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## Who is a Child? Age Assessment Procedures and the Erosion of the Presumption of Minority in International Human Rights Law

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*Every protection owed to an unaccompanied or separated child depends upon a prior finding that the person concerned is in fact a child. A determination of majority does not simply redirect an applicant into a different procedure; it removes, in a single administrative step, the whole body of rights conferred by the Convention on the Rights of the Child. This article argues that the benefit of the doubt in age assessment operates as a rule allocating the burden of proof, and not as a discretionary indulgence, and that recent State practice has reversed that allocation. Its central submission is that where the margin of error of an assessment method extends across the age of majority, the method cannot lawfully be treated as determinative. The argument is developed through the views of the Committee on the Rights of the Child under the third Optional Protocol, the recent case law of the European Court of Human Rights, and two legislative developments: Part 4 of the United Kingdom's Nationality and Borders Act 2022, and Article 25 of the European Union's Asylum Procedure Regulation, which became applicable on 12 June 2026. The article then considers the Indian position, where Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015 lays down a documentary hierarchy that is, in principle, more protective than several European regimes, but which presupposes records that an undocumented foreign child cannot produce.*

**Keywords:** children, age assessment, doubt.

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## INTRODUCTION

For a child who arrives alone at an international frontier without papers, no question carries greater consequence than how old she is taken to be. The answer settles whether she enters a child protection system or an immigration queue, whether a guardian is appointed for her, where she is accommodated, and whether the State may detain and remove her. Article 1 of the Convention on the Rights of the Child defines a child as every human being below the age of eighteen years unless majority is attained earlier under the applicable law.<sup>1</sup> The definition assumes that age is a knowable fact. For a great many children on the move it is not, and the machinery that States have constructed to supply the missing fact is the subject of this article.

That machinery does work of a jurisdictional character. It is not a preliminary formality but the finding upon which the applicability of an entire treaty regime depends, a point the Committee on the Rights of the Child has made in terms, observing that the assessment of the age of a person claiming to be a minor is of fundamental importance because its outcome decides whether that person is entitled to protection as a child or excluded from it.<sup>2</sup> Notwithstanding that consequence, the procedures by which the finding is reached have largely escaped the evidentiary discipline which any other determination of comparable effect would attract.

It is submitted that the benefit of the doubt, in this context, is not a courtesy extended to sympathetic claimants. It is a rule allocating the burden of proof, and it is derived from the best interests principle together with the child's rights to identity, to be heard, and to protection when deprived of a family environment. State practice has reversed that allocation. The young person is now required, in substance, to disprove adulthood, and the instruments used against her carry margins of error wider than the distinction they are asked to draw. My argument is that where the confidence interval of a method spans the age of majority, its use as determinative evidence cannot be reconciled with Article 3 of the Convention.

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<sup>1</sup> Convention on the Rights of the Child 1989

<sup>2</sup> *NBF v Spain* [2018] CRC/C/79/D/11/2017

Some limits of scope should be stated at the outset. The article is concerned with age assessment in the migration context and not with the determination of juvenility in criminal proceedings, though Part VI draws on Indian authority arising from the latter for want of authority arising from the former. Nor does it attempt a survey of national practice across jurisdictions, a task ably performed elsewhere. The object is narrower: to identify the point at which the presumption of minority is lost, and to propose a standard by which it may be recovered.

Part II reconstructs the normative framework. Part III addresses the assessment methods. Part IV examines the case law that has emerged since 2018. Part V turns to legislative developments in the United Kingdom and the European Union, and Part VI to India. Part VII sets out the proposed standard.

### **THE BENEFIT OF THE DOUBT AS AN ALLOCATION OF BURDEN**

The starting point is General Comment No 6 of 2005, which remains the fullest early statement of the international standard. The Committee required that age assessment consider not merely physical appearance but psychological maturity; that it be carried out in a scientific, safe, child- and gender-sensitive and fair manner; that it avoid any risk to the physical integrity of the child and give due respect to human dignity; and that in the event of remaining uncertainty the individual be given the benefit of the doubt, so that if there is a possibility that he or she is a child, he or she should be treated as such.<sup>3</sup> The formulation is worth reading closely. The benefit of the doubt is expressed as a rule of decision rather than as a consideration to be weighed against others, and it attaches to the residual condition of uncertainty rather than to any threshold quantum of evidence. The trigger is possibility, not probability.

The joint general comment issued in 2017 by the Committee on the Rights of the Child together with the Committee on the Protection of the Rights of All Migrant Workers took the position considerably further. The Committees recorded their concern that children, and especially those aged between fifteen and eighteen, are at times treated as adults, before setting out what States are required to do: undertake a comprehensive assessment of the

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<sup>3</sup> UN Committee on the Rights of the Child, 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (UN Doc CRC/GC/2005/6, 2005)

child's physical and psychological development, conducted by specialist paediatricians or other professionals skilled in combining different aspects of development, carried out promptly and in a child-friendly, gender-sensitive and culturally appropriate manner, and including interviews in a language the child understands. The Committees then directed that documents which are available be considered genuine unless there is proof to the contrary, and that statements made by children and by their parents or relatives be taken into consideration.<sup>4</sup>

This last direction is the pivot of the whole scheme, and it is also the provision that State practice most consistently ignores. What it establishes is a default in favour of the young person's own account and her documents. Medical evidence is admitted as a rebuttal of that default, not as a substitute for it. The structure, in other words, is one of presumption and rebuttal, and it follows that the rebutting evidence must be capable of carrying the weight assigned to it. Much of what follows in this article is an examination of whether it is.

The derivation of these requirements from the operative provisions of the Convention is not merely presentational, and the point deserves emphasis because it is what makes the standard justiciable rather than hortatory. Registration of a young person under an incorrect age interferes with the right to preservation of identity under Article 8. An age finding reached without hearing the person concerned violates Article 12, and does so at the moment when the right to be heard is of the greatest practical significance, since age determination is the starting point for the application of the Convention as a whole. Where the erroneous finding produces a withdrawal of care, Article 20(1) is engaged. Article 3 governs throughout. The Committee has found violations of these four provisions in combination with sufficient regularity to suggest that it treats them as a composite guarantee rather than as four separate claims, and the practical significance of that approach is that a State cannot make good a failure on one limb by compliance with another.

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<sup>4</sup> Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return (UN Doc CMW/C/GC/4-CRC/C/GC/23, 2017)

## THE METHODS AND THEIR MARGINS

Three families of methods are in use: skeletal radiography, dental staging, and, more recently, algorithmic estimation from facial images. They share a structural defect. Each yields an estimate accompanied by a margin of error, and in each case the margin is wide enough to include the legal threshold in dispute.

Radiographic assessment of the hand and wrist remains the most commonly used technique. The reference atlas against which images are compared was compiled from a cohort of children of a single ethnicity and social class in the United States in the 1930s, and its application to contemporary populations from West Africa, South Asia or the Horn of Africa is contested for reasons that are not difficult to appreciate. Dental staging of the mandibular third molar is likewise indicative rather than conclusive. What these techniques characteristically produce is an estimate expressed with a standard deviation of roughly two years in either direction. The consequence, once stated, is not easily answered: a method which cannot distinguish sixteen from twenty is unable to distinguish seventeen from eighteen, and the latter is the only distinction the law requires it to make.

The facts in *FB v Belgium* illustrate the difficulty with some force. The applicant, who stated that she was sixteen, was subjected to a triple bone test comprising radiographs of the hand and wrist, the clavicle and the dentition. The experts concluded that she had been 21.7 years of age on the date of the tests, with a standard deviation of two years, which is to say that the result was consistent with any age between roughly 19.7 and 23.7. On that basis, the guardianship service terminated her support as an unaccompanied minor, preferring the test to the documents she had produced.<sup>5</sup> A result of that kind is capable of supporting an inference that the applicant is an adult. It does not establish the fact, and the difference between the two is what an evidentiary system exists to maintain.

The turn towards artificial intelligence has not dissolved the problem so much as moved it. Independent evaluation of facial age estimation systems indicates that no single system performs consistently well across all circumstances, and that accuracy is lowest in the range from sixteen to eighteen years.<sup>6</sup> The technology, in other words, performs best where the law

<sup>5</sup> *F B v Belgium* [2025] App no 47836/21 (ECtHR)

<sup>6</sup> Subhajit Basu, 'Facial age estimation' (UK Parliamentary Office of Science and Technology, 16 July 2026) <<https://doi.org/10.58248/RR106>> accessed 20 July 2026

has no need of it and worst where the law depends upon it. There is a further difficulty, distinct from accuracy. An algorithmic output is opaque to the person it concerns, and an estimate which cannot be explained cannot in any meaningful sense be contested, which raises a question under Article 12 and under domestic guarantees of reasoned decision-making that has yet to be tested.

Objections from the professions are not confined to reliability. Radiological examination undertaken for an administrative purpose exposes the subject to ionising radiation without therapeutic benefit, and paediatric and dental bodies in several jurisdictions have declined on ethical grounds to endorse the practice.

### THE CASE LAW AND WHAT IT HAS LEFT UNDECIDED

A substantial body of views on age assessment has accumulated under the third Optional Protocol. Communications against Spain dominated the early docket of the Committee on the Rights of the Child, and by October 2020 the Committee had adopted fourteen decisions concerning the age determination of unaccompanied migrant children in that State alone.<sup>7</sup> The findings are strikingly uniform across the series. The Committee has repeatedly held Spain to have violated Articles 3, 8, 12 and 20(1) of the Convention, together with Article 6 of the Optional Protocol concerning interim measures, in cases where documentary evidence was disregarded, no guardian or legal assistance was provided during the process, and the determination rested upon medical examination conducted without adequate safeguards.

One feature of this jurisprudence has an importance extending well beyond Spain, and it concerns admissibility rather than merits. Spain argued, in case after case, that the communications were inadmissible *ratione personae* because the authors had been shown by objective medical testing to be adults. Had that argument succeeded, it would have placed the very determination under challenge beyond the reach of review, and the Committee rejected it. It held further that requiring an applicant to undergo additional medical testing was not an effective domestic remedy, and it took into account the absence of basic due process guarantees, including legal assistance and guardianship, when assessing whether available remedies had to be exhausted. On the substantive side, the Committee has treated

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<sup>7</sup> 'Spain's age assessment procedures violate migrant children's rights, UN committee finds' (UN, 13 October 2020) <<https://www.ohchr.org/en/press-releases/2020/10/spains-age-assessment-procedures-violate-migrant-childrens-rights-un>> accessed 20 July 2026

the appointment of a representative during the process as equivalent to according the benefit of the doubt, and as an essential guarantee of respect for the child's best interests and right to be heard.

The European Court of Human Rights came to this territory later. In *Darboe and Camara v Italy*, decided on 21 July 2022, it ruled for the first time on the compatibility of age assessment procedures with the European Convention. The applicant had reached Italy in 2016, declaring himself to be seventeen, was moved from a facility for unaccompanied minors to an adult reception centre, and was subjected to radiographic examination. The Court found violations of Article 8, on account of the absence of procedural guarantees during the assessment, of Article 3, on account of his placement in inadequate conditions in an adult centre for more than four months, and of Article 13.<sup>8</sup> What is of most consequence for the present argument is that the Court located within Article 8 a positive obligation to apply the presumption of minority throughout the process.

The position has since been consolidated. In *AC v France* the Court found a violation of Article 8 where the domestic authorities had failed to act with the necessary diligence or to provide clear and precise information to an applicant whose minority was in dispute and who ought on that account to have been regarded as particularly vulnerable.<sup>9</sup> Some seven weeks afterwards, in *FB v Belgium*, it again found a violation of Article 8, observing among other things that nothing in the file indicated that the applicant had been informed of the need for her consent to the medical test.<sup>10</sup> A coherent line of authority has thus formed within a little over two years, which by the standards of Strasbourg is rapid.

Its limitation, however, is serious, and in my submission it constitutes the central weakness of the international position as it presently stands. In none of the three judgments did the Court rule upon the reliability of the underlying methods. Its scrutiny has been confined to what may be called the procedural envelope, comprising information, consent, representation, reasons and appeal, and has not extended to the evidentiary value of what that envelope contains. The result is that a State which appoints a guardian, explains the procedure, records consent, issues a reasoned decision and affords a right of appeal may

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<sup>8</sup> *Darboe and Camara v Italy* [2022] App no 5797/17 (ECtHR)

<sup>9</sup> *A C v France* [2025] App no 15457/20 (ECtHR)

<sup>10</sup> *F B v Belgium* [2025] App no 47836/21 (ECtHR)

lawfully find a child to be an adult on the strength of a test with a four-year error range. Procedural regularity has come to serve as an answer to substantive unreliability. That is not the requirement of General Comment No 6, and it is not what the benefit of the doubt was understood to mean.

## **LEGISLATIVE RETRENCHMENT**

While the supervisory bodies have been tightening procedural requirements, legislatures have been moving in the opposite direction on the allocation of burden. Part 4 of the Nationality and Borders Act 2022 established a statutory framework for age assessment in the United Kingdom, including a National Age Assessment Board and a power in the Secretary of State to specify scientific methods by regulation. The provision of present interest is Section 52(7), which permits a decision-maker to treat a refusal to consent to a specified scientific method, where there is no good reason for the refusal, as damaging the credibility of the person concerned.<sup>11</sup> Four methods were specified with effect from 10 January 2024: radiographic assessment of the mandibular third molars and of the bones of the hand and wrist, and magnetic resonance imaging of the distal femur and proximal tibia and of the medial end of the clavicle.<sup>12</sup>

The structure of Section 52(7) repays attention. Consent to an examination which no clinician could justify on therapeutic grounds is sought under an express warning that refusal will be held against the claimant, and consent obtained on such terms is consent in name only. At the same time the provision performs precisely the reversal identified in this article, since doubt arising from the claimant's reluctance to undergo an unreliable and invasive procedure is resolved against her. Section 58 of the Illegal Migration Act 2023 carried the position further, providing that in specified circumstances a person is to be treated as if the decision-maker had determined him to be over eighteen.<sup>13</sup>

What has happened since complicates the picture in a way that is worth recording. The specified methods were never in fact implemented, and it did not become the practice of the Home Office to commission them. In July 2025, the Government announced that it would pursue facial age estimation using artificial intelligence instead, and a policy paper published

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<sup>11</sup> Nationality and Borders Act 2022, s 52(7)

<sup>12</sup> Immigration (Age Assessments) Regulations 2024

<sup>13</sup> Illegal Migration Act 2023, s 58

subsequently confirmed a move away from radiographic and magnetic resonance methods, which are no longer being pursued.<sup>14</sup> The retreat has been justified by reference to cost and speed rather than principle, and the legislative architecture, including the adverse credibility inference, remains in force. The instrument has changed; the allocation of burden which made the instrument objectionable has not.

Something of the scale of error the system tolerates may be gathered from official statistics. Of approximately 6,400 age dispute cases in the year to March 2026, some 43 per cent were initially assessed as adults, and of those initially treated as adults in the second half of 2025, 17 per cent were subsequently found to be children.<sup>15</sup> An error rate approaching one in six, in a system where the consequence of error is placement in adult accommodation and exposure to removal, cannot fairly be described as a marginal imperfection.

Nor is the retrenchment confined to the United Kingdom. Regulation (EU) 2024/1348, which establishes a common procedure for international protection and became applicable on 12 June 2026, deals with age assessment in Article 25. The provision contains real advances. Assessment may not be based solely on physical appearance or behaviour; available documents are to be considered genuine unless there is evidence to the contrary; statements by minors are to be taken into consideration; and medical examination becomes available only where doubts persist following a multidisciplinary assessment, an arrangement the European Union Agency for Asylum has described as a cascade approach beginning with the least invasive methods and moving to more intrusive ones only where strictly necessary.<sup>16</sup>

Article 25(6) then withdraws a good part of what has been given. A refusal to undergo medical examination does not prevent the determining authority from taking a decision on the application, and such refusal may only be considered to be a rebuttable presumption that the applicant is not a minor.<sup>17</sup> The drafting is guarded. The presumption is rebuttable, and the sub-article says that refusal may only be so considered, which suggests an intention to

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<sup>14</sup> *Facial age estimation: using AI to support initial age decisions (A Guide)* (Gov.UK, 2026)

<<https://www.gov.uk/government/publications/facial-age-estimation/facial-age-estimation-using-ai-to-support-initial-age-decisions-a-guide-accessible>> accessed 20 July 2026

<sup>15</sup> *Summary of Latest Statistics* (Gov.UK, 2026) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-march-2026/summary-of-latest-statistics>> accessed 20 July 2026; Basu (n 6)

<sup>16</sup> Common Procedure for International Protection in the Union 2024, art 25

<sup>17</sup> Common Procedure for International Protection in the Union 2024, art 25(6)

confine rather than to expand. Even so, an instrument which opens by requiring that documents be presumed genuine, and the child's statements considered, closes by creating a presumption of adulthood triggered by the exercise of a right to decline an invasive procedure. Where the Convention places the presumption of minority at the centre of the scheme, Article 25(6) introduces a competing presumption running the other way and leaves the young person to displace it.

## THE INDIAN POSITION

India is not a party to the Convention relating to the Status of Refugees 1951 or to its 1967 Protocol, and has no domestic refugee statute. It is a party to the Convention on the Rights of the Child. The position that results is a curious one. The Indian framework governing age determination is in several respects more protective than the European regimes considered above, yet it was built for a different population and has not been adapted to children on the move.

Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015 lays down a clear evidentiary hierarchy. Where it is obvious to the Child Welfare Committee or the Juvenile Justice Board from the appearance of the person brought before it that he is a child, the authority is to record that observation, state the age as nearly as may be, and proceed without awaiting further confirmation. Where there are reasonable grounds for doubt, the authority is to seek the date of birth certificate from the school or the matriculation or equivalent certificate; in the absence of that, the birth certificate issued by a corporation, municipal authority or panchayat; and only in the absence of both may age be determined by an ossification test or other latest medical age determination test, which must be completed within fifteen days of the order. The age so recorded is deemed for the Act to be the true age.<sup>18</sup>

The Supreme Court has enforced the hierarchy with some firmness. In *Vinod Katara v State of Uttar Pradesh*, the Court observed that in the order of priorities, the date of birth certificate from the school stands at the highest pedestal, while the ossification test has been kept at the last rung, to be considered only in the absence of both documentary criteria.<sup>19</sup> The Court in

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<sup>18</sup> Juvenile Justice (Care and Protection of Children) Act 2015, s 94

<sup>19</sup> *Vinod Katara v State of Uttar Pradesh* (2024) INSC 171

the same case accepted the opinion of the Medical Board that estimation of age based on X-ray examination becomes uncertain after twenty-five years, which is a judicial acknowledgement of the limits of the method that has few counterparts in the comparative material. It has elsewhere been held that where a plea of juvenility is raised at a belated stage, medical tests may be resorted to for age determination in the absence of the documents enumerated in Section 94.<sup>20</sup> Read together, these authorities amount to something close to the cascade approach which the European Union has adopted by regulation only now, and they rest upon a statute of 2015.

The difficulty lies in scope rather than in standard, and it is here that the Indian framework fails the children with whom this article is concerned. Section 94 was drafted for children in conflict with the law and for children in need of care and protection within the domestic system. Its hierarchy presupposes the existence of Indian school records, municipal birth registration or panchayat certification. For an undocumented foreign child, whether a Rohingya child or one of those who crossed into Mizoram or Manipur after the events of 2021 in Myanmar, the first two rungs are structurally unavailable. The section accordingly directs every such child straight to the ossification test, which is the very outcome the hierarchy was designed to prevent. A framework whose protective force lies in its preference for documents has little to offer a child whose defining characteristic is the absence of them.

The gap is widened by the interaction with the Foreigners Act 1946, a colonial statute conferring broad executive powers of detention and removal and containing no exception for children or other vulnerable persons. A young person whose age is disputed may therefore fall between two regimes, being too undocumented to engage the protective hierarchy of the Juvenile Justice Act and too foreign to escape the Foreigners Act. Accounts of children held in detention facilities together with adult relatives, and of siblings separated into different institutions, suggest that the concern is not theoretical. What is missing is any statutory presumption of minority applicable to foreign children, and any guardianship mechanism of the kind the Committee on the Rights of the Child has required, with the consequence that the determination is left to administrative discretion at exactly the point where the international standard demands that it should not be.

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<sup>20</sup> *Abuzar Hossain @ Gulam Hossain v State of West Bengal* (2012) 10 SCC 489

## CONCLUSION

On paper the international framework has settled into an intelligible shape. Age assessment is to begin with documents and with the young person's own account; it is to proceed by multidisciplinary and non-invasive means; it is to be attended by information, representation, reasons and appeal; and where doubt remains, the person is to be treated as a child. What has not settled is the meaning of doubt. States have read it as a residual category surviving only where the evidence is silent, rather than as a condition persisting wherever the evidence is imprecise. That reading is where the presumption of minority has been lost.

The remedy I propose is to give the benefit of the doubt an evidentiary content, in the following terms. Where the confidence interval of an assessment method crosses the age of majority, that is to say where the range of ages consistent with the result includes an age below eighteen, the method has failed to answer the question for which it was employed, and the presumption of minority survives it. Applied to the facts of *FB v Belgium*, an estimate of 21.7 years carrying a standard deviation of two years would not displace a claim of minority supported by documentation, because the method itself concedes an inability to exclude the possibility. Only where the interval lies wholly above the threshold, and the young person's account and documents have been weighed and found wanting, would a finding of adulthood be open.

It may be objected that such a standard would make findings of adulthood very difficult to sustain, and that States would regard it as unworkable. The objection has force and should be met directly rather than avoided. Two answers may be offered. The first is that the difficulty is a function of the methods, not of the standard: a State which wishes to make findings of adulthood may develop or adopt techniques of sufficient precision, and the present imprecision is not a fixed feature of the world. The second is that the objection assumes the cost of uncertainty must fall somewhere, and says nothing about why it should fall upon the child. If a State is unable to prove majority, the consequence of treating a small number of young adults as children is the provision of care to persons who did not require it. The consequence of the opposite error is the placement of children in adult facilities and their exposure to detention and removal. These are not symmetrical harms, and there is no reason to treat them as though they were.

Three consequences follow. First, the adverse credibility inference in Section 52(7) of the Nationality and Borders Act 2022 and the rebuttable presumption in Article 25(6) of Regulation (EU) 2024/1348 are difficult to reconcile with Article 3 of the Convention, each converting the exercise of a right to decline an unreliable procedure into evidence of the fact in issue. Secondly, the European Court of Human Rights ought to extend its scrutiny from the procedural envelope to the evidentiary value of its contents, since a guardian who witnesses an unreliable test does not thereby make the test reliable. Thirdly, so far as India is concerned, the extension of Section 94 to undocumented foreign children requires more than the assertion that the section applies to all children within the territory. It requires an adapted procedure supplying, for children unable to produce school or municipal records, the multidisciplinary assessment and the express presumption of minority which the documentary hierarchy was designed to secure. A short amendment to that effect, or a direction of the National Commission for Protection of Child Rights, would cost the State very little.

The question in the title of this article is not, in the end, an empirical question at all. Law does not discover who a child is. It decides who is to be treated as one, and it does so under conditions of uncertainty which no method presently available will remove. What remains to be settled is only who bears the cost of that uncertainty, and for four decades the answer returned by international human rights law has been that the child does not bear it.