EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (AGE ASSESSMENTS) REGULATIONS 2024

2024 No. 19

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument specifies the scientific methods that may be used for the purposes of age assessments under section 50 or 51 of the Nationality and Borders Act 2022 ("NABA").

2.2 The scientific methods specified are:

- Interpretation of x-ray images to assess the development of the mandibular third molars (lower wisdom teeth)
- Interpretation of x-ray images to assess the development of the bones of the hand and wrist
- Interpretation of MRI images to assess the development of the bones of the knee
- Interpretation of MRI images to assess the development of the clavicle (collar bone)

2.3 Specified scientific methods may be used for the purposes of an age assessment under section 50 or 51 NABA only if the appropriate consent is given. Under section 52(6) and (7) NABA, decision makers must take a negative inference towards the credibility of the person claiming to be a particular age, in deciding whether to believe any statements made by the person relevant to the assessment of the person's age, if consent is refused without reasonable grounds. Where another person has made a statement on behalf of the person claiming to be a particular age, this negative inference must be taken against the credibility of that person making that statement.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is all of the United Kingdom.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is all of the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for Countering Illegal Migration, Michael Tomlinson MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Immigration (Age Assessments) Regulations 2024 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument specifies scientific methods to be used in age assessments under sections 50 and 51 NABA using the power in section 52 NABA (subject to the affirmative parliamentary procedure). Section 52 NABA provides the Secretary of State with the power to make regulations specifying scientific methods that may be used for age assessment. Once specified, section 52(6) and (7) NABA enables a decision-maker to be able to take a negative credibility inference from a refusal to consent to the use of those specified methods in a scientific age assessment without good reason.

6.2 Under section 52(3), the Secretary of State's power to make regulations specifying a scientific method is conditional on the Secretary of State having determined that the method is appropriate for assessing age, after seeking scientific advice.

6.3 The specified scientific method may be used for the purposes of an age assessment conducted under sections 50 and 51 only where appropriate consent is given. The meaning of "appropriate consent" is set out in section 52(5) and includes consent by a parent or guardian where the age-disputed person does not have the capacity to consent.

6.4 Those subject to age assessments will, if the decision-maker concludes that the person is an age other than the age they claim or are claimed to be, be able to challenge the decision via judicial review. Sections 54 and 55 NABA introduced a right of appeal for age assessments under section 50 or 51, which has not yet been commenced and would be disapplied for those who are subject to the duty to make arrangements for removal under the Illegal Migration Act 2023. The Secretary of State continues to keep commencement of the right of appeal under review.

6.5 Sections 57 and 58 of the Illegal Migration Act 2023 ("IMA") pertain to age assessments and are not yet commenced. Section 57 concerns how an individual who meets the conditions to remove in the IMA may bring a challenge to a decision on age and how that challenge may be carried out. Section 58 introduces a power to make regulations about the effect of a decision not to consent to the use of a specified scientific method for an age assessment where there are no reasonable grounds for refusal to consent. Regulations may include that a person is to be treated as if the decision-maker had decided they are over the age of 18. Such regulations will not be made unless and until the Secretary of State is satisfied that the science is sufficiently accurate to mean that applying an automatic assumption of adulthood is compatible with the European Convention on Human Rights (in particular Article 8 (right to private and family life)). When regulations are made under section 58, the scientific methods specified under section 52(1) NABA at the time will be the relevant methods for the purpose of section 58 (section 58(3) IMA).

6.6 This instrument will be made after the Ministry of Justice ("MoJ") have made an affirmative statutory instrument which determines that the use of ionising radiation (radiography – x-rays) for the purpose of scientific age assessment is justified under the Justification of Practices Involving Ionising Radiation Regulations 2004 ("JoPIIRR 2004"). Further information on justification is at paragraph 7.13.

7. Policy background

What is being done and why?

7.1 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, and to line up with international practice. The United Kingdom is one of few countries in Europe that does not make use of scientific methods of age assessment.

7.2 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).

7.3 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.

7.4 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.

7.5 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.

7.6 As part of wider 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. The NABA also gives the Secretary of State powers to make regulations to bring more clarity to the age assessment process by setting out a uniform set of standards to achieve greater consistency in the process.

Scientific Methods

7.7 The Secretary of State sought impartial scientific advice from both 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-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 the credibility of the person who made the statements about that individual's claimed age, in deciding whether to believe any statements made relevant to the assessment of the person's age. 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 assessment 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; although used for different purposes, these are the same methods commonly used in medical and dental practices.

Justification

7.13 The use of ionising radiation in the United Kingdom ("UK") is regulated by the JoPIIRR 2004. The JoPIIRR 2004 requires a Justifying Authority to assess whether the individual or societal benefit of any new class or type of practice involving ionising radiation outweighs the health detriment it may cause, before that practice can be introduced in the UK. The Home Office made an application to the Secretary

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

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 ionising radiation imaging for age assessment purposes. The MoJ have determined that this practice is justified and will lay an affirmative SI in accordance with the JoPIIRR 2004. Subject to Parliamentary approval of both instruments, that JoPIIRR 2004 instrument will be made.

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 2018.

9. Consolidation

9.1 This instrument does not consolidate existing legislation.

10. Consultation outcome

10.1 The Government's New Plan for Immigration (NPI) was publicly consulted on in 2021. The NPI consultation covered a range of propositions, age assessments were covered under chapter four which focused on Disrupting Criminal Networks and Reforming the Asylum System. Although the chapter on age assessment was not specific to scientific age assessment so did not form part of this consultation, the government committed to undertake further work to define the placeholder Bill provisions during the passage of NABA to further develop the reforms in these areas, including around the introduction of scientific methods for age assessment.

10.2 The Home Office has engaged with key stakeholders including professional bodies and NGOs to socialise the published AESAC report with other government departments, Strategic Migration Partnerships, Local Authorities, Non-Government Offices, Devolved Governments and subject matter experts.

10.3 The MoJ undertook a statutory consultation as per regulation 18 of JoPIIRR before approving the use of radiography (x-ray) for scientific age assessment. 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, and Department of Environment Northern Ireland 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 will be provided to age assessment practitioners and published on the GOV.UK 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 The main direct impact on the public sector will be the cost associated with conducting scientific age assessments using the specified methods. There may also be an impact on the public sector if the specified methods result in different decisions on age, since this would result in different support costs for the individuals concerned. However, the total impact on the public sector is uncertain since design and

implementation plans are currently in progress, and there is currently no available evidence to estimate the likelihood of the specified methods resulting in different outcomes.

12.3 A full Impact Assessment has not been prepared for this instrument because the policy and design are still under development. A full assessment will be prepared as part of implementation.

13. Regulating small business

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

14. Monitoring & review

14.1 These instruments and their outcomes will be subject to internal monitoring and review by the Home Office.

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

14.3 In line with the AESAC report, recommendation 5 advises that the Home Office look to eradicate the use of radiography (x-ray) in the long term, and research is continued into the use of non-ionising radiation imaging such as MRI. This would be subject to internal monitoring.

15. Contact

15.1 Emma McCarron at the Home Office: asylumpolicy@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Dr. Miv Elimelech, Deputy Director for Asylum and Protection Unit, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Michael Tomlinson MP, The Minister of State for Countering Illegal Migration, at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.