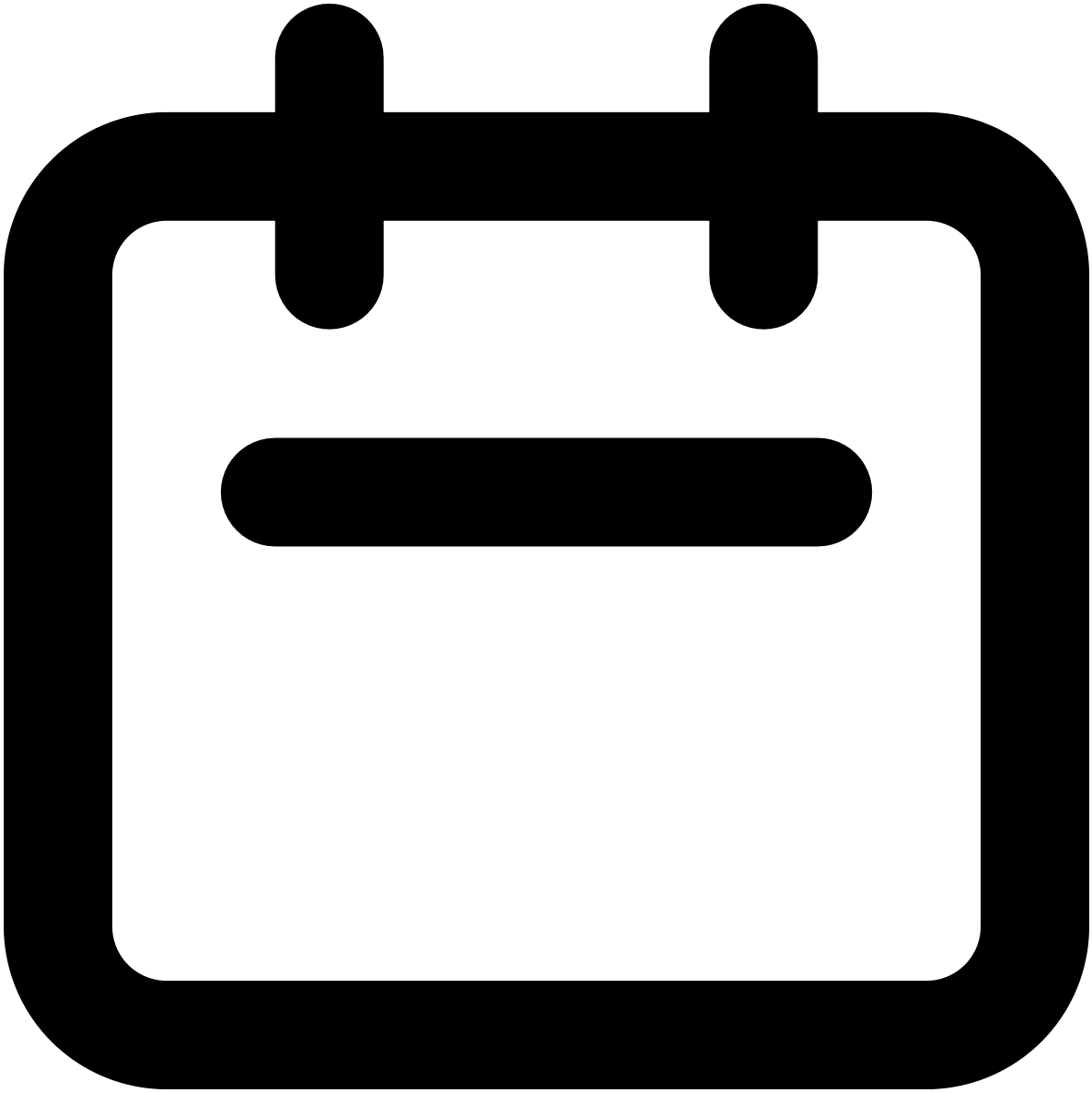
A mixed assessment on age assessment: F.B. v. Belgium



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F.B. v. Belgium concerns the decision of the Belgian Guardianship Service to terminate the support of an unaccompanied minor following an age assessment. While the ECtHR found a violation of Article 8 ECHR due to a lack of sufficient safeguards, it did not substantively engage with the reliability of bone testing.

F.B. is the next judgment in a series of rulings on procedural guarantees in age assessment procedures, including cases against Italy (*Darboe and Camara*, discussed here on Strasbourg Observers; *Diakitè*), Greece (*T.K.*) and France (*A.C.*, commented on here on this blog). With the Human Rights Centre and the Centre for the Social Study of Migration and Refugees (CESSMIR), we submitted a third party intervention (TPI) in *F.B.* – as did the Ligue des droits humains and the Plate-forme Mineurs en exil.

This blogpost highlights how the section on general principles has, regrettably, shifted away from earlier rulings on age assessment, by prioritising migration control over children's rights – an example of the so-called 'Strasbourg reversal'. While the Court does reinforce certain procedural safeguards in age assessment processes—most notably, stressing that medical tests require free and informed consent and should only be used as a last resort—it falls short in other critical areas. Specifically, the Court fails to substantively assess the reliability of medical age testing and does not address either the effectiveness of available remedies or the potential discriminatory effects of medical tests. We conclude by situating the judgment within the broader context of today's rapidly evolving policy landscape.

The facts

F.B. claims to have fled Guinea to escape abuse linked to a forced marriage. Upon arrival in Belgium, she lodged an application for international protection, declaring to be 16 years old and adding a non-legalised copy of her birth certificate. During the first interview with the Immigration Office, which took place without the support of a guardian or lawyer, the official expressed doubt regarding the applicant's declared age. As Belgian law currently prescribes,

'immediate' recourse was taken to a medical test, consisting of a dental scan and a radiography of the hand, wrist and collarbone. According to this test, F.B. was 21.7 years old, with a standard deviation of two years.

It was only after the medical test had been conducted that F.B. was interviewed by an official from the Guardianship Service, to whom she submitted a copy of a supplementary judgment by the Conakry court of first instance and a copy of an extract of her birth certificate. A few days later, she transferred the originals of these documents, which had however not been legalised as required by the Belgian Code of Private International Law. Given that the lower age limit indicated by the medical test differed by more than two years from the age stated in the submitted documents, the Guardianship Service gave precedence to the test results and decided on 11 September 2019 to end the support provided under the status of unaccompanied minor. Notably, the advice from the Belgian federal public service Foreign Affairs questioning the authenticity of these documents was only issued on 23 September, and could therefore not have influenced the Guardianship Service's decision.

The Council of State rejected both the appeals for suspension and annulment. Following its usual reasoning, the Council declared the annulment appeal inadmissible because F.B. had by then – according to her own declarations – turned 18 and therefore lost the required interest to obtain the decision's annulment. The invitation to the Guardianship Service to reconsider its decision remained unanswered. Before the ECtHR, the applicant alleged violations of Articles 8, 13 and 14 ECHR.

Summary of the judgment

The decision to terminate support as an unaccompanied minor deprived F.B. of all rights associated with this status, and thus constituted an interference with her right to respect for private life (Article 8 ECHR). The interference has a legal basis in the Guardianship Act and, according to the Court, pursues legitimate aims, namely the protection of public order and safety, and of the rights and freedoms of others.

Regarding the necessity of the interference, the Court does not rule on the reliability of bone tests nor on the applicant's minor status upon arrival in Belgium.Rather, the Court examines whether the national authorities respected the guarantees of Article 8, considering the margin of appreciation they have in age assessment procedures. Because the decision to end support lacked sufficient safeguards, the Court unanimously finds a violation of Article 8 ECHR. Two main issues arise. First, the Court notes no evidence that F.B. was informed of the need for her consent to the medical test. The Court stresses that the need for clear information is even more important since young people in Belgium undergo age assessment methods without assistance of a representative or a lawyer. Second, given their invasive nature, such medical tests should be a last resort when other methods prove inconclusive. The Court highlights that a trained Guardianship Officer interviewed F.B. only after the tests, whereas an earlier interview might have clarified her age and ensured she understood her rights more effectively.

In line with its previous case law, the Court finds that the Council of State's assessment, which was limited to a legality review, does not violate Article 13 ECHR. Two other grievances with respect to Article 13 ECHR – concerning the lack of suspensive effect of appeals brought before the Council of State, and the inadmissibility of the annulment appeal due to loss of interest – are declared inadmissible for lateness. These findings are unfortunate, particularly in light of earlier critical assessments of the effectiveness of the remedy available in Belgium, among others by the UN Committee on the Rights of the Child in its 2019 concluding observations on Belgium (para 41) and by migration lawyer Benoit Dhondt.

The Court also rejects the claim under Article 14 ECHR, in conjunction with Article 8, as manifestly ill-founded, emphasising that access to the protection regime for unaccompanied minors is based on the objective criterion of age. The Court does not address our argument in the TPI that when age assessment methods are used to determine whether a person is granted protection as an unaccompanied minor, proper consideration must be given to the risk that certain groups of migrants, particularly those of non-White ethnic origin, may be more likely to be incorrectly assessed as adults. Nevertheless, the Court has previously held in *D.H. and others v. the Czech Republic* (regarding access to adequate education) that where there is a danger that the testing methods are biased, and the results are not analysed in light of the particularities and special characteristics of the persons concerned, 'the tests in question cannot serve as justification for the impugned difference in treatment' (para 201).

The general principles section: both predictable and puzzling

When assessing the merits under Article 8 ECHR, the Court begins its discussion of general principles with the well-known statement: *'Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence, and expulsion of aliens'* (para 69).

On the one hand, this is unsurprising. Scholars have frequently pointed out that the ECtHR's migration case law usually opens with a reference to states' sovereign right to control migration – rather than with the human rights at stake. This pattern, termed the 'Strasbourg reversal' by Marie-Bénédicte Dembour and the 'sovereignty approach' by Thomas Spijkerboer, reflects a longstanding – yet widely criticised – tendency of the European human rights court.

On the other hand, this approach is puzzling. In recent judgments concerning procedural safeguards in age assessment cases, the 'general principles' section had omitted such a reference altogether. Instead, the Court started by emphasising states' positive obligations under Article 8 ECHR (*Darboe and Camara*, para 128) or underscoring that *'the best interests of the child must be paramount in all decisions concerning children'* (*A.C.*, para 154). Likewise, the Council of Europe's Committee of Ministers, in its 2022 recommendation on age assessment in migration contexts, begins by affirming that *'[t]he fundamental principle underlying all others is respect for the dignity of each child as a human being and rights holder.'*

While a human rights perspective should take precedence in all migration-related cases, this is especially true for decisions on age assessment. Even though these decisions involve young people in a migration context, the determination of minority or majority status has broader implications for the applicability of the full range of children's rights. These include the right to education, healthcare and other essential support, but also the right to have their best interests considered and their views being given due weight in all matters affecting them. Therefore, the Court is invited to reaffirm its 'good practice' of prioritising children's rights over the sovereign authority of states in matters of migration control—both when formulating general principles in future age assessment judgments and when applying these principles to the case at hand.

Emphasising some procedural guarantees…

Following *F.B.*, persons claiming to be minors are entitled to greater procedural safeguards than those currently provided in Belgian law and practice. The Court highlights two key safeguards.

First, the Court underscores the importance of free and informed consent, particularly given the intrusive nature of the medical test. In this context, it criticises the omission of any reference to the requirement or existence of such consent in the information leaflet and the Guardianship Service's decision respectively. Consequently, the procedures for informing applicants about the medical examination and the consequences of refusal, as well as the methods for obtaining and recording their consent, must be revised. However, the Court does not provide further guidance on whether, or how, this process should be adapted to the age and developmental stage of the young persons concerned.

Second, Belgium is now required to give priority to less intrusive methods—such as in-depth interviews and the consideration of statements and documentation—over medical testing. This necessitates an amendment to the Guardianship Act, which currently mandates that the Guardianship Service '*immediately* commissions a medical examination' when a person's age is in doubt, along with significant changes in current practice.

While the Court has indeed reinforced certain procedural safeguards, it is equally noteworthy what remains insufficiently examined. The fact that the applicant was not assisted by a guardian or a lawyer throughout the age assessment process was mentioned by the Court as a factor augmenting the need for accessible information, but not scrutinised as such. This ties in with the fact that the crucial principle of the *benefit of the doubt* (or *presumption of minority*) is only briefly addressed in *F.B.* (para 73) (in contrast to, e.g. *Darboe and Camara*). This principle implies that individuals undergoing age assessments should be presumed to be minors unless proven otherwise. While the Court acknowledges that the applicant's placement in a specialised residential setting respects this principle, it stops short of fully articulating its broader implications for age assessment procedures.

From a children's rights perspective, this omission warrants further scrutiny. As discussed in our TPI, the UN Committee on the Rights of the Child provides a more comprehensive interpretation of the benefit of the doubt. The Committee has affirmed that even when a person's minority is contested, they do retain the right to be supported by a guardian, legal counsel, and, when needed, an interpreter – starting from the very first interview and throughout the age assessment process. In the Committee's view, these procedural safeguards are essential to ensure that age assessment procedures are compatible with children's rights and uphold their best interests. The Court could draw inspiration from this authoritative guidance in future judgements involving age assessments. This becomes even more relevant in a context where the Belgian federal government's coalition agreement indicates a future shift towards a 'presumption of majority', positing that 'a medical test is not required to determine majority if there are convincing elements indicating (manifest) adulthood'…

… at the cost of substantive engagement

The Court ends its analysis on Article 8 as follows: '*It is not for the Court to rule on the reliability of bone tests, a matter that has been extensively debated by the parties and third-party interveners and remains widely contested*' (para 94). This is again both puzzling and yet somewhat predictable: on the one hand, when an issue has been 'extensively debated' by the parties, one might expect the Court to feel an even stronger responsibility to address it. On the other hand, this stance reflects the Court's broader reluctance to engage with matters perceived as contentious.

Yet, the claim that the reliability of bone testing remains 'widely contested' appears to be open to challenge itself. For instance, the applicant referred to the advice of the Order of Physicians, according to which the reliability of the tests is compromised by the fact that the reference framework is based on a Caucasian individual, and does not take into account other factors such as ethnicity and environment. The applicant also referred to the harmful effects of the tests due to the use of X-rays, as well as their invasive nature. Moreover, in its concluding observations to Belgium, the CRC Committee has considered this medical test 'intrusive and unreliable'. Bone testing has also been found to violate the Revised European Social Charter, because it is inappropriate and unreliable.

Overall, and as further substantiated in the TPI, it can be argued that the scientific evidence is not as 'widely contested', and the consensus on the unreliability of bone testing – among both scientists and human rights institutions – is broader than the Court is willing to acknowledge.

Conclusion: a judgment amid a rapidly changing landscape

While the *F.B.* judgment should already impact current legislation and practices in Belgium (as well as potentially in other countries such as the Netherlands), it is handed down in the context of a swiftly evolving legal and policy environment.

At EU level, age assessments are only regulated in the context of the international protection procedure, currently in Article 25(5) of the Asylum Procedures Directive, and as from 12 June 2026 onwards, in Article 25 of the new Asylum Procedures Regulation (APR). This provision stands out as one of the few that increase rights protection in the recent set of new asylum regulations.

The *F.B.* judgment aligns with the key directions set out in the APR, which provides that to determine an applicant's age in case of doubt, a 'multi-disciplinary assessment, including a psychosocial assessment' may be undertaken, and 'documents that are available shall be considered genuine, unless there is evidence to the contrary'. Only if doubts about an applicant's age persist after such a multidisciplinary assessment may medical examinations be used — and even then, strictly as a measure of last resort.

In various ways, however, the provisions of the APR go beyond the standards set in *F.B*. While the Court emphasises the need for information and consent, the APR specifies that information should be given in a child-friendly and age appropriate manner. Moreover, consent should be obtained not only from the minor, but also from their parent/responsible adult/representative (Art. 25 APR). While the Court in *F.B.* does not engage in depth with the absence of a lawyer/representative during the age assessment process, EU Member States will be obliged to designate a provisional representative 'as soon as possible, and in any case in a timely manner' to assist the young person in the age assessment procedure (Art. 23(2)(a) APR).

The changes introduced by the APR apply exclusively to unaccompanied minors who have submitted an application for international protection. In Belgium, however, age assessments are conducted for *all* unaccompanied individuals (regardless whether they apply for international protection or not) who claim to be minors and for whom an authority expresses a doubt regarding this declared age. In this context, the procedural guarantees established by the *F.B.* ruling are particularly relevant for minors who have not lodged an asylum application – as the latter do not benefit from the stronger standards in the APR. These guarantees are important not only because recognition as a minor triggers the full range of children's rights, but also because Belgium provides a separate residence procedure —distinct from the asylum process— with the aim of identifying a 'durable solution' for the unaccompanied minor. Furthermore, from the standpoint of non-discrimination and good governance, it could be argued that the same standards of the APR should apply to *all* minors – including those who have not applied for asylum. In this regard, it is notable that the proposal for a new Return Regulation does envisage a similar age assessment process for irregular young persons, as foreseen in the APR.

It seems that, both in Belgium and at the European level, the debate on age assessment is far from settled. Although the *F.B.* judgment offers important procedural anchors for protecting the rights of individuals with disputed age, it leaves us with mixed feelings due to the ECtHR's limited engagement with the substantive reliability of age assessment methods, and the effectiveness of the remedy available in Belgium.

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