EXPLANATORY MEMORANDUM TO

THE JUSTIFICATION DECISION (SCIENTIFIC AGE IMAGING) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory instruments.

2. Purpose of the instrument

2.1 This instrument approves as justified the Home Office's proposed use of ionising radiation (X-ray) imaging to support scientific age assessments of age-disputed persons, subject to certain conditions. The Lord Chancellor and Secretary of State for Justice is required to make this instrument to grant this approval.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Regulations come into force the day after they are made. This early commencement is justified, given that these Regulations would not impose duties on people that are significantly more onerous than before, or require them to adopt different patterns of behaviour, as these Regulations solely enable the use of x rays for a specified purpose. The commencement provision is the same as for all previous Regulations made under this power.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Lord Chancellor and Secretary of State for Justice, Alex Chalk KC has made the following statement regarding Human Rights: "In my view the provisions of 'The Justification Decision (Scientific Age Imaging) Regulations 2023' are compatible with the Convention rights."

6. Legislative Context

Justification of Practices in Involving Ionising Radiation Regulations 2004 (JoPIIRR)

6.1 JoPIIRR sets out that any proposed, non-medical use of X-rays that has not previously been found to be justified (meaning the societal or individual's benefits outweigh the detriments of the practice) or carried out in the United Kingdom before 6 February 2018 must be approved by a Justifying Authority. The Justifying Authority can be any Secretary of State, Scottish Minister, Northern Ireland Department or Welsh Minister

that is functionally separate from all other persons concerned with the promotion or utilisation or the practice.

6.2 The Home Office made an application to the Secretary of State for the department of Business Energy and Industrial Strategy ("BEIS") (as then was) who allocated the MoJ to act as the Justifying Authority for the use of radiation-ray imaging for age assessment purposes. The Lord Chancellor and Secretary of State for Justice has delegated the functions of the role to the Minister of State.

6.3 The Lord Chancellor and Secretary of State for Justice determined that this proposed use of X-rays was justified and a "new practice" under JoPIIRR. Approval of "new" classes or types of practice must be made through an affirmative statutory instrument.

Nationality and Borders Act 2022

6.4 Sections 52 and 53 of the Nationality and Borders Act 2022 (NABA) set out specific requirements for scientific age assessment methods, including that a method can only be specified in regulations if the Secretary of State determines, after having sought scientific advice, that the method is appropriate for assessing a person's age (section 52(3)). The Home Secretary has received this advice from the Home Office Chief Scientific Adviser and the Age Estimation Science Advisory Committee, who have recommended the use of MRI and Radiography (X-ray) methods.

6.5 Sections 52(8) and 53(3) state that regulations relating to scientific age assessment methods under these sections are subject to an affirmative resolution procedure - an affirmative Statutory Instrument fulfils this requirement.

The Immigration (Age Assessments) Regulations 2023

6.6 The Home Office will make 'The Immigration (Age Assessments) Regulations 2023' after the Ministry of Justice makes 'The Justification Decision (Scientific Age Assessment Of Age-Disputed Persons) Regulations 2023'.

6.7 The Home Office's statutory instrument is being made to allow the specified scientific methods to be used in age assessments as defined in sections 50 and 51 of the Nationality and Borders Act 2022, and to allow a negative inference to be taken against a person's claimed age if they refuse to consent to those specified scientific age assessment methods.

7. Policy background

What is being done and why?

7.1 The number of asylum applications from unaccompanied asylum-seeking children ("UASCs") has risen in recent years. In 2022, there were 5,242 asylum applications from UASCs. This is a 20% increase from 2021 (4,382 UASC applications) and a 39% increase from 2019, prior to the COVID-19 pandemic (3,775 UASC applications).

7.2 Similarly, UASC asylum applications to the EU+ countries (27 EU Member States, EEA states and Switzerland) have increased, from 26,755 in 2021 to 42,925 in 2022. In 2022, the UK received the 3rd highest number of asylum applications from unaccompanied children out of all EU+ countries and the UK combined and accounted for approximately 11% of all reported UASC claims in that year.

7.3 Between 2016 and December 2022 there were 7,900 asylum cases where age was disputed and subsequently resolved of which almost half (49 per cent - 3833 individuals) were found to be adults.

7.4 In view of the rising number of applications and the inherent difficulty in reliably assessing age, the Government considers it is necessary and appropriate to provide decision-makers with a wider breadth of evidence on which to base their decisions. Assessing someone's age in the absence of documentary evidence is a highly challenging task which is usually resolved via a Merton-compliant age assessment. A Merton age assessment is a holistic, social worker-led assessment which must adhere to principles set out in *R(B) v Merton London Borough Council* [2003] 4 All ER 280 and subsequent case law. Local authorities regularly report difficulties in handling cases that involve age disputes. As the courts have recognised, even comprehensive and thorough holistic age assessment can carry a significant margin of error.

7.5 There is no single age assessment method (scientific or not) which can determine an individual's age with precision, however, the use of scientific methods offers the opportunity for more informed and robust decision-making around an age-disputed person's age. The United Kingdom is one of few countries in Europe that does not make use of scientific methods of age assessment.

7.6 As part of a wider package of reforms, NABA sought to address this, and the Government set out plans to strengthen decision-making, by making assessments more consistent and robust from the outset. This includes a decision-making function in the Home Office, referred to as the National Age Assessment Board, which went live on 31 March 2023 and consists of trained social workers whose task is to conduct full age assessments, and aims to increase capacity and expertise in the system.

Scientific Methods

7.7 The Secretary of State for the Home Department sought impartial scientific advice from the Home Office Chief Scientific Adviser and the Age Estimation Science Advisory Committee (AESAC), who have recommended the use of MRI and Radiography (x-ray) methods on specific body parts. Recommendations from AESAC are published in their report[1] on the "Biological evaluation methods to assist in assessing the age of unaccompanied asylum-seeking children" on 11 January 2023.

7.8 As per the AESAC report, the Home Office will not use the scientific methods to determine an age or age range, but rather use the science to establish whether the claimed age of the age disputed person is possible. This will be done by determining which hypothesis the science is more supportive of; the hypothesis that the assigned age by the social worker is possible versus the hypothesis that the claimed age is possible.

7.9 The AESAC report recommends four biological analyses which could be used in combination to assess whether a person's biological age is possible. Given that different parts of the body grow to different schedules, the error rate can be significantly reduced by combining the results of assessment of the teeth, bones in the limb (i.e. wrist and knee), and clavicle. The selection of analyses should be chosen on a case-by-case basis considering a person's sex, claimed age, and whether there is a suspicion that the person might be younger or older than they claim. The AESAC also recommend allowing the young person to be able to choose between radiography (x-

[1] Biological methods to assess unaccompanied asylum-seeking children's age - GOV.UK (www.gov.uk)

ray) and MRI methods where appropriate (hand/wrist or knee) as some people may find MRI distressing or have metal in their body.

7.10 The Home Office are clear that any methodology used for the assessment of age involving the specified scientific methods should respect and prioritise the health and wellbeing of the individual and minimise any health risk to the individual being assessed.

Negative inference

7.11 Decision-makers must take refusal to consent to the use of the methods specified without reasonable grounds into account as damaging to credibility with respect to statements made about that individual's claimed age (not the credibility of their asylum claim more generally). This would not automatically preclude the individual being considered a child; that refusal will be taken into account alongside other relevant evidence as part of a holistic, Merton-compliant age assessment process by decision-makers. This negative inference towards credibility can only be taken once scientific methods are specified in an affirmative statutory instrument.

7.12 The person undergoing scientific age imaging will be supported to provide valid informed consent to undergo the scientific methods proposed and will be free to withdraw consent. Information will be provided to explain the risk and benefits of the process including appropriate translations.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate.

10. Consultation outcome

10.1 No consultation has taken place on 'The Justification Decision (Scientific Age Imaging) Regulations 2023' as this is a procedural instrument.

10.2 The Ministry of Justice undertook a statutory consultation as per regulation 18 of JoPIIRR before approving the Home Office's proposed use of radiography (X-ray) for scientific age assessment and proceeding with this instrument. The UK Health Security Agency, Health & Safety Executive (UK), Health & Safety Executive (NI), Office for Nuclear Regulation, Food Standards Agency, Environment Agency, Scottish Environment Protection Agency, Natural Resources Wales, Department of Environment Northern Ireland and Scottish Government were consulted in 2022 on this proposed use of radiography.

11. Guidance

11.1 Advisory guidance relating to the introduction and implementation of scientific age assessment (including X-rays) will be provided to age assessment practitioners and published on the GOV.UK by the Home Office in advance of the commencement of the use of scientific methods.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared as this instrument is procedural under JoPIIRR. The impact on business, charities, voluntary bodies or on the public sector will be subject to how the Home Office applies the practice this instrument approves.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Ministry of Justice will monitor and review the Home Office's use of X-rays approved by this instrument and compliance with the conditions set. As per Regulation 10 of the JoPIIRR, the Ministry of Justice will carry out a review of the practice if "(a) new and important evidence is acquired about the efficacy or potential consequences of – (i) the class or type of practice; or (ii) other techniques or technologies that have the same objective as it; or (b) there has been a justification decision that is not justified."

14.2 The instrument does not include a statutory review clause because it does not regulate businesses and therefore the requirements of the Small Business, Enterprise and Employment Act 2015 do not apply.

15. Contact

15.1 Emma Coots, Head of Prison Security Policy, at the Ministry of Justice Telephone: 07966 428092 or email: Emma.Coots@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Rachel Pascual, Deputy Director for Counter Terrorism, Prison Safety, Security and Operational Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Lord Chancellor and Secretary of State for Justice, Alex Chalk KC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.