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Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 11/2017**, ***, ****

Communication submitted by:	N.B.F. (represented by counsel, Albert Parés Casanova)
Alleged victim:	N.B.F.
State party:	Spain
Date of communication:	15 February 2017
Decision adopted on:	27 September 2018
Subject matter:	Determination of the age of an alleged unaccompanied minor
Procedural issues:	Non-exhaustion of domestic remedies; abuse of the right of submission; lack of substantiation of the complaint
Articles of the Convention:	3, 8, 12, 18 (2), 20, 27 and 29
Articles of the Optional Protocol:	7 (c), (e) and (f)

1.1 The author of the communication is N.B.F, a citizen of Côte d'Ivoire, who claims to have been born on 26 March 2000. He claims to be the victim of violations of articles 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol to the Convention on the Rights of the Child on a communications procedure entered into force for the State party on 14 April 2014.

* Reissued for technical reasons on 22 May 2019.

** Adopted by the Committee at its seventy-ninth session (17 September–5 October 2018).

*** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bernard Gastaud, Olga A. Khazova, Hatem Kotrane, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Kirsten Sandberg, Ann Marie Skelton, Velina Todorova and Renate Winter. Pursuant to rule 8, paragraph 1 (a), of the Committee's rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Committee member Jorge Cardona Llorens did not participate in the consideration of the communication.

**** The joint concurring opinion of Committee members Benyam Dawit Mezmur, Olga A. Khazova, Ann Marie Skelton and Velina Todorova and individual dissenting opinions of Committee members Mikiko Otani and Hatem Kotrane are appended to the present Views.

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1.2 In accordance with article 6 of the Optional Protocol, on 21 February 2017, the Working Group on Communications, acting on behalf of the Committee, requested that the State party refrain from returning the author to his country of origin and that it transfer him to a child protection centre while his case was pending consideration by the Committee.

1.3 On 15 June 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request to consider the admissibility and the merits of the communication separately.

The facts as submitted by the author

2.1 On 26 January 2017, the Spanish National Police intercepted the small boat in which the author was travelling in his attempt to enter Spain illegally. At the time of his arrest, the author, who was undocumented, claimed to have been born on 26 March 2000.

2.2 On 27 January 2017, the juvenile prosecution service of the Provincial High Court of Granada ordered that osteometric tests be carried out to determine the author's age.[1] The tests were carried out on that same day at the Virgen de las Nieves hospital in Granada and consisted of an X-ray of his left hand. The results of the X-ray showed that the author's bone age was "over 19 years".[2]

2.3 On the same day, and on the basis of the results of the tests, the juvenile prosecution service of the Provincial High Court of Granada decreed that the author was of legal age.[3]

2.4 On 28 January 2017, Motril Court of Investigation No. 3 ordered that the author be placed in a holding centre for foreign nationals for a period of not more than 60 days pending the execution of a deportation order. The author was taken to the holding centre in Barcelona. On admission, he again stated that he was a minor; as a result, on 15 February 2017, the police officers at the centre sent a fax informing the juvenile section of the Public Prosecution Service of Barcelona Province, as well as the child protection authority of the autonomous regional government of Catalonia, of the situation. The author maintains that he has so far not received any response.

2.5 The author notes that the rulings on the determination of his age issued by the prosecution service cannot be appealed in court, as confirmed by the Spanish Constitutional Court in its decision 172/2013, and that he has therefore exhausted all available domestic remedies.

Complaint

3.1 The author maintains that during the age assessment he underwent, no account was taken of the best interests of the child, in violation of article 3 of the Convention. He notes that, according to the Committee, the State party does not have a uniform national process for protecting unaccompanied minors. Age-determination methods, for instance, vary from one autonomous community to another.[4]

3.2 The author notes that the only methods of age determination currently used in Spain are medical estimates and estimates based on a person's physical characteristics. Other methods, however, such as psychosocial and developmental estimates and estimates drawing on available documentation, knowledge and local information, are not used. The main method used in Spain is the radiological test based on the Greulich and Pyle atlas, a 1950s study of a sample of 6,879 healthy children of upper-middle-class background from the United States of America. The test makes it possible to estimate the age range within which a person falls. The study, like other studies done later, is merely indicative and was

[1] According to the copy provided, the prosecution service ordered that precise osteometric tests be carried out, that the report and corresponding X-rays be provided, and that the minimum and maximum age range of the individual be specified.

[2] The author provides a copy of the medical report from the psychiatric unit at the Virgen de las Nieves hospital in Granada.

[3] The legal age of majority in Spain is 18 years.

[4] The author cites the Committee's concluding observations on the combined third and fourth periodic reports of Spain (CRC/C/ESP/CO/3-4), paras. 27 and 59.

not initially considered a method of determining a person's chronological age. The author notes the need to differentiate between chronological age and bone age, which is a statistical concept that, developed through clinical experience, is useful for strictly medical purposes, such as the estimation of the pace of a person's bone maturation or predictions about how tall a person will be. Chronological age, however, is the length of time a person has lived. Bone age and chronological age are not necessarily the same, as a child's growth and development can be affected not only by genetic, pathological, nutritional, hygienic and health factors reflecting his or her social status but also by racial factors. According to a number of studies, a person's socioeconomic status is a key determinant of his or her bone development.

3.3 The author submits that the best interests of the child should be the prime consideration throughout an age assessment process and that only necessary medical tests, compatible with medical ethics, should be carried out. The resulting medical reports should always indicate the margin of error. In addition, X-rays should be taken and read by medical personnel specialized in reading them, and the overall assessment of the results should be carried out not, as is often the case, by radiology departments, but by medical personnel specialized in legal and forensic medicine.[5] Lastly, age assessments should draw on several complementary tests and examinations. However, pursuant to article 35 of Organic Act No. 4/2000, testing to determine a child's age should not be carried out at all when he or she is in possession of identity papers.[6]

3.4 The author claims to be a victim of a violation of article 3 of the Convention, read in conjunction with articles 18 (2) and 20 (1), because he was not assigned a guardian or representative, a practice that is a key procedural guarantee of respect for the best interests of the unaccompanied child.[7] He submits that, having been declared an adult on the basis of unreliable evidence, he has been left defenceless, without the protection he is owed and in a situation of extreme vulnerability.

3.5 The author maintains that the State party has violated his right to preserve his identity, enshrined in article 8 of the Convention. He notes that age is a fundamental aspect of identity and that the State party has an obligation not to undermine his identity, as well as to preserve and recover the related data.

3.6 The author also alleges a violation of article 20, on the grounds that he was not afforded the protection he was owed by the State party as a child deprived of his family environment.

3.7 Lastly, he alleges he is a victim of a violation of his rights under articles 27 and 29 of the Convention on the grounds that he was not allowed to develop properly, because he was not assigned a guardian to look out for his best interests.

3.8 The author proposes the following possible solutions: (a) that the State party recognize that it was not possible to establish his age on the basis of the medical tests carried out; (b) that the possibility of appealing age-determination decrees before the courts be recognized; and (c) that all the rights to which he is entitled as a minor be recognized, including the right to receive protection from the public authorities, to be assigned a legal representative, to receive an education, and to be granted a residence and work permit to allow the full development of his personality and his social integration.

[5] The author cites a 2011 report of the Síndic de Greuges (the Ombudsman of Catalonia) on the process of assessing the age of unaccompanied foreign minors.

[6] The author also cites the report "*Ni ilegales ni invisibles: realidad jurídica y social de los menores extranjeros en España*" (Not illegal, not invisible: judicial and social realities for foreign minors in Spain) (2009), by the United Nations Children's Fund (UNICEF), the General Council of Spanish Lawyers and the Banesto Foundation, and "*Aproximación a la protección internacional de los menores no acompañados en España*" (Approaches to international protection for unaccompanied minors in Spain), a 2009 report by La Merced-Migraciones-Mercedarios, the Office of the United Nations High Commissioner for Refugees, Save the Children, the Santander Programme on Minors and the Law at the University of Comillas, Baketik and the Asociación Comisión Católica Española de Migración.

[7] The author cites the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 21.

State party's observations on admissibility

4.1 In its observations of 31 March and 11 April 2017, the State party argues that the communication is inadmissible because it constitutes an abuse of the right of submission and is manifestly unfounded, in accordance with articles 7 (c) and 7 (f) of the Optional Protocol respectively. It notes that the author has not provided any evidence proving that he is a minor. As in other cases brought before the Committee, the author is a person who is presumably close to the age of majority, who appears to be over the age of 18 years and who has undergone, with his consent, objective medical tests in Spain that certify that he has reached the age of majority; who has not presented any original identity documents with biometric data or medical test results that contradict those obtained by the State party, despite being represented by lawyers with sufficient means; and who does not state which medical tests would be appropriate. The State party cites the case of *M.E.B. v. Spain*,[8] in which the author claimed to be a minor despite the existence of X-ray evidence concluding that he was 18 years old. Following investigations by the Spanish police in the author's country of origin, it was found that he had tried to use a false identity and that he was actually 20 years old. The State party warns of "trafficking mafias that profit from illegal immigration, encouraging people to leave their countries in pursuit of uncertain and illusive prosperity in Europe", and that frequently recommend that these people should not carry or should hide their identity documents and claim to be minors.

4.2 The State party also contends that the communication is inadmissible on the grounds that the author failed to exhaust domestic remedies, given that: (a) age determination can be reviewed by submitting new objective evidence (such as identity documents with biometric data or objective medical evidence), in which case the Public Prosecution Service may order new investigations to be conducted to determine the individual's age; (b) an application for a judicial determination of his age can be submitted; and (c) the deportation order can also be appealed through administrative and judicial channels.

4.3 The State party reports that, on 27 February 2017, as the maximum internment period of 60 days at the holding centre had elapsed without the deportation order having been enforced, the author was released. The author is currently under the care of the Cepaim Foundation in Teruel, Aragón.

4.4 The State party maintains that the author's situation has been re-examined in accordance with article 6 of the Optional Protocol, and that it has been concluded that: (a) there are various pieces of objective evidence, namely the X-ray of the left hand and the physical examination,[9] carried out by specialized doctors under the supervision of the prosecution service and the courts, which confirm that the author has reached the age of majority; (b) no documentary evidence has been provided to the contrary; and (c) there is no evidence that the author's return to his country of origin, where he has personal and family ties, would put him at risk of irreparable harm, nor would it constitute an exceptional circumstance.

4.5 The State party provides information on the application of a specific protocol for dealing with presumed unaccompanied minors,[10] under which an immigrant in an irregular situation who claims to be an unaccompanied minor and clearly appears to be a minor is immediately entrusted to the child protection authorities and entered in the register of unaccompanied minors. If the individual's physical appearance raises doubts, medical tests are carried out immediately, with his or her informed prior consent, to determine his or her age, in accordance with the criteria accepted by the medical forensics community. The results of these tests – which are interpreted in the way most favourable to the immigrant – are taken into account when considering whether specific child protection measures are required.

[8] *M.E.B. v. Spain* (CRC/C/75/D/9/2017).

[9] No copy of the results of the physical examination is provided.

[10] Agreement between the Ministry of Justice, the Ministry of the Interior, the Ministry of Employment and Social Security, the Ministry of Health, Social Services and Equality, the Attorney General's Office and the Ministry of Foreign Affairs and Cooperation on the adoption of the framework protocol on specific interventions in relation to unaccompanied foreign minors, published in the Official Gazette of 16 October 2014.

Author's comments on the State party's observations on admissibility

5.1 In his comments of 26 May 2017, the author states that, although a lawyer was appointed to provide him – as an adult – with assistance in connection with the deportation proceedings, he was at no time appointed a representative of his own choosing to defend his interests as a minor, in violation of article 12 of the Convention.[11]

5.2 The author notes that, due to his migration experience, his appearance is very different from that of a person living a normal life and should not be a relevant factor in determining his age. He emphasizes the unreliability of assessments based on the Greulich and Pyle atlas and maintains that, in the determination of his age, his right to be presumed to be a minor was infringed.[12] He also maintains that unaccompanied foreign children should be entrusted to the child protection services even before their age is determined. He disputes the argument that the medical tests conducted to determine his age are accepted by the medical forensics community.

5.3 The author notes that there is no record of his signed consent, of the translation of a consent document into his language or of the manner in which he was informed of the consequences of giving his consent.

5.4 The author maintains that the State party's claims in relation to his supposed personal and family ties to his country are completely unfounded and uncorroborated.

5.5 The framework protocol on specific interventions in relation to unaccompanied foreign minors has been challenged before the Supreme Court, as many of its articles are considered unconstitutional. In particular, under the protocol, children in possession of a passport can have their passport deemed invalid if they have the physical appearance of an adult. The Supreme Court found that "an immigrant whose passport or equivalent identity document confirms that he or she is a minor cannot be considered an undocumented foreign national and subjected to … age-determination tests".

5.6 Lastly, the author alleges that the State party failed to implement the interim measure ordered by the Committee, since he was entrusted to a private social entity as an adult. He explains that this transfer took place before the maximum internment period in the holding centre for foreign nationals had elapsed.

State party's observations on admissibility and the merits

6.1 In a submission dated 10 November 2017, the State party reiterates its arguments on admissibility. It notes that, on the basis of the author's current photograph, there is no doubt that he is an adult. It adds that the author's own representative tacitly acknowledges that he does not look like a minor when claiming that the author's migration experience explains his physical appearance.

6.2 The State party maintains that a minimum criterion for the admission of a communication under the Optional Protocol should be the provision of at least some evidence that the author is a child.

6.3 The State party notes that the conformity of medical age-determination tests with human rights was confirmed by the European Court of Human Rights in its judgment in *Ahmade v. Greece*.[13] In that judgment, the Court interpreted the author's refusal to undergo a dental X-ray as a sign that he was afraid the test would reveal that he was not the age he claimed to be.

6.4 The State party reiterates its arguments regarding the failure to exhaust available domestic remedies. While the provisional determination of age by the Public Prosecution Service cannot be judicially reviewed, the Service itself can agree to conduct new investigations if new objective evidence is presented. In addition, a request can be made to

[11] The author also cites the Committee's general comment No. 6, para. 25.

[12] The author cites general comment No. 6, para. 31 (i), and the resolution of the European Parliament of 5 February 2009 on the application of directive 2003/9/EC, para. 51.

[13] European Court of Human Rights, *Ahmade v. Greece* (Application No. 50520/09), 25 September 2012, paras. 77 and 78.

the civil court in the place of detention to review any decision by the autonomous community in which the individual is not considered to be a minor. The deportation order and, where applicable, the denial of asylum can also be appealed before the administrative courts. Lastly, non-contentious proceedings can be brought for age determination before a civil court, in accordance with Act No. 15/2015 of 2 July on non-contentious jurisdiction, given that, according to the Constitutional Court, age assessments carried out by the Public Prosecution Service are highly provisional.

6.5 The State party maintains that the complaint is generic and seemingly rooted in the argument that any finding based on medical age-determination tests that shows that the age of majority has been attained constitutes a violation of the Convention. General comment No. 6 establishes the presumption of minority in case of uncertainty, but not when it is obvious that the individual is an adult, in which case the national authorities can legally consider him or her as such without having to conduct any tests. However, in the present case the authorities gave the author the opportunity to undergo objective medical tests to determine his age.

6.6 In the absence of reliable evidence of his status as a minor, it was not appropriate for the author to be placed in a centre with other children on the sole basis of his claim to be a minor, since doing so might place those children at serious risk of abuse and ill-treatment.

6.7 In relation to the author's complaint of an alleged violation of his best interests, the State party notes that the author has omitted to report that he was rescued by Spanish authorities while aboard a flimsy boat; that he was looked after by health services on arrival on Spanish soil and provided with a lawyer and interpreter free of charge; that as soon as he claimed to be a minor, this was reported to the Public Prosecution Service, the institution responsible for ensuring the best interests of the child; and that he is currently at liberty and is receiving social assistance. Consequently, one can hardly speak of a lack of legal assistance or protection, even if the author was a minor, which is not the case.

6.8 As for the allegations concerning his right to an identity, the State party stresses that the author has not provided any official identity document, let alone one with verifiable biometric data. Nonetheless, the Spanish authorities registered the author with the name he gave when he illegally entered Spanish territory.

6.9 The author was cared for by the State until the maximum internment period in the holding centre elapsed, at which point he was released and proceeded to receive "coordinated assistance" and health coverage. His right to development has therefore not been violated.

6.10 With regard to the reparation measures requested, the author does not indicate which means should have been used to discard the medical tests carried out. Nonetheless, these decisions can be reviewed by the prosecution service if new information is presented. With regard to the remaining requests, the State party points out that the author has already received State assistance. As for free education, the author would automatically be entitled to it if he was a minor. Lastly, residence and work permits can only be acquired if the general legal requirements are met, which they have not been in the author's case as he entered the country illegally and did not apply for international protection.

Author's comments on the State party's observations on admissibility and the merits

7.1 In his comments of 3 January 2018, the author stresses that the State party is basing its arguments on his physical appearance, which indicates a lack of rigorous, reliable criteria for age determination.

7.2 The author reiterates that no representative was appointed for him during the age-determination process and that he did not give his consent for the medical age-determination tests to be carried out.

7.3 The author disputes the claim that his representative has the necessary resources to undertake alternative medical tests: it is the State party that has the obligation to carry out such tests.

7.4 The author notes that the State party cites the *M.E.B. v. Spain* case but neglects to mention another case before the Committee, *R.L. v. Spain*,[14] in which the author was found to be a minor following checks carried out with the Algerian consulate in Barcelona, despite having previously been declared to be an adult on the basis of X-ray tests, which shows how unreliable such tests are.

7.5 Regarding appeals against the deportation order, the author notes that the lawyer appointed for him did not appear in person, nor was any interview carried out. The lawyer was unable to prepare any appeal given that he was appointed in Motril and the author was transferred to Barcelona, and Spanish law does not provide for a court-appointed lawyer to be replaced when a person is transferred to another autonomous community. He adds that the only possible appeal against a deportation order is administrative, not judicial. As for challenging the detention order, the author says that the order made no mention whatsoever of the assessment of the author's age.

Third-party submission[15]

8.1 On 3 May 2018, the Defender of Rights of France made a third-party submission on the issue of age assessment. The Defender of Rights argues that age-assessment processes must be accompanied by the necessary safeguards to ensure respect for the best interests of the child. According to a 2017 Council of Europe report, the procedural safeguards afforded under international treaties are "not upheld consistently across member states".[16]

8.2 Age assessments should be carried out only when there are serious doubts about a person's age, given that age should be verified on the basis of documents or statements provided by the person concerned. In these procedures, States should consider not only the physical appearance of the individual, but also his or her psychological maturity, thereby adopting a multidisciplinary approach. If doubt persists after the completion of the procedure, the individual concerned should be given the benefit of the doubt.

8.3 There are no common rules or agreements on age assessment in European States. Several States use a combination of medical and non-medical tests. The medical tests used include X-rays of the left wrist (23 States), dental X-rays (17 States), X-rays of the collarbone (15 States), dental examinations (14 States) and estimates based on physical appearance (12 States). While bone age assessment is common, it is not reliable and it undermines children's dignity and physical integrity. There are no medical indications for this type of assessment, as confirmed by the London-based Royal College of Radiologists. In its resolution of 12 September 2013 on the situation of unaccompanied minors in the European Union, the European Parliament deplored the unsuitable and intrusive nature of the medical techniques used for age assessment based on bone maturity, which may cause trauma, show wide margins of error and are sometimes performed without the child's consent.

8.4 The Greulich and Pyle method is unsuitable and is not applicable to the migrant population, which consists mostly of adolescents from Saharan Africa, Asia or Eastern Europe who are fleeing their countries of origin, often in precarious socioeconomic conditions. Several studies show that there are differences in skeletal development based on ethnic origin and socioeconomic status, and, therefore, that this method is not suitable for age assessment in the case of the non-European population.[17] The method shows significant margins of error, particularly in the 15 to 18 age group.[18] According to the Commissioner

[14] *R.L. v. Spain* (CRC/C/77/D/18/2017).

[15] This submission affects communications Nos. 11/2017, 14/2017, 15/2017, 16/2017, 20/2017, 22/2017, 24/2017, 25/2017, 26/2017, 28/2017, 29/2017, 37/2017, 38/2017, 40/2018, 41/2018, 42/2018 and 44/2018 submitted to the Committee.

[16] Council of Europe, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, 2017, p. 6.

[17] See M. Mansourvar et al, "The applicability of Greulich and Pyle atlas to assess skeletal age for four ethnic groups", *Journal of Forensic and Legal Medicine*, vol. 22 (February 2014), pp. 26–29.

[18] The Defender of Rights cites, inter alia, the report of the United Nations Children's Fund (UNICEF) on age-assessment practices, 2011; "*Sur la fiabilité des examens médicaux visant à déterminer l'âge à des fins judiciaires et la possibilité d'amélioration en la matière pour les mineurs étrangers*

for Human Rights of the Council of Europe, associations of paediatricians across Europe state clearly that dental and skeletal maturity cannot be used in assessing the exact age of a child; all that can be achieved is an estimate with a wide margin of error of two to three years. Moreover, the interpretation of data may vary from one country to another or even from one specialist to another.[19] The Committee on the Rights of the Child has also called on States not to use bone age assessment methods.[20]

8.5 The Defender of Rights recommends, accordingly, that: (a) a multidisciplinary approach be taken to age assessment and medical testing be used as a last resort when there are serious doubts about the person's age; (b) the child be informed and given the opportunity to give prior consent; (c) the person be presumed to be a child during the age-assessment process and protective measures be taken, such as the appointment of a legal representative to assist throughout the proceedings; (d) the testing be carried out with strict respect for the rights of the child, including the right to dignity and physical integrity; (e) the child's right to be heard be respected; (f) the person be given the benefit of the doubt if the findings of the procedure are inconclusive; (g) an application for protection not be denied solely on the basis of a refusal to undergo medical tests; and (h) an effective remedy be provided through which decisions based on an age-assessment procedure may be challenged.

8.6 The Defender of Rights recalls that the detention of migrant children, even for short periods or for purposes of age assessment, is prohibited by international law and that States should instead use alternative measures. States should prohibit the practice of depriving children of liberty or detaining them in facilities for adults.[21] Child protection services should be informed immediately to enable them to ascertain the child's protection needs.[22]

Parties' comments on the third-party submission

9. In his comments of 1 August 2018, the author maintains that the submission confirms that the method used to assess his age was inappropriate owing to its wide margin of error, particularly for his age group. The forensic medicine institutes in Spain share this position and have developed "recommendations on forensic methods for age assessments of unaccompanied foreign minors".[23]

10.1 In its observations of 3 August 2018, the State party notes that none of the cases against Spain submitted to the Committee concern detained persons. The authors of these communications have been offered the option of staying in open centres while their administrative and judicial cases are considered. The State party adds that none of the cases relate to asylum seekers; rather, they involve economic migrants.

isolés"(report of the National Academy of Medicine of France on the reliability of medical tests for age assessment for judicial purposes and possible improvements for foreign unaccompanied children), *Bulletin de l'Académie nationale de médecine*, vol. 191, No. 1 (January 2007), pp. 139–142); and the report of the Swiss Society of Paediatrics entitled "*Détermination de l'âge des jeunes migrants*" (Assessing the age of young migrants), 2017.

[19] Commissioner for Human Rights of the Council of Europe, "Methods for assessing the age of migrant children must be improved", 2011.

[20] General comment No. 6 and joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 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.

[21] European Court of Human Rights, Grand Chamber, *Tarakhel v. Switzerland*, Application No. 29217/12.

[22] European Court of Human Rights, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Application Nos. 25794/2013 and 28151/2013.

[23] The author attaches a copy of a consensus document setting out the best practices of Spanish forensic medicine institutes. The aim of the document, which was issued in 2010, was to "standardize and harmonize the minimum criteria required for expert reports, as well as the margins of error deriving from the normal distribution and variability in an individual's development towards maturity. It is suggested that age assessments be performed at forensic medicine institutes by experienced practitioners under supervision, after obtaining the informed consent of the presumed minor." (*Revista Española de Medicina Legal*, vol. 37, No. 1 (January–March 2011), p. 22).

10.2 The Greulich and Pyle test is not the only test used in Spain. In other cases submitted to the Committee, the authors had undergone up to five medical tests to determine their age. Furthermore, medical tests are only performed when the person does not appear to be a child. The Supreme Court has ruled that if a person is in possession of a passport or similar document, they should not be subjected to age-assessment tests. However, the Court has also noted that if there is reasonable justification for questioning the validity of such documents or if the documents have been declared invalid by the competent authorities, the child will not be considered "documented" and may be subjected to such tests in cases of uncertainty. The State party adds that it follows from this interpretation that an unaccompanied minor may only be considered documented if he or she is in possession of a passport or similar identity document, which is not the case in any of the communications pending before the Committee. Accordingly, the authors of these communications should be regarded as undocumented. In addition, they did not have the physical appearance of minors, which is why they were subjected to age-assessment tests. In some cases, the authors initially stated that they were of legal age but subsequently claimed to be minors. In other cases, the authors were recognized as children by the Spanish authorities and, on that basis, the Committee closed their case. In another case, the authorities of the author's country of origin had confirmed that the author was an adult. That communication was also closed. This proves the veracity of the medical tests carried out.

10.3 The State party reiterates that placing persons deemed to be adults on the basis of medical tests in child protection centres could endanger the children living in those centres.

10.4 When the person appears to be a minor or is in possession of a passport or identity card containing biometric data, he or she is not subjected to age-assessment tests. Lastly, the Defender of Rights does not specify which age-assessment tests should be used.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, whether the communication is admissible.

11.2 The Committee notes the State party's argument that the communication is inadmissible under article 7 (c) of the Optional Protocol because the author clearly appears to be an adult and has not provided any documentary or medical evidence to the contrary. The Committee nonetheless considers that the file presents no evidence that the author, a young man who claims he was a child at the time of the events, was in fact an adult at the time of his arrival in Spain. Accordingly, the Committee considers that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

11.3 The Committee also notes the State party's argument that the author has not exhausted available domestic remedies because: (a) he did not apply to the Public Prosecution Service for a review of the age-determination decree; (b) he did not request a judicial determination of his age; (c) he did not appeal the deportation order before the administrative courts; and (d) he did not appeal the detention order before the civil courts. Nonetheless, the Committee notes that, as pointed out by the State party, the age-determination decree issued by the Public Prosecution Service can be reviewed only when new evidence is submitted, such as identity documents with biometric data or new medical tests that contradict the earlier results. In this regard, the Committee notes that the author did not have the documents required by the State party or the resources to pay for alternative medical tests and that, in any case, according to the author, it was for the State party to conduct the necessary medical and psychological tests to determine his age. The Committee further observes that, in a fax dated 15 February 2017, the Public Prosecution Service was informed of the author's repeated claim that he was a minor, but that this did not in itself prompt new age-determination tests. The Committee considers that, in the context of the author's imminent expulsion from Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order

cannot be considered effective. The Committee notes that the State party has not specified that the remedies invoked would suspend the author's deportation. Accordingly, the Committee considers that article 7 (e) of the Optional Protocol does not constitute a barrier to the admissibility of the communication.

11.4 The Committee considers that the author's claims under articles 18 (2), 20 (1), 27 and 29 of the Convention have not been sufficiently substantiated for purposes of admissibility and finds them inadmissible under article 7 (f) of the Optional Protocol.

11.5 The Committee is nonetheless of the view that the author has sufficiently substantiated his claims under article 3 of the Convention, in connection with the failure to give consideration to the best interests of the child, and article 12, in connection with the failure to appoint a guardian or representative during the age-determination process. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

12.1 The Committee has considered this communication in the light of all the information made available to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

12.2 The issue before the Committee consists of determining whether, in the circumstances of the present case, the chosen process of determining the age of the author, who claimed to be a minor, violated his rights under the Convention. In particular, the author has claimed that the process did not take account of the best interests of the child owing to the type of medical tests used to determine his age and the failure to appoint a guardian or representative during the age determination process.

12.3 The Committee considers that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights contained in the Convention flows from that determination. It is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, the person should be given the benefit of the doubt and treated as a child. Accordingly, the Committee considers that the best interests of the child should be a primary consideration throughout the age-determination process.

12.4 The Committee recalls that, in the absence of identity documents or other appropriate evidence, "to make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children must be taken into account. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes."[24]

12.5 In the present case, the Committee notes that: (a) for the determination of his age, the author, who arrived in Spanish territory undocumented, underwent medical tests consisting of an X-ray of his left hand and, allegedly, a physical examination, with no additional tests, particularly psychological tests, being administered, and there is no record of the author having been interviewed as part of the process; (b) on the strength of the tests

[24] Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 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, para. 4.

carried out, the medical centre in question determined that the author's bone age was more than 19 years according to the Greulich and Pyle atlas, without establishing any possible margin of error; and (c) on the basis of this medical result, the juvenile prosecution service of the Provincial High Court of Granada issued a decree stating that the author was of legal age.

12.6 The State party has cited the case of *M.E.B. v. Spain* as a precedent for relying on X-ray evidence based on the Greulich and Pyle atlas. The Committee notes, however, that there is ample information in the file to suggest that this method lacks precision and has a wide margin of error, and is therefore not suitable for use as the sole method for determining the chronological age of a young person who claims to be a minor.

12.7 The Committee notes the State party's conclusion that the author clearly appeared to have reached the age of majority, and that, although he could directly have been considered an adult without the need to conduct any tests, medical tests were carried out to determine his age. Nonetheless, the Committee recalls its general comment No. 6, which states that in age assessments, an individual's psychological maturity should be taken into account in addition to his or her physical appearance, that age determination must be conducted in a scientific, safe and impartial manner that incorporates a child- and gender-sensitive approach, and that in the event of remaining uncertainty, the individual should be accorded the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.[25]

12.8 The Committee also notes the author's allegations – which were not refuted by the State party – that he was not assigned a guardian or representative to defend his interests as a possible child on arrival or during the age-determination process to which he was subjected. The Committee considers that States parties should appoint a qualified legal representative, with the necessary linguistic skills, for all young persons claiming to be minors, as soon as possible on arrival and free of charge. The Committee is of the view that the provision of a representative for such persons during the age-determination process is equivalent to giving them the benefit of the doubt and is an essential guarantee of respect for their best interests and their right to be heard. Failure to do so implies a violation of articles 3 and 12 of the Convention, as the age-determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

12.9 In the light of the foregoing, the Committee considers that the age-determination procedure undergone by the author, who claimed to be a child, was not accompanied by the safeguards needed to protect his rights under the Convention. In the circumstances of the present case, in particular the examination used to determine the author's age and the absence of a representative to assist him during this process, the Committee is of the view that the best interests of the child were not a prime consideration in the age-determination procedure to which the author was subjected, in breach of articles 3 and 12 of the Convention.

12.10 Having found a violation of articles 3 and 12 of the Convention, the Committee will not separately consider the author's claim that the same acts constituted a violation of article 8.

12.11 Lastly, the Committee notes the author's claims concerning the State party's failure to implement the interim measure of transferring him to a child protection centre while his case was pending consideration. The Committee is of the view that, by ratifying the Optional Protocol, States parties undertake to comply with the interim measures requested under article 6 of the Optional Protocol, which, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure. In the present case, the Committee notes the State party's argument that the author's transfer to a child protection centre might have posed a serious risk to the children in those centres. However, the Committee observes that this argument is based on the premise that the author was an adult. The Committee considers that the greater risk would be to send someone who may be a child to a centre reserved for individuals recognized as

[25] General comment No. 6, para. 31 (i).

adults. Consequently, the Committee considers that the failure to implement the requested interim measure in itself constitutes a violation of article 6 of the Optional Protocol.

12.12 The Committee, acting under article 10 (5) of the Optional Protocol, finds that the facts before it reveal a violation of articles 3 and 12 of the Convention and article 6 of the Optional Protocol.

13. The State party is under an obligation to prevent similar violations in the future, in particular by ensuring that all procedures for determining the age of possible unaccompanied children are carried out in a manner consistent with the Convention and that, in the course of such procedures, the persons subjected to them are promptly assigned a qualified legal or other representative free of charge.

14. The Committee recalls that, in becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Convention or its two substantive optional protocols.

15. In accordance with article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the measures it has taken to give effect to the Committee's Views. The State party is also requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish the present Views and disseminate them widely.

Annex I

[*Original: English*]

Joint concurring opinion of Committee members Benyam Dawit Mezmur, Olga A. Khazova, Ann Marie Skelton and Velina Todorova

1. The present opinion provides a different rationale to reach the same outcome as the majority view, and clarifies how the benefit of the doubt should be applied.

Admissibility

2. We concur with the majority view on admissibility (para. 11.2), but provide additional reasons. The flaws in the age-assessment procedures are central to this matter, and to find the case inadmissible on the basis of evidence arising from that process would be to pre-judge the case. Both the author and the State party give examples showing that the age-assessment method yields unreliable results. In the majority view (para 4.1), the State party cites *M.E.B. v. Spain*,[1] a case in which X-ray evidence had led to the conclusion that the author (who claimed to be a child) was 18 years old. Following investigations it was found that he was actually 20 years old. The author highlights (para 7.4) *R.L. v. Spain*,[2] a case in which the author was proved to be a child, despite having previously been declared an adult on the basis of the X-ray results. This demonstrates that the State party's presentation of the test results (18 years old) as accurate without a margin of error is misguided. We therefore cannot rely on the test result as a ground for inadmissibility.

Merits

3. We agree with the findings in the majority view stated in paragraphs 12.3, 12.4 and 12.8.

4. We also concur with the finding (para. 12.9) that the absence of a multidisciplinary age-assessment procedure and the lack of safeguards leads to a finding that the best interests of the child were not a primary consideration in the age-determination procedure to which the author was subjected, in breach of articles 3 and 12 of the Convention.

5. However, to reach the conclusion that there was a breach of the Convention, the Committee had to conclude that the author was a child or that, in the absence of reliable evidence, the author should be given the benefit of the doubt relating to his age. In other words, his statement regarding his age had to be preferred over the age provided by the flawed test.

6. It is necessary to examine what evidence was on record regarding the author's age. The State party relied heavily on the physical appearance of the author. The author provided a statement of his age, uncorroborated. The only other evidence was that obtained through the flawed X-ray process, and we therefore cannot rely on it. Should the author have provided more evidence? There are situations in which children have fled situations of danger and are seeking asylum, and in such circumstances it is most unlikely that they will able to obtain proof from the authorities in their country of origin or from embassies. Problems with lack of birth certificates and statelessness add to the difficulties in proving age. However, in the present case, the author makes no such claims, and fails to provide reasons why he has been unable to obtain evidence verifying his age.

7. Is the State party, with all the resources at its disposal, not in a stronger position to establish age? In situations where the child is seeking asylum it would be inappropriate for the State party to engage with the State of origin relating to the child's age or other personal

[1] CRC/C/75/D/9/2017.
[2] CRC/C/77/D/18/2017.

details. In this matter, there is no suggestion that the author was seeking asylum. As much as it is true that the author did not prove his correct age, the State party did not bring any actual evidence to prove the author's correct age either.

8. That leaves the Committee with no reliable evidence as to age. The Committee's majority view does not squarely rest its decision on a finding that the author should be given the benefit of the doubt. This is, however, one of the key issues in the present case. In our view, this is the only way in which the violation of rights in terms of articles 3 and 12 of the Convention can be found to apply to the author.

9. The third party submissions of the ombudsperson of France (*Défenseur des droits*) recommend that, in cases of doubt, the person should be presumed to be a child during the age-determination procedure and that in cases of persisting doubt at the end of the procedure, the benefit of the doubt should prevail.

10. A person claiming to be a child should be given the benefit of the doubt because any other approach will require a pre-determination of the very issue to be determined – the age of the person. However, one can sympathize with a State party that, once it has applied an age-determination process that provides the safeguards required under the Convention on the Rights of the Child, continues to be met with endless demands to extend the benefit of the doubt to everyone who continues to insist that he or she is a child. General comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, in which the Committee states that the benefit of the doubt is such that if there is a possibility that the individual is a child, she or he should be treated as such, may be of assistance here. This approach excludes the benefit of the doubt being demanded by an insincere individual where there is no possibility that he or she is a child.

11. Where does that leave us in the current case? There is an absence of reliable evidence regarding age. While we do not make a finding as to which party bears the onus to produce such evidence, it must be noted that neither party did so, nor gave reasons for that failure. This situation should be avoided in future cases, and parties should make the effort to obtain and present all available evidence or explain the absence thereof. However, in the absence of reliable evidence in the current matter, the benefit of the doubt should apply.

12. The State party originally gave the author the benefit of the doubt, and applied the flawed X-ray assessment. The author persisted in claiming he was a child, and the State party refused to give him any further benefit of the doubt. Was the State party wrong to do so?

13. If it had developed and applied an age-determination process that was compliant with the Convention, it could have justifiably accepted the determined age and concluded that there was no doubt remaining. However, that is not the situation here. We concur with the Committee's decision (para 12.9) that the age-determination process does not provide the safeguards required under the Convention. In such a situation, the State party should have given the author the benefit of the doubt, even after the age-determination process was concluded. The Committee too, in the absence of reliable evidence, and in the context of an age-determination process that lacks the safeguards required by the Convention, has to give the author the benefit of the doubt, and find that he should have been treated as a child. The State party's failure to do so amounts to a violation of the author's rights under articles 3 and 12 of the Convention.

Annex II

[*Original: English*]

Individual dissenting opinion of Committee member Mikiko Otani

1. I regret to present a dissenting opinion as I concur with most parts of the findings of the majority decision, both on the admissibility and merits, including with regard to the problems of the age-determination process used by the State party. However, I cannot associate myself with the conclusion that the State party violated the rights of the author under articles 3 and 12 of the Convention.

Admissibility

2. I concur with the decision on admissibility, but the reason in paragraph 11.2 needs to be elaborated upon. In the current case, the file presents no evidence that indicates that the author was an adult at the time of the alleged violation of his rights, that is, when the author was subjected to the age determination. If it was proved, even later, that the author was an adult at that time, the complaint would be incompatible with the provisions of the Convention, which protects the rights of children, and thus inadmissible under article 7 (c) of the Optional Protocol.[1] However, the State party's argument on the inadmissibility under this article is based only on the current photo of the author, which, according to the State party, leaves no doubt that he is an adult (para. 6.1). While the file contains a copy of the medical report from the psychiatric unit at the Virgen de las Nieves hospital in Granada, submitted by the author, according to which the results of the X-ray showed that the author's bone age was "over 19 years" (para. 2.2), the Committee cannot rely on that report to find that the author was an adult, as the reliability of the test and estimate used there is at issue. Therefore, article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

Merits

3. I find that the decision failed to give due consideration to the facts that the author has not provided any evidence proving that he was a child, other than his statement, and that the author did not avail himself of the procedure available to him under the Spanish laws that would have allowed him to prove that he was a child, despite the fact that he was appointed a lawyer. Furthermore, the information before the Committee does not show that the author tried to submit evidence to prove that he was a child, nor did the author provide a reason as to why he could not submit any evidence, such as that his birth had not been registered, that he did not have a birth certificate or that he had lost his birth certificate.

4. By this I do not mean to imply that there were no problems with the age-determination process used by the State party. On the contrary, I agree with the findings in paragraphs 12.3, 12.4 and 12.8. The method and the lack of procedural safeguards in the age-determination process used by the State party would have violated the author's rights under the Convention if he were a child. However, on the basis of the information available to it, I do not think that the Committee can find a violation of the rights of the author as a child. I am not convinced by the argument that the author should have been given the benefit of the doubt and found to be a child at the time of the alleged violation. There may be a situation where the uncertainty that the author was a child remains despite the evidence provided by the author. In that case, it would be appropriate for the Committee to find that the author was a child by giving him or her the benefit of the doubt. However, the current communication is not such a case, as the author has not provided any evidence other than his statement that he was born on 26 March 2000 (para. 2.1) and that he was a minor (para. 2.4). I do not suggest that the oral statements of the author have no evidential value. Nor do

[1] *Y.M. v. Spain* (CRC/C/78/D/8/2016).

I intend to make arguments on the onus. My position is that in the present case the Committee needed at least additional information indicating that the author was a child to find a violation of his rights as a child.

5. I feel obliged to point out that the purpose of the individual communications is to provide a remedy to the individual whose rights under the Convention were violated. In my view, the majority decision confuses two issues: on the one hand, whether the age-determination process used by the State party violated its obligation under the Convention, and on the other, whether the author's rights under the Convention were violated. The confusion is also reflected in the majority decision on remedies, in that the Committee recommends only general measures to prevent similar violations in the future without making any recommendations on the remedies for the author under rule 27, paragraph 4, of the rules of procedure of the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (para. 13).

6. To effectively protect the specific rights of the child under the Covenant, the Committee needs to exercise the functions conferred on it by the Optional Protocol appropriately.

Annex III

[*Original: French*]

Individual dissenting opinion of Committee member Hatem Kotrane

Admissibility

1. I do not agree with the decision of the majority of the members of the Committee that the case file does not contain any evidence that the author was an adult at the time of his arrival in Spain and that article 7 (c) of the Optional Protocol does not therefore constitute an obstacle to the admissibility of the communication.

2. There is, in my opinion, a confusion between the benefit of the doubt afforded to the child by the immigration authorities and the age requirement as a condition of admissibility for a communication submitted to the Committee under the Optional Protocol.

3. The author does not provide the Committee with any documents showing that he is a child. Whether he is a child is a fundamental issue in the proceedings before the Committee. Only children are permitted to submit communications, and the Committee has no jurisdiction if, on the date of submission of a communication, the author provides no evidence showing that he or she is a child, as happened in the present case.

4. Furthermore, there is no express provision for the presumption of minority – or the benefit of the doubt – in either the Optional Protocol or the Convention. The Committee has recognized it as one of the elements to be taken into account in assessing the age of young persons claiming to be unaccompanied minors and who must be protected by the immigration authorities for the necessary period during which an age assessment is to be conducted. Consequently, young persons are presumed to be minors at the time of their arrival in a foreign country and in their interactions with the immigration authorities, not at the time they submit a communication to the Committee, which has no means to assess their claim to be a minor, although this is an essential condition allowing the Committee to determine whether it has jurisdiction within the meaning of the Optional Protocol.

5. Furthermore, age is a legal fact. It follows that proof of age can be established by any means. Civil status documents constitute effective evidence; it would have been advisable for the author's lawyers to provide the Committee with such documents, the evidentiary value of which is rooted in the presumption that certificates issued in other countries are valid.

6. In the present case, however, the author has not provided the Committee with any documentation showing that he is a child even though his status as a minor is challenged by the authorities of the State party. The Committee itself cannot accept the presumption of minority, and the burden of proof lies with the author to demonstrate that he is a child.

Merits

Presumption of minority

7. The reasoning of the majority decision centres on reminding the State party of the limitations of medical tests in the absence of psychological tests and interviews with the author.

8. However, it should be recalled that in its general comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, the Committee affirms that "in the event of remaining uncertainty, the individual should be accorded the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such".[1] It therefore follows that the principle of presumption of

[1] General comment No. 6, para 31 (i).

minority is itself based on two presumptions: the authenticity of the documents provided and the legitimacy of the bearer. Consequently:

(a) The Committee does not fully exclude the use of scientific assessment; however, this must "be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child" and afford all due respect to human dignity;[2]

(b) The benefit of the doubt is not absolute. It is afforded to the child "in the event of remaining uncertainty"[3] and "if there is a possibility that the individual is a child."[4]

9. Thus, if doubt persists between the results of a scientific test showing the individual to be an adult and documents that attest to the contrary, the individual should be given the benefit of the doubt and deemed to be a child. The Committee recalls this position in joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 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, which states that "documents that are available should be considered genuine unless there is proof to the contrary."[5]

10. The situation is different when no doubt exists and the person concerned presents no documents and simply claims to be a child, while the immigration authorities have had to conduct a scientific test, as a result of which they are satisfied that he or she is an adult.

The child's best interests and the right to be heard

11. The majority decision concludes that the State party has violated articles 3 and 12 of the Convention, in particular by failing to appoint a representative to assist the young person with the age-assessment procedure.

12. This conclusion appears exaggerated in view of the fact that the rights set forth in articles 3 and 12 apply solely to children. The State party indeed has an obligation to protect a person claiming to be a minor and to refrain from placing him in a detention facility for adults, for example, but an ad hoc representative does not have to be appointed automatically in cases where the individual has not supplied any documents showing that he or she is a minor. The presumption of minority, with all its attendant implications, should be allowed "in the event of remaining uncertainty"[6], which is precisely what the State party contests given that the author did not provide any evidence showing he was a minor.

[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Para. 4.
[6] General comment No. 6, para 31 (i).