum seekers from Italy to other EU countries. The idea was that those who were ineligible for protection could be sent back immediately. In this setting, it was the intention that EU agencies (EASO, Frontex, Europol and Eurojust) would collaborate with the national authorities. The hotspots were seen as a sort of reception and registration centre where all administrative actions around the arrival of migrants, including asylum seekers, could be swiftly handled: identification, reception, asylum procedure or return.

Implementation practice

In practice, the registration phase and obtaining access to the asylum procedure in Italy still has its challenges.¹³² It is for good reason that Italy is receiving support from the EASO with a range of processes: the Operating Plan 2020 explicitly states that fragmentation in the asylum and reception system is problematic for the proper functioning of information systems and coordination mechanisms and that registration needs to be standardised.¹³³

For instance, the *fotosegnalamento* and the submission of the application often do not occur at the same time or in the same location, partly due to capacity issues. Accordingly, it regularly happens that formal registration occurs weeks after the submission of the application. The formal legal time frames, both for registration and for decision-making, are generally not met, and asylum seekers are not kept informed. In the meantime, asylum seekers are not entitled to shelter or access to medical or other facilities. The law also does not provide for financial support for travelling to the competent office of the *Questura* to submit the application. In some cases, there are NGOs who provide this support, but that is not guaranteed. Because asylum seekers do not receive a document showing their intention to submit an asylum application (asylum seekers only receive their documents after formal registration), they have nothing from which they can derive a right of residence, and while they wait for actual registration of their application, they run the risk of being arrested and deported.

In addition, there are a range of practical obstacles surrounding the arrival and registration process. Some *Questura* offices only allow appointments to be made online, and the system often does not work or is otherwise inaccessible for asylum seekers. Sometimes, only a limited number of people per week can submit applications due to limited opening hours. There are reports of refusals to allow asylum seekers to wait indoors and long queues outside police stations with asylum seekers being verbally abused and intimidated by third parties without any action from the police.

In practice, when asylum seekers are giving their details and when their asylum applications are registered, interpreters/translators are by no means always present. Officially, interpreters are supposed to be provided, but there is a shortage of qualified interpreters in the necessary languages. In particular, they are not available when asylum seekers land and enter Italian territory outside of official border posts. However, there is also a general shortage of interpreters. The priority for the use of interpreters is during the substantive handling of asylum applications during Territorial Committee hearings, rather than at the time of registration and identification by the *Questura* and border police.¹³⁴

The picture with regard to being able to review an incorrect age registration (indicating minor status instead of the registered adult status) is also murky. Both the *Questura* and the Territorial Committees have been known to change ages without additional age assessments. Sometimes, in accordance with the new legislation (see below), the juvenile court can also be asked to start an age assessment procedure. In other cases, a later declaration by an asylum seeker that he or she is a minor is simply ignored, and the person remains registered, and continues to be treated, as an adult.¹³⁵

The ACVZ has learned of the following problems relating specifically to the practice in the hotspots in relation to registration and identification. The situation appears to be fairly chaotic. As far as we can tell,¹³⁶ the border police sometimes register the age as stated by the asylum seeker. In other cases, age is established unilaterally, without a further conversation or age assessment. This was difficult to ascertain for two reasons: first, even in the latter case, it is noted that age was established 'on the basis of a statement by the applicant'. Second, asylum seekers do not receive documentation after this initial identification process in the hotspots. Asylum seekers therefore cannot check the age that has been registered in the system.¹³⁷

Protection of minors and age assessment

From various reports and investigations by NGOs and international organisations, it seems that the reception and protection of minors in Italy in recent years has left much to be desired.¹³⁸ The ECtHR has also commented on this issue. Following the Tarakhel case, Italy had to issue individual guarantees before transfers could be made under the Dublin Regulation.¹³⁹ In 2017, the ECtHR issued an interim measure because two minors were housed in a centre that was not suitable: it was a normal reception centre, which was overcrowded, with poor sanitary and other facilities.¹⁴⁰ More recent reports are also not positive. An AIDA report from June 2020 states that new guidelines have been issued for reception facilities, particularly for minors. However, because most reception centres are still set up as emergency reception locations, in spite of the lower numbers of applications, the situation remains concerning according to local organisations.¹⁴¹ The reception and protection of minors is also an area of concern for the EASO in its work.¹⁴²

New legislation, new practice?

In 2017, a new act took effect, with provisions on the protection of unaccompanied foreign minors: '*Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati*' (L47/2017). It also included provisions on the way in which age assessment should be performed.

In the new situation, a socio-medical (multidisciplinary) investigation must take place, which is requested if there is doubt about the age of the alleged minor. As in the Netherlands, there is doubt if an asylum seeker claims to be a minor but cannot produce documents to substantiate that claim. An investigation can also be launched in exceptional circumstances where the authorities have real doubts, for example in the case of a 14-year-old who adamantly insists he or she is an adult. This investigation can be initiated at any point in the procedure, including during the asylum procedure or any appeal. Consent must be obtained from the minor or his or her guardian for the medical part of the investigation. An age investigation will only be launched based on a writ from a chief prosecutor in the juvenile court: this should put an end to the policy whereby minors, even documented minors, are housed in closed facilities with no legal basis. The new act also allows for separate appeals specifically against the age assessment.¹⁴³

According to Italian asylum lawyers, this new method of age assessment is widely ignored in practice. The implementation policy guidelines were only published very recently, in July 2020, and practical implementation has so far been highly variable across the different regions. The implementation of the multidisciplinary approach has yet to get off the ground.¹⁴⁴ In 2019, the Italian Ombudsman for Children reported that the number of 'new style' age assessments was still low.¹⁴⁵

Medical age testing is also still being performed even where documentation exists and there should therefore not be any doubt about the age. In 2017, the Italian Ombudsman for Children observed that all minors are given a medical examination after their initial hearing, before photos and fingerprints are taken. During the process, minors continue to be treated as adults.¹⁴⁶

In other words, parts of the new legislation are promising and more in line with international standards. Since implementation of the new legislation is only just beginning, it is still too early to say what effect it will have in the long term.

2. Greece

*Identification and registration: The registration process*¹⁴⁷

Since 2015, like Italy, Greece has been applying a hotspot procedure to the registration and identification process on the islands. Reception and Identification Centres (RICs) have been set up on Lesbos, Chios, Samos, Leros and Kos.¹⁴⁸ Evros has had an RIC since 2013 for overland arrivals.

Since late March 2016, after the EU-Turkey Statement took effect, this has been a closed centre as part of an accelerated border procedure. This means that everyone is placed in detention immediately after arrival. Because this attracted considerable criticism both nationally and internationally, and because, in a practical sense, automatic detention was impossible to enforce due to the increasing numbers of arrivals and limited capacity, this was converted to geographic freedom-restricting measures in late 2016: in other words, a requirement to remain on the island. At the end of 2019, these reception centres had a collective capacity of around 6,200 places, but they are actually permanently overcrowded.

The hotspot procedure was implemented in Greek laws and regulations, including an Act dated 3 April 2016 (L 4375/2016). The idea behind this type of registration process actually already existed but was codified in 2016. The most recent Greek asylum statute, the IPA of 1 January 2020, states in Section 39 that 'all third-country nationals and stateless persons who do not meet the ordinary formal requirements for entry into the country will be subject to registration and identification procedures'.

These procedures consist of five phases:

1. providing information (about rights and obligations, transfer to other locations, the right to apply for asylum, the possibility of voluntary return);
2. the 'reception and identification procedure': new arrivals must be immediately transferred to an RIC where they will go through this phase in a closed setting. In theory, this phase takes 5 days, but this can be extended to 25 days;
3. registration and medical examination, including identification of vulnerable groups;
4. referral to the asylum procedure: as soon as an asylum application is submitted, the Asylum Service's Rapid Response Teams divide the applications by country of origin and prioritise them by nationality;
5. further referral or transfer to a reception or detention centre depending on the circumstances of the case.

This process broadly corresponds with the previous structure of the registration procedures.

Practical implementation

In the *RICs on the islands*, asylum seekers are registered by the Reception and Identification Service (RIS). In addition to monitoring the hotspot location, the police are responsible for the actual identification and verification of the nationality of the applicants. They are supported in this task by Frontex. In practice, this often means that Frontex performs this process, because the Greek authorities lack capacity and interpreters. Frontex's findings are adopted by the Greek authorities, but the associated documentation is considered to be restricted (a 'non-paper' process) and cannot be accessed by the asylum seeker. In practice, assessments and decisions about identity, including age, are difficult for an asylum seeker to dispute.¹⁴⁹ Those who wish to apply for asylum are referred to the Asylum Unit, which is located in the RIC, for registration and to submit their asylum applications. The EASO is supporting the Greek authorities with this process and plays a very active role in this accelerated border procedure, conducting interviews and providing advice about decisions made on asylum applications. The EASO is also involved in identifying vulnerable asylum seekers.¹⁵⁰

In 2019, this registration was generally completed within a few days. Bigger issues arise when medical assessments and psychological support are required. Until mid-2017, this work was outsourced to NGOs. Since then, it has come under the responsibility of the Ministry of Health, which delegates these tasks to underlying bodies such as the National Organisation for Public Health, a private party. In 2019, many deficiencies and delays in care for asylum seekers were observed, largely due to a lack of medical staff combined with ongoing overcrowding in reception centres.¹⁵¹

In most cases, new asylum seekers leave the RIC after a couple of days, if the above phases have been completed. At the same time, a return decision is often issued immediately by the police, in combination with a detention order. These decisions are then suspended through a postponement of departure decision from the head of the regional police, which means the asylum seeker must remain in a specific area (the island), either in the RIC or in another reception centre, until the asylum procedure is complete.¹⁵²

However, unaccompanied minors are generally not given a right of free movement around the island. They must remain in the RIC under a freedom-restricting measure or protected reception measure. In practice, this means an extremely lengthy stay in the RIC, which is not suitable for this purpose, pending a place becoming available in a more suitable reception centre.¹⁵³

Asylum seekers who arrive in Greece via the Evros border are not covered by the EU-Turkey Statement. They are therefore not subject (by default) to the accelerated border procedure, application of the 'safe third countries' concept or freedom-restricting measures after completion of the registration procedure.

However, they are identified and registered in the RIC in Fylakio, Orestiada. This RIC continues to have a closed setting. Depending on numbers and thus on

occupancy of the RIC, they may first be detained in the pre-RIC detention centre, which is also in Fylakio.¹⁵⁴ According to the Greek Refugee Council, this detention was recently limited to a couple of days. However, the detention centre remains overcrowded: in late 2019, it held 391 people, although officially there is only room for 240.¹⁵⁵

In Fylakio, the 'reception and identification procedures' take a week on average. The procedure is the same as on the islands.

When numbers are high, asylum seekers from certain countries of origin with a relatively high recognition rate for asylum applications are sometimes released immediately and issued with a suspension of departure decision for a period of six months, but without being allowed to apply for asylum. In addition, there is often no room for them in the open reception centres due to a lack of capacity.

As on the islands, unaccompanied minors are held for more than 25 days in the Fylakio RIC while waiting for a place in a suitable shelter, and sometimes for up to 6 months, under the guise of protected reception. In 2019, this applied to 371 registered unaccompanied minors. During this period, these minors stayed in a centre without adequate medical or psychosocial facilities and without access to education or daytime activities. They were often housed in the same rooms as adult asylum seekers, putting them at risk of exploitation and abuse.¹⁵⁶

Age assessment of unaccompanied foreign minors

In Greece, a distinction is made between age assessment during the registration phase (in the RIC), during the asylum procedure or in detention.

With regard to the registration phase and the asylum procedure, there are legal provisions that provide a framework for the age assessment process.¹⁵⁷ No such provisions exist with regard to alleged unaccompanied minors in detention. Although in Greece, as elsewhere, the basic principle is that minors should be detained only in extreme cases, it is not officially prohibited by law and occurs regularly in practice, including in so-called 'pre-removal centres'. These minors come under the responsibility of the police, and a different policy framework applies to them: in the event of doubt about their age, medical age testing is performed using X-rays. The outcome of this assessment is not open to appeal, even though the margin of error for X-ray assessments is high, which means the chance of minors being incorrectly treated and detained as adults is also high.¹⁵⁸ The Greek Council for Refugees has reported a number of these cases: *'These include for example in Kos PRDF the case of a child of Palestinian origin, claiming to be 15 years old, who was deemed by the authorities to be an adult, following dental and hand X-rays; A 17 year old minor from Egypt, carrying a copy of his passport and birth certificate on him, who was detained as an adult, without an age assessment procedure, based solely on the initial age registration of the police on the day of his arrest; Two UAM from Guinea, carrying on them original birth certificates, remaining in detention for a period of 5 months.'*¹⁵⁹

There is often inadequate medical and psychosocial care in the RICs.¹⁶⁰ This also has serious consequences for age assessment in the registration phase. Based on the statutory measures, if there is 'particular, justifiable doubt' about age during this phase, the asylum seeker is referred to the medical team in the RIC. This applies both on the islands and at the border in Evros.

Under the regulations, the following procedure is followed:

- an assessment of physical characteristics (height, weight, BMI, voice, hair growth), followed by a clinical assessment by a paediatrician.
- If this assessment does not result in a unanimous opinion, it will be followed by an assessment by a psychologist and a social worker of the cognitive, behavioural and mental development of the person concerned.
- If no paediatrician is available or if the interdisciplinary assessment does not remove the doubt, as a last resort, the person will be referred to the hospital for medical age testing, including assessment of teeth and hand/wrist growth.

The outcomes of the testing/assessments are then sent to the head of the medical and psychosocial department of the RIC, who makes a recommendation to the head of the RIC regarding the age to be registered and the reasons behind that decision. The decision about the age is communicated to the asylum seeker, who then has 10 days to lodge an objection with the RIC.

According to NGOs and international organisations, this procedure is rarely followed. In practice, the procedure is limited to medical age examination by means of X-rays, which have become the default procedure instead of the last resort.¹⁶¹ This is due to the lack of qualified medical staff in RICs. The Council for Refugees provided a number of examples:¹⁶² On Lesbos, for example, between May and September 2019, there was no psychosocial unit. Later that year, when there was a unit again, the pressure on the system was such that, although referrals were made, the authorities did not wait for them, and the persons concerned were declared to be adults. Long waiting times were also reported on Samos. Age assessments there are performed only by appointment, once a month. From May to November 2019, no psychologist was employed at the local hospital, meaning procedures were suspended. In Fylakio/Evros, too, it is reported that the statutory procedure is not followed. In most cases, referrals to the age assessment procedure are made based on a single visual inspection by RIC officials, sometimes even only on the basis of a photo. This can happen even if the asylum seeker holds proper documentation proving his or her minority status. Here, too, age testing consists solely of X-rays in the local hospital.¹⁶³

The UNHCR has indicated that multiple age assessments are sometimes requested and performed in the same case, because the procedure takes so long, there are long waiting times, registration is poorly organised, and many different actors are involved. Not only is this onerous for young asylum seekers, it also extends their stay in the RIC in substandard conditions.¹⁶⁴

Finally, reports from organisations on the ground suggest the registration process in the RICs often leaves much to be desired. There have been cases in which personal data, including age, have been registered incorrectly by the police, which may or may not have been the result of translation errors by Frontex.¹⁶⁵ If Frontex is involved, reviewing or correcting an incorrect registration is difficult. This is because Frontex internal documents are not public ('non-paper'). The documents are not made available to asylum seekers; instead, they are destroyed, and no appeal is possible.¹⁶⁶

Moreover, the procedure for objecting to an age assessment actually offers little legal protection, since 10 days is often too little time to collect evidence, particularly given the closed setting in which asylum seekers reside. In 2019, 13 notices of objection were submitted, and none were upheld.¹⁶⁷

Age assessment in the asylum procedure

The Greek legislation (Section 75(3) of the IPA) provides for an age assessment process that can be performed at any point in the asylum procedure, whenever doubt arises with regard to age. The provisions contain all necessary procedural safeguards.¹⁶⁸ The policy framework for the performance of an age assessment during the asylum procedure (JMD 1982/2016) broadly corresponds to the process in the RIC.¹⁶⁹

The consequence of the deficiencies in the protection of minors in practical implementation, including the lack of a properly functioning guardianship system, is that these statutory frameworks are difficult to implement.¹⁷⁰ In addition, the problems with the age assessment process in the RICs have consequences for the asylum procedure. An incorrect registration of age by the police (in a detention setting) can be corrected by simply giving the correct date of birth to the Asylum Service, but an incorrect age assessment in an RIC can only be corrected by means of an authentic source document.¹⁷¹ If the official involved has doubts about the registered age, he or she can decide to refer the person concerned to the age assessment procedure.¹⁷²

In addition to NGOs and international organisations such as UNHCR, the Greek Ombudsman has also voiced criticism on several occasions about the diligence of the age assessment in the asylum process, in light of the combination of circumstances outlined above: '*This makes more difficult the further verification of the scientific correctness of the assessment*'.¹⁷³

¹⁶⁶ The ACVZ does not claim that this section is in any way comprehensive; only the standards and provisions that are the most relevant for this report are listed. For an exhaustive list of applicable national and international norms, standards and directives relating to age

assessment, see, for example, Separate Children in Europe Programme, *Position Paper on Age assessment in the context of separated children in Europe*, 2012; UNICEF, *Age Assessment. A Technical Note*, 2013; UNHCR, UNICEF and IRC, *The way forward: to strengthened policies and practices for unaccompanied and separated children in Europe*, 2017; EASO, *Practical Guide on Age Assessment*, 2018.

⁸⁷ Compare this with Article 24 of the EU Charter of Fundamental Rights (right of the child to protection and safeguarding the best interests of the child). Specifically in relation to the implications of the 'best interests of the child' for asylum procedures involving unaccompanied minors, see UNHCR and UNICEF, [Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe](#), 2014; UNHCR, *In eerste plaats een kind* [First and foremost a child], 2019.

⁸⁸ UN Committee on the Rights of the Child, General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration, 2013, Sections 6(c) and 14 (b).

⁸⁹ UNHCR Guidelines on International Protection No. 8: Child Asylum Claims, 2009, Section 7, 65.

⁹⁰ UN Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005.

⁹¹ UNHCR. ExCom Conclusion on Children at Risk, No. 107, 2007, Section (g)(ix);

⁹² UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Sections 196, 203, 204.

⁹³ UNICEF, *Every Child's Birth Right: Inequities and Trends in Birth Registration*, 2013.

⁹⁴ UNHCR Guidelines on International Protection No. 8: Child Asylum Claims, 2009, Sections 73-75: '[...] it may be necessary for the examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances which may call for a liberal application of the benefit of the doubt.'

See also UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Minors seeking Asylum*, 1997, Section 5.11; UN Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005; UNHCR ExCom Conclusion on Children at Risk, No. 107, 2007, Section (g)(ix); UNHCR and UNICEF, [Safe & Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe](#), 2014, p. 34.

⁹⁵ EASO, *Practical Guide on Age Assessment*, 2018.

⁹⁶ ECRE, AIRE Centre, Dutch Council for Refugees, Third Party Intervention on 5 July 2017 in ECtHR, *Darboe and Camara v Italy*, No. 5797/17.

⁹⁷ UNHCR, 1997, Section 5.11; UNHCR, 2007, Section (g)(ix); UNHCR, 2009, Section 75; UNHCR and UNICEF, 2014, p. 34.

⁹⁸ UNHCR, 2009, Section 75.

⁹⁹ UNHCR and UNICEF, 2014, p. 34.

¹⁰⁰ For a detailed analysis, see the Meijers Committee, Note 48 above.

¹⁰¹ See also H. Battjes, *Verblijfblog: interstatelijk vertrouwensbeginsel in het Dublinsysteem* [Residency blog: The principle of mutual trust between states in the Dublin system], 5 December 2018, which can be accessed at <http://verblijfblog.nl/interstatelijk-vertrouwensbeginsel-in-het-dublinsysteem/>; judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, Section 35.

¹⁰² CJEU, Opinion 2/13 regarding the accession of the European Union to the European Convention on Human Rights, 18 December 2014, ECLI:EU:C:2014:2454, Section 191.

¹⁰³ CJEU, *N.S. v United Kingdom*, C-411/10 and C493/10, 21 December 2011, ECLI:EU:C:2011:865, Sections 79-80.

¹⁰⁴ <https://acelg.blogactiv.eu/2015/11/11/mutual-trust-before-the-court-of-justice-a-view-from-cjeu-judge-sacha-prechal/>

¹⁰⁵ ECtHR, *K.R.S. v United Kingdom*, see Note above, and ECtHR, *M.S.S. v Belgium and Greece*, see Note 60 above.

¹⁰⁶ See for example CJEU, *Commission v Spain*, C-503/03 (Grand Chamber), 31 January 2006.

¹⁰⁷ Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹⁰⁸ See E. Brouwer, Note 48 above, p. 25.

¹⁰⁹ For more on the interpretation of Article 47 of the Charter, see CJEU, *Ghezelbash*, C-63/15, 7 June 2016 and CJEU, *El Hassani*, C-403/16, 13 December 2017. For a person to be said to have an effective legal remedy, there must also be a suspensive effect with regard to the enforcement of the decision at first instance, sufficient time to prepare a defence, access to legal assistance, etc. See inter alia ECtHR, *Gebremedhin v France*, No. 25389/05, 26 April 2007, Section 66. See also ECtHR, *Hirsi Jamaa v Italy*, No. 27765/09, 23 February 2012 and ECtHR, *M.O.S.H. v The Netherlands*, 63469/09, 3 February 2015.

¹¹⁰ For a further discussion of the meaning of a 'fair trial' in the field of migration, see the note by E. Brouwer, *JV* 2020-4, No. 59.

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- ¹¹¹ ECtHR, *Korosec v Slovenia*, 8 October 2015.
- ¹¹² FRA, *Age assessment and fingerprinting of children in asylum procedures. Minimum age requirement concerning children's rights in the EU*, 2018.
- ¹¹³ Reception Conditions Directive, Procedures Directive, Dublin Regulation (e.g. Article 8(4)), Family Reunification Directive (e.g. Article 10(3)(a)).
- ¹¹⁴ CJEU, *Rewe*, C-120/78, 20 February 1979, ECLI:EU:C:1979:42; see also M. Klaassen and G. Lourens, Note 11 above, p. 45.
- ¹¹⁵ EASO, Note 95 above.
- ¹¹⁶ *Ibid.*, p. 11.
- ¹¹⁷ IND Work Instruction 2018-19 on Age assessment, which can be found at https://ind.nl/Documents/WI_2018-19.pdf
- ¹¹⁸ District Court of The Hague, 24 December 2019, ECLI:NL:RBDHA:2019:14251.
- ¹¹⁹ For this reason, it could also be argued that the ability to exercise the right to an effective legal remedy had been called into question. See the note by E. Brouwer, Note 110 above, p. 40.
- ¹²⁰ CJEU, *M v Ireland*, C-277/11, 22 November 2012, p. 66.
- ¹²¹ District Court of The Hague, 24 December 2019, grounds for decision 2.4.7 and 2.4.8.
- ¹²² Haarlem District Court, NL20.4689, 19 March 2020, grounds for decision 3.3 ff.
- ¹²³ At the time of completion of this publication, the Division had not yet issued a judgment.
- ¹²⁴ District Court of The Hague sitting in Den Bosch, 10 December 2019, ECLI:NL:RBDHA:2019:13122, grounds for decision 11.
- ¹²⁵ See Note 110 above.
- ¹²⁶ Comprehensive information about the structure of the Italian asylum procedure can be found in AIDA Country Report Italy, June 2020, which can be found at <https://www.asylumineurope.org/reports/country/italy>
- ¹²⁷ Italian asylum legislation states that the application must be registered within three working days of the applicant expressing a desire to apply for asylum or within six days if this desire is expressed at the border. This time frame may be extended to 10 days in the event of high numbers.
- ¹²⁸ Based on Italian asylum legislation, this hearing must take place within 30 days after the application, and a decision must be issued within 3 working days, unless this decision cannot reasonably be made. In that case, the decision-making time frame is extended to 6 months, which may be extended still further where necessary, to 9 or 12 months.
- ¹²⁹ Italy had already been supported by the EASO since 2013 due to the increasing numbers of arrivals and the associated pressure on its poorly-functioning asylum system. See also *Italy Operating Plan 2020*, issued by the EASO, available at www.easo.europa.eu/italy-operating-plan-2020.
- ¹³⁰ The Italian list of safe countries of origin was established on 4 October 2019 and comprises the following countries: Albania, Algeria, Bosnia-Herzegovina, Cabo Verde, Ghana, Kosovo, Montenegro, Morocco, North Macedonia, Senegal, Serbia, Tunisia and Ukraine.
- ¹³¹ COM (2015) 240 final: European Commission, A European Agenda on Migration, May 2015. See also Council Decisions 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015.
- ¹³² See AIDA Country Report Italy, June 2020 p. 36 ff; email exchange with the ASGI, June 2020.
- ¹³³ See EASO Italy Operating Plan 2020, Measures 1 and 5.
- ¹³⁴ AIDA Country Report Italy, June 2020, p. 45.
- ¹³⁵ Email exchange with the ASGI, August 2020.
- ¹³⁶ Access to the hotspot locations is limited. On this topic and on the procedure in these locations in general, see: *ECRE, A study on the implementation of the hotspots in Italy and Greece, December 2016*; *Danish Refugee Council, Fundamental Rights and the EU Hotspots approach, December 2017*; AIDA Country Report Italy, June 2020, p. 32 ff; FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy*, 3/2019, 4 March 2019.
- ¹³⁷ Email exchange with the ASGI, August 2020.
- ¹³⁸ See for example www.ecre.org/shortages-in-reception-systems-expose-unaccompanied-children-to-harmful-conditions-in-italy-and-greece/; www.hrw.org/news/2016/06/23/italy-children-stuck-unsafe-migrant-hotspot; www.oi-fles-d8-prod.s3.eu-west-2.amazonaws.com/s3fa-public/file_attachments/children_alone_pulled_from_the_sea_by_wayside.pdf; www.unhcr.it/wp-content/uploads/2019/11/Report-UNHCR_UNICEF_OIM-At-a-crossroads.pdf; www.statewatch.org/media/documents/news/2016/aug/italy-asgi-statement.pdf.
- ¹³⁹ ECtHR, *Tarakhel v Switzerland*, No. 29217/12, 4 November 2014.
- ¹⁴⁰ For documentation on this case, see: https://www.asgi.it/wp-content/uploads/2017/02/CEDU_art.-39_Cona_14.2.17_erased.pdf; see also a statement by the ECRE, which can be accessed at <https://www.ecre.org/ecthr-ruling-in-support-of-complaints-from-unaccompanied-minors-in-italy/> and <https://www.ecre.org/italian-ngos-raise-concerns-over-conditions-in-cone-reception-centre-and-government-reform-plans-to-tackle-reception-problems/>.

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- ¹⁴¹ AIDA Country Report Italy, June 2020, p. 15–16.
- ¹⁴² EASO Italy Operating Plan 2020, Measure 2(2).
- ¹⁴³ AIDA Country Report Italy, June 2020, p. 76.
- ¹⁴⁴ ASGI interview, June 2020.
- ¹⁴⁵ AIDA Country Report Italy, 2020, p. 76.
- ¹⁴⁶ Note 144 above.
- ¹⁴⁷ Comprehensive information about the structure of the Greek asylum procedure can be found in AIDA Country Report Greece, June 2020, which can be found at <https://www.asylumineurope.org/reports/country/greece>.
- ¹⁴⁸ The five First Reception Centres (FRCs) were set up by Joint Ministerial Decision 2969/2015 of December 2015. Lesbos became operational as a hotspot in October 2015, with a capacity of 2,840 and an occupancy of 18,615. Chios (February 2016) has a capacity of 1,014 and an occupancy of 5,782. Samos (March 2016) has a capacity of 648 and an occupancy of 7,765. Leros (March 2016) has a capacity of 860 and an occupancy of 2,496. Finally, Kos (June 2016) has a capacity of 816 and an occupancy of 3,765. These data reflect the situation as at 31 December 2019 and were provided by the National Coordination Centre for Border Control, Immigration and Asylum.
- ¹⁴⁹ AIDA Country Report Greece, June 2020, p. 114; Interview with Refugee Support Aegean on 2 July 2020.
- ¹⁵⁰ ECRE, The Role of EASO Operations in National Asylum Systems, November 2019.
- ¹⁵¹ AIDA Country Report Greece, June 2020, p. 21–22.
- ¹⁵² *Ibid.*, p. 40.
- ¹⁵³ Interview with Refugee Support Aegean on 2 July 2020.
- ¹⁵⁴ Communication by the UNHCR dated 15 May 2019 in the cases of M.S.S. and Rahimi v Greece. (Nos. 30696/09, 8687/08), accessible at: <https://bit.ly/39PPbt7>.
- ¹⁵⁵ AIDA Country Report Greece, June 2020, p. 44.
- ¹⁵⁶ European Committee of Social Rights, UNHCR, ICJ and ECRE v Greece, Complaint Procedure No. 173/2018, 9 August 2019, accessible via: <https://www.refworld.org/docid/5d9745494.html>.
- ¹⁵⁷ Ministerial Order 92490 and Joint Ministerial Order 1982/2016.
- ¹⁵⁸ Working Group on Arbitrary Detention, Preliminary Findings from its visit to Greece (2–13 December 2019), accessible via: <https://bit.ly/2vNJInk>.
- ¹⁵⁹ AIDA Country Report Greece, June 2020, p. 192.
- ¹⁶⁰ AIDA Country Report Greece, June 2020, p. 41.
- ¹⁶¹ See Note 157 above; AIDA Country Report Greece, June 2020, p. 114.
- ¹⁶² *Ibid.*
- ¹⁶³ Humanrights360, No end in sight – The mistreatment of asylum seekers in Greece, 21 August 2019, p. 28.
- ¹⁶⁴ See Note 157 above.
- ¹⁶⁵ AIDA Country Report Greece/Greek Council for Refugees, June 2020, UNHCR interview.
- ¹⁶⁶ Refugee Support Aegean interview, July 2020; AIDA Country Report Greece, June 2020, p. 43.
- ¹⁶⁷ *Ibid.*, p. 113.
- ¹⁶⁸ This refers to the procedural safeguards derived from international and EU law provisions; see Chapter 3.
- ¹⁶⁹ For a comprehensive description, see: AIDA Country Report Greece, June 2020, p. 114 ff.
- ¹⁷⁰ For more information, see: <https://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups/legal-representation>.
- ¹⁷¹ AIDA Country Report Greece, June 2020, p. 116.
- ¹⁷² Section 75(3) of the IPA.
- ¹⁷³ Ombudsman, Migration flows and refugee protection: Administrative challenges and human rights, Special Report 2017, 25–25 and 75. For comparable comments by the Ombudsman in 2018 and 2019, see: AIDA Country Report Greece, June 2020, p. 116.