Summary of an opinion – Medical age assessments in the asylum process – ethical aspects

This text summarises The Swedish Council on Medical Ethics discussion and positions taken in the Opinion *Medical age assessments in the asylum process – ethical aspects* that was published in October 2016.

Introduction

On its own initiative, the Swedish National Council on Medical Ethics has produced this statement on the ethical aspects of the use of medical age assessments in the asylum process. The Council's task is to highlight ethical issues in healthcare from an overall societal perspective, and to assess medical research, diagnostics and treatment based on central ethical values such as human dignity, privacy, autonomy and justice.

Medical age assessments undertaken during the asylum process essentially raise ethical questions with respect to all of these values. The investigation itself raises questions concerning consent and the meaning of autonomy, the right to privacy, and the importance of respect for human rights, including the particular rights of children. The aim of medical age assessments is to determine whether the asylum seeker is a child, i.e. under the age of 18. Children are always a particularly vulnerable group because they have limited capacity to safeguard their own interests. In addition to that, the children concerned are generally unaccompanied refugee children, who are thus particularly vulnerable since they lack guardians to safeguard their interests. It is therefore important

that the process of medical age assessments is designed to ensure respect for children's rights and interests.

Another topical issue in the debate has been whether medical assessments should be used at all when assessing the age of asylum seekers, given the margins of error inherent in the methods. The decision whether to use or not to use medical age assessments has ethical consequences for the stakeholders involved. The Council therefore considers it important to analyse the advantages and disadvantages of different courses of action.

Background

According to Swedish Migration Agency statistics, more than 35 000 unaccompanied minors applied for asylum in Sweden in 2015. This can be compared with approximately 7 000 unaccompanied minors in 2014 and approximately 3 800 in 2013.[1] One in five of the more than 870 000 refugees and migrants who came to Europe via the Mediterranean Sea in 2015 were children. These children are particularly vulnerable to risks such as illness, injury, violence, abuse and trafficking.[2]

A child has special rights under international and Swedish law. Where there is doubt as to whether the asylum seeker is a child or an adult, the Swedish Migration Agency must make an assessment of the person's age in light of the evidence in the case. There are various methods – both medical and non-medical – that can be used to assess age, but none of them can precisely establish a person's age.

In 2015, the National Board of Health and Welfare launched a review of its recommendations on medical age assessments of children in their upper teens and of the various methods available for medical age assessments. As part of this work, the National Board of Health and Welfare conducted a knowledge review and

[1] For statistics see the Swedish Migration Agency website http://www.migrationsverket.se/Andra-aktorer/Kommuner/Om-ensamkommande-barn-och-ungdomar/Statistik.html.
[2] IOM and UNICEF, *Data Brief: Migration of Children to Europe*, 30 November 2015.

scrutinised the scientific support for investigations using X-rays and magnetic resonance imaging (MRI).[3]

In this review, the Board found that magnetic resonance imaging of the knee joint produces a substantially reduced risk of mistaking a child for an adult compared with taking X-rays of the teeth or hand/wrist – 3/7 per cent (boys/girls) compared with approximately 12 per cent. With regard to the risk of mistaking an adult for a child, the risk is substantially reduced from 55 per cent in the case of X-rays of the teeth to 29 per cent for MRIs of the knee joint and 25 per cent for X-rays of the hand/wrist. The Board writes that, given the population dose of radiation for large groups of asylum seekers, the 18-year age limit should be determined using MRI, which also offers a more reliable assessment than either X-rays of the teeth or X-rays of the hand/wrist. Furthermore, there is said to be a lack of consensus between different people judging X-rays of teeth (60–85 per cent). The consensus in the case of assessments using MRI of the knee joint is acceptable (85 per cent). The proportion of children and adults who are correctly classified is estimated generally to be less than 90 per cent for teeth, but over 90 per cent for boys in a study of ankles. The Board proposes that a pilot study should investigate how the combination of four growth zones in the knee joint and ankle investigated using MRI can improve age assessment relative to the 18-year age limit.

In connection with the knowledge review, the National Board of Health and Welfare also asked the Enquiry Service of the Swedish Agency for Health Technology Assessment and Assessment of Social Services, about the state of the scientific literature with respect to the reliability of age assessments using non-radiological methods. In their response, the Enquiry Service did not identify any systematic overviews or primary studies that can offer reliable answers about the accuracy of age assessments using these methods.[4] Apparently, the literature in general indicates that the variation between individuals is too great for age assessments based on physical attributes (puberty, height, etc.) to

[3] National Board of Health and Welfare, *Methods of radiological age assessment – A systematic survey*, 2016.

[4] Response from the Enquiry Service of the Swedish Agency for Health Technology Assessment and Assessment of Social Services, *Age assessments using non-radiological methods*, 20 April 2016.

be reliable. No studies concerning psychosocial age assessments were identified.

In May 2016, the Government assigned the National Board of Forensic Medicine to perform medical age assessments which are part of residence permit applications. It was noted that it has been difficult for a long time to get medical age assessments undertaken, that it is inappropriate to have adult asylum seekers living with unaccompanied minors in child accommodation, and that resources reserved for children should not be used for adult asylum seekers.

In July 2016, the Government instructed the National Board of Health and Welfare to deepen the knowledge of magnetic resonance imaging as a medical age assessment method relative to the 18-year age limit, when used in the asylum and criminal process. [5]

The age of the asylum seeker

The burden of proof lies with the asylum seeker to plausibly demonstrate both his or her account and identity (including age). This applies even for children. This means that asylum seekers themselves are primarily responsible for providing relevant information to guide the assessment of their need for protection. [6] However, unaccompanied minors often lack documents that can prove their age.

The results of a medical age assessment are one of several forms of evidence that an applicant can use to fulfil the burden of proof with respect to age, and the results are evaluated alongside other evidence[7]. The Swedish Migration Agency has an obligation to inform the child of the possibility to undergo a medical examination to establish age (Chapter 8, Section 10h of the Aliens Ordinance (2006:97)). In other words, this is not an investigative method that the Swedish Migration Agency itself uses in order to come to a decision regarding the asylum application, but rather something that can be offered to the individual to help

[5] Government decision of 14 July 2016, *Assignment to deepen knowledge of magnetic resonance imaging as a medical age assessment method*, S2016/04832/FS.
[6] See judgment of the Migration Court of Appeal MIG 2007:12.
[7] See judgment of the Migration Court of Appeal MIG 2014:1.

demonstrate his or her age. This provision is based on EU law, and the established principle of the benefit of the doubt.

There are various methods of assessing age. In its report *Age assessment practice in Europe* (see further below), the European Asylum Support Office (EASO) divides them into non-medical methods and medical methods. [8]

The non-medical methods are:

- interview with an asylum case officer or social worker, for example, in order to determine age;
- consideration of documentary evidence, information from European databases, etc;
- estimations based on physical characteristics, appearance and demeanour. These are performed by, for example, asylum case officers.

The medical methods are:

- dental observation (not X-rays);
- physical development assessment by a paediatrician;
- psychological interviews/tests;
- sexual maturity examination;
- X-rays (hand, collar bone, teeth, hip).

Ethical principles

The Swedish National Council on Medical Ethics bases its discussion on a number of ethical principles or values. These are:

1. The principle of the best interests of the child
2. Informed consent
3. Autonomy

[8] EASO, *Age assessment practice in Europe*, 2013.

4. Justice
5. Human dignity
6. Integrity
7. The principles of beneficence and non-maleficence
8. Knowledge gaps.

Ethical issues, discussion and deliberations

Stakeholders

Various stakeholders are affected by the ethical discussion concerning medical age assessments. The most important stakeholder with interests that requires protection is the child seeking asylum. In this respect, it is important to distinguish between a child seeking asylum and an adult seeking asylum who claims to be a child in order to gain advantages. The Council primarily has the asylum seekers perspective in mind when discussing ethical aspects of medical age assessments. Other stakeholders include staff at accommodation for unaccompanied minors, Swedish Migration Agency case officers, relevant authorities, health care professionals and the public.

Should medical age assessment methods be used in the asylum process?

Uncertainty in the use of different age assessment methods has consequences for the unaccompanied minors who are examined. Children risk being deemed to be adults, and vice versa. The question has been raised whether medical age assessments should be used at all in the asylum process, since all medical methods entail various degrees of uncertainty. But then, how certain would an age assessment based solely on an individual case officer's estimation of the asylum seeker's age (which would otherwise be the case) be? Regardless of whether a medical age assessment is done or not, the authorities still must make an assessment to determine whether the applicant is a child. Since no age assessment

method is precise, there are, in the view of the Council, a number of more or less appropriate methods available. An ethical analysis identifies various alternative courses of action, and their respective advantages and disadvantages are balanced in order to come to a conclusion which is the best way to go.

Since there are currently no methods that can accurately indicate a person's age, the Swedish National Council on Medical Ethics notes that there is always a risk of a child being deemed an adult and vice versa. The important thing is to minimise this risk. In the Council's view, it is thus a matter of using the methods that prove to be most accurate, preferably in combination if this increases the accuracy of the assessment.

With regard to non-medical age assessment methods, such as interviews or estimations based on the asylum seeker's physical characteristics, appearance and demeanour, the Council notes that the risk of inaccurate assessments is likely to be substantial. Nor has the Council seen any estimates of the margin of error associated with these methods. Weaknesses noted by the European Asylum Support Office with respect to age determination interviews, for example, include the lack of protocols and checklists on how to perform such interviews, and what information needs to be collected and analysed.

The Swedish National Council on Medical Ethics therefore considers that the risk of inaccurate assessments of an asylum seeker's age is considerably greater if non-medical methods alone are used than if they are combined with medical methods. However, this does not mean that medical methods should always be used.

1. The Swedish National Council on Medical Ethics recommends that medical age assessments are used under certain circumstances in the asylum process to establish the age of an asylum seeker. For the assessment to be as accurate as possible, the medical methods used should be those with the strongest scientific support and the most accurate results. Moreover, various medical age assessment methods should be used in combination if this increases the accuracy of the assessment.

Medical methods based on X-ray examinations involve a certain degree of risk for the asylum seeker due to radiation. Since these risks should be negligible[9], the Council does not consider this a sufficient reason to exclude effective age assessment methods. However, medical methods that involve a health risk for the applicant should not be used if other methods are available that are more accurate and do not affect health, or that involve a lower risk.

The Swedish National Council on Medical Ethics notes that the question of which medical method should be chosen, can only be answered after careful consideration of their comparative advantages and disadvantages. The Council also considers that the responsible authorities should evaluate the use of different age assessment methods regularly, since advances are rapid in the field of medicine.

Other arguments put forward against medical age assessment are based on doctors' duty of beneficence and non-maleficence. It has been claimed that health and medical professionals should not devote time to assessments that are not medically warranted. However, as is pointed out in the National Board of Health and Welfare's ethical analysis, the Council notes that there are already a number of measures undertaken in health care services that are not directly warranted in medical terms. [10] For this reason, the Council finds that this argument is insufficient to decide that medical age assessments should not be carried out.

Another subject of the debate has been whether or not the doctor performing the medical age assessment has a responsibility for its results and the negative consequences it may have for the asylum seeker. The Swedish National Council on Medical Ethics considers that when this question is discussed, it is important to consider the aim of medical age assessments and the fact that they are part of a judicial context governed by certain rules and principles. As previously outlined, a medical age assessment may be the only way for an asylum seeker to prove that he or she is a child. The Council therefore considers that medical age assessments should primarily be viewed as a means for an asylum seeker to fulfil

[9] International Commission on Radiological Protection (ICRP), *Radiological Protection in Biomedical Research* (ICRP Publication 62), 1992.
[10] National Board of Health and Welfare, *Age assessment within the framework of the asylum process – an ethical analysis*, 2016, p. 26 ff.

the burden of proof with respect to age. It is however crucial that ethical values are respected in order for the use and performance of medical age assessments to be ethically acceptable (more about this below).

The Council is aware that a doctor can be placed in a difficult position when a medical age assessment means a negative decision for the asylum seeker. However, the Council considers that the doctor's responsibilities are limited to the medical examination and assessment that he or she makes. In the Council's view, a doctor cannot be held responsible for what happens in the subsequent legal proceedings or for the consequences that the possible rejection of an asylum application may have for the applicant. It is also important to consider the alternative scenario of no medical age assessments being carried out. In the Council's opinion, this would constitute an even worse starting point for the asylum seeker. The Council considers it a serious moral problem if asylum seekers would lack opportunity to have a medical age assessment carried out. It must not be forgotten that the asylum seeker's age will be assessed by the authorities processing the asylum case, regardless of whether a medical age assessment has been carried out or not.

The use of medical age assessments

Important ethical issues have to be considered in respect to how the medical age assessments are carried out and how its results are used in the asylum process. For example, when should the question of a medical assessment arise? Which methods should be used? Other issues concern the asylum seeker's human rights, such as the respect for human dignity and the right to privacy. The applicant also has a right to information and autonomy. A further issue is what the age assessment should be based on.

Many central ethical values are thus at stake, and the Swedish National Council on Medical Ethics considers it important to ensure that these are respected when medical age assessments are used in the asylum process.

The Council considers that certain conditions must be met when medical age assessments are used in the asylum process.

2. Medical age assessments may only be carried out after an evaluation of documentary or other evidence and the asylum seeker's own account, and if there is still doubt whether the asylum seeker is an adult or a child. Medical age assessments should thus not be a standard or routine practice.

According to the principle of the benefit of the doubt, the applicant's account should form the basis of the decision, as long as he or she has done everything possible to plausibly demonstrate his or her account and it does not lack credibility and is not inconsistent. Therefore, it is only if there is still doubt as to the applicant's age when the authorities have assessed any identity documents the asylum seeker may have and conducted interviews with the applicant, that it may be relevant to supplement the investigation with a medical age assessment. Consequently, the Council stresses that medical age assessments should not be undertaken as a routine practice.

3. It is the view of the Swedish National Council on Medical Ethics, that in a situation described in statement 2 above, the asylum seeker should be offered to undergo a medical age assessment as a means to fulfil the burden of proof in respect to age.

The Council considers this a matter of justice. All asylum seeking persons whose age are doubted by authorities, should be given the same opportunity to prove they are minors.

4. Prior to a medical age assessment, the asylum seeker must have received information about the method, possible consequences of the results of the examination and the consequences of not undergoing a medical age assessment. This information should be adjusted in relation to the asylum seeker's maturity, experience, language and other

individual circumstances of the applicant. The person responsible for providing the information should also, as far as possible, ensure that it is correctly understood.

The Council finds that this is of utmost importance, since it is a question of the asylum seeker's ability to exercise his or her right to autonomy and informed consent.

5. The asylum seeker's autonomy must be respected and a medical age assessment may not be carried out without his or her consent.

This is a fundamental ethical principle that must be respected. It is debatable whether an applicant's consent to the medical age assessment is entirely voluntary. Given the burden of proof, i.e. the fact that it is up to the applicant to plausibly demonstrate that he or she is under the age of 18, it is obvious that the applicant may feel forced to undergo the examination if there is a lack of other evidence. However, the alternative, that the burden of proof should lie with the Swedish Migration Agency, does not appear to be a reasonable alternative. In light of this, the Swedish National Council on Medical Ethics considers that it is crucial that the applicant receives sufficient information about the medical age assessment, how it is carried out and its consequences so that he or she can make an informed decision (see statement 4 above). This decision must then be respected.

6. The asylum seeker's right to privacy and dignity must be respected when undertaking a medical age assessment.

This too is a fundamental ethical principle connected to the right to informed consent and autonomy. The Council stresses that methods involving the least possible invasion of the applicant's right to privacy should be selected. However, it is not possible to make a general statement about whether a medical method entails an acceptable invasion of an applicant's right to privacy; this must be assessed on a case-by-case basis after consultation with the

individual. An intervention that is perceived unacceptable by one person, might be deemed perfectly acceptable by another, and vice versa. Since many asylum seekers may have a background of traumatic experiences, it is particularly important to pay close attention to these questions so that applicants' right to privacy and dignity is not violated. Both the official case officers and those conducting the medical examinations must therefore be sensitive to the applicant's experiences and attitude towards the examination so that the person's right to autonomy can be respected.

7. The final age assessment should be based on an overall assessment taking into account all circumstances of the asylum case. This means that information from identity documents and interviews etc. should be assessed along with any medical evidence.

How should uncertainties and margins of error be reported and taken into account in the final age assessment made by the authorities?

Additional questions arise when the results of medical age assessments are to be reported. For example, how should uncertainties and the margin of error be reported in the medical documentation? And how should they then be taken into account in the final age assessment made by the authorities? The approach chosen can have major consequences for the asylum seeker.

How uncertainties and margins of error regarding the medical age assessment are valued in the final age assessment, is ultimately a legal question of evidence and of when the applicant should be considered to have fulfilled the burden of proof. Nonetheless, the Swedish National Council on Medical Ethics notes that if the margin of error is taken into account, it will mean on the one hand, that fewer children will incorrectly be deemed to be adults. This in turn means that fewer children risk incorrect judgements of their asylum cases, which obviously is of crucial importance to the child. Ultimately, it can mean the difference between being granted a residence permit or not. In addition, a child seeking asylum has different rights compared to an adult.

On the other hand, taking the margin of error into consideration means that more adult asylum seekers will incorrectly be deemed to be children. This means that, to a certain extent, resources reserved for children will be used for adults. It can also cause problems in municipal accommodation for unaccompanied minors if children are mixed with adults, as well as work environment problems for those working in such accommodation, if there is a greater risk of conflicts etc. The Council notes that the Swedish Migration Agency and the Swedish Association of Local Authorities and Regions are currently cooperating to find a solution to the problem of adults incorrectly deemed to be children living in municipal accommodation for unaccompanied refugee children.

8. The Council considers that all results from medical examinations that are of significance to the age assessment, should be reported in the medical documentation. Uncertainties and margins of error should be stated in the medical age assessment and be clearly documented. This is to ensure that the final age assessment will be as transparent, legally certain and predictable as possible.

The Council considers that the question of whether uncertainties and margins of error are to be reported in the medical documentation is ultimately a matter of due process. The fact that the authority making the final age assessment is aware of these factors, also means that it can decide what weight the uncertainties should be given when determining age. It is also important for the asylum seeker that the results of the medical age assessment are clear.

9. The Council stresses that the authorities must take the margin of error for the particular medical age assessment method into consideration in the final age assessment. The Council finds that the consequences for the asylum seeker if that is not done, are not ethically acceptable. Then children would be at greater risk of being incorrectly

treated as adults and miss out on the more extensive protection to which they are entitled.

The Council considers this very important in order to maintain the respect for the rights of the child. However, it is not up to the Council to have an opinion on what margins of error that are acceptable. It is important however, that the authorities make uniform assessments in this respect, so that justice, predictability and due process can be maintained.

Research and development

As previously noted, there are is a lack of scientific knowledge with respect to medical age assessments. For example, more studies are needed on the reliability of different methods in relation to different population groups, and on the accuracy of non-radiological methods. Knowledge gaps in this area naturally have major consequences for asylum seekers undergoing medical age assessments.
A related issue concerns methodological development and the importance of continuous evaluation of whether the methods used are the most reliable according to current research.

10. The Swedish National Council on Medical Ethics considers that more scientific studies need to be initiated in order to increase knowledge of which medical methods gives the most accurate results. The Council also wishes to underscore the importance of continuous follow-up and evaluation of the methods used, and of revising and changing methods if new research shows that methodological improvements or other methods, or combinations of methods, produce more reliable results.

The Council considers it very important that the methods used in medical age assessments are supported by strong scientific evidence, since children seeking asylum are entitled to more extensive protection. Because there are a number of knowledge

gaps in this area, the Council welcomes the Government's assignment to the National Board of Health and Welfare to deepen the knowledge of magnetic resonance imaging as a medical age assessment method relative to the 18-year age limit. Nonetheless, the Council believes that more initiatives and more research are needed in this area.

Evaluations and methodological improvements must be continuous. The National Board of Forensic Medicine has announced that it will use both MRIs of the knee joint and dental observations in medical assessments of the age of asylum seekers. As such, the Board has a responsibility to evaluate and follow up whether these methods in combination are the most appropriate for use in medical age assessments.

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A working group consisting of Council members Finn Bengtsson, Anna-Lena Sörenson, Barbro Westerholm, Ingemar Engström, Olle Olsson and Nils-Eric Sahlin worked with Research Officer Helena Teréus to produce this statement.

This opinion was discussed at the ordinary meeting of the Council on 25 August 2016. The statement was subsequently adopted by the Council per capsulam. The text was adopted by members Kjell Asplund (Chair), Finn Bengtsson, Sven-Olov Edvinsson, Chatrine Pålsson Ahlgren, Anna-Lena Sörenson, Charlott Qvick, Barbro Westerholm and Anders Åkesson. Åsa Gyberg-Karlsson did not approve the text, her reservation is available only in Swedish. Experts Lars Berge-Kleber, Ingemar Engström, Göran Hermerén, Ann Johansson, Olle Olsson, Bengt Rönngren, Nils-Eric Sahlin, Anna Singer and Elisabet Wennlund took part in the preparation of the opinion.

On behalf of the Council,

Kjell Asplund