



# 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. 63/2018\*, \*\*

<i>Communication submitted by:</i>	C.O.C. (represented by counsel, Vanessa Hernández Delgado)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	28 November 2018
<i>Date of adoption of Views:</i>	29 January 2021
<i>Subject matter:</i>	Determination of the age of an unaccompanied minor
<i>Procedural issues:</i>	Failure to exhaust domestic remedies, incompatibility <i>ratione personae</i> , failure to substantiate the complaint
<i>Articles of the Convention:</i>	3, 8, 18 (2), 20 (1), 27 and 29
<i>Articles of the Optional Protocol:</i>	6 and 7 (c), (e) and (f)

1.1 The author of the communication is C.O.C., a national of the Gambia born on 2 February 2001. He claims to be the victim of violations of articles 3, 8, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014. The Committee also notes that although the author does not explicitly invoke it, he suggests that he is a victim of a violation of article 12 of the Convention.

1.2 Pursuant to article 6 of the Optional Protocol, on 3 December 2018, the working group on communications, acting on behalf of the Committee, requested the State party to adopt an interim measure – namely, to stay the execution of the order for the author’s deportation pending the consideration of his case by the Committee – and to transfer him to a child protection centre.

\* Adopted by the Committee at its 86th session (18 January–5 February 2021).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Marie Skelton, Velina Todorova and Renate Winter.



### **The facts as submitted by the author**

2.1 On 28 October 2018, the Maritime Safety and Rescue Agency, in cooperation with the National Police, detained the author as he attempted to enter the State party on board a small boat. Although he was not carrying any documentation, he claimed to be a minor. On the same day, the author was taken to an annex of the National Police station at Playa de las Américas in the south of the island of Tenerife.

2.2 On 31 October 2018, the author was notified of a decree of the Santa Cruz de Tenerife Provincial Prosecutor's Office declaring him to be an adult on the basis of medical tests, no evidence of which was recorded in his case file. The author claims not to have been notified of the results of these medical tests. On 2 November 2018, the author was notified of an order for his removal issued by the Immigration Office of the Government Sub-Delegation of Santa Cruz de Tenerife. On 3 November 2018, Court of Investigation No. 4 of Arona ordered that the author be placed in the Hoya Fría migrant holding centre. However, the author continued to be held in the annex of the National Police station in Playa de las Américas until 16 November, when he was transferred to the holding centre.

2.3 On 8 November 2018, the author appealed against the removal order. He contended that there was no basis for the decree of the Prosecutor's Office declaring him to be an adult, since it cited tests of which there was no record in the case file and failed to mention the date on which they had been carried out. As of the date of submission of the communication, the author had received no response to this appeal.

2.4 Also on 8 November, the author's lawyer went to the Santa Cruz de Tenerife Provincial Prosecutor's Office to collect the results of the medical tests allegedly carried out on the author and seven other minors, as those results were not included in the respective case files. The prosecutor for minors refused to hand over this evidence in all but one of the eight cases. According to the report to which the lawyer had access, the only tests that had been performed on the minors were a wrist X-ray taken for a bone age assessment using the Greulich and Pyle atlas and a medical examination. The author claims that these tests were done without his consent or an interpreter, that he was not attended by a professional specializing in the age determination process and that he was not assisted by a lawyer during the procedure. Moreover, the Prosecutor's Office decree declaring him to be an adult stated that, in keeping with the Mincer method, a dental panoramic radiograph was taken with his informed consent, but the author claims that this radiograph was not taken because the necessary equipment was out of service.

### **The complaint**

3.1 The author maintains that the State party failed to respect his right to be presumed a minor in the event of doubt or uncertainty and thus acted against his best interests and in violation of article 3 of the Convention.<sup>1</sup> This violation is made all the more flagrant by the real risk of the author's suffering irreparable harm as a consequence of his having been placed in a detention centre for adults and ordered to return to his country of origin. The author cites the concluding observations adopted in respect of the State party in which the Committee expresses concern about the lack of a uniform process in its territory to determine what it means to act in the child's best interests when assessing the age of unaccompanied children.<sup>2</sup> The author points out that in these concluding observations, the Committee expressed concern about substandard accommodation conditions and neglect in emergency centres in the Canary Islands, the centre in La Esperanza on Tenerife in particular.<sup>3</sup> In addition, the author refers to various studies to support his claim that the age estimation methods used in the State party, particularly those used in his case, have a wide margin of error, as the studies underpinning them were based on other populations with very different racial and socioeconomic characteristics.

3.2 The author also claims that he is a victim of a violation of his rights under article 3 of the Convention, read in conjunction with article 18 (2), owing to the failure to appoint a

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<sup>1</sup> The author cites general comment No. 6 (2005), para. 31.

<sup>2</sup> CRC/C/ESP/CO/3-4, paras. 27 and 59.

<sup>3</sup> Ibid., para. 59 (e).

guardian to protect his interests as an unaccompanied minor, a step that is a key procedural safeguard.<sup>4</sup> In addition, he maintains that his rights under article 3 (2), read in conjunction with article 20 (1), have been violated as a result of the State party's failure to provide him with protection, even though he was defenceless and highly vulnerable. The author submits that the best interests of the child should prevail over public order concerns regarding foreign nationals and that the State party has an obligation to take appropriate legislative and administrative measures for the proper protection of children, so that they are not left in a situation of distress as a result of the failure to appoint a guardian.<sup>5</sup>

3.3 In addition, the author submits that the State party has violated his right to an identity, a right enshrined in article 8 of the Convention, since age is a fundamental aspect of a person's identity and the State party has a duty not to interfere in this regard. Moreover, the State party's obligation includes the duty to preserve and retrieve any available information on the author's identity.

3.4 The author likewise claims to be the victim of a violation of his rights under articles 27 and 29 of the Convention, as his proper all-round development has been impeded. The author believes that his not having a guardian to guide him has prevented him from developing in a manner consistent with his age.<sup>6</sup>

3.5 The author also alleges a violation of his rights under article 20 of the Convention, since he has not received protection from the State party. He cites general comment No. 6 (2005), according to which this right must be interpreted in the light of the child's circumstances, age and ethnic, cultural and linguistic background.

3.6 The author proposes the following potential solutions:

- (a) That the State party acknowledge that it is impossible to establish his age on the basis of the medical tests that were carried out;
- (b) That he be notified of any decision affecting him;
- (c) That the possibility of lodging an appeal with the judicial authorities against age determination decrees issued by the Public Prosecution Service be recognized;
- (d) That he be assigned a representative immediately;
- (e) That all his rights as a minor be recognized, including the rights to receive State protection, to have a legal representative, to receive an education and to be granted a residence and work permit to allow him to fully develop as a person and to be integrated into society.

### **State party's observations on admissibility and the merits**

#### *Account of the facts*

4.1 In its observations of 1 March 2019 on the admissibility and merits of the communication, the State party made its own presentation of the relevant facts. According to the State party, on 28 October 2018, the author arrived in a small boat, with 72 other people of sub-Saharan origin, off the coast of Santa Cruz de Tenerife. On the same day, the local immigration and borders brigade of the National Police activated the protocol on

<sup>4</sup> The author cites general comment No. 6 (2005).

<sup>5</sup> The author cites a report by La Merced Migraciones (Mercedarios), the Office of the United Nations High Commissioner for Refugees, Save the Children, the Santander Programme on Law and Minors at the Pontifical University of Comillas, Baketik and Asociación Comisión Católica Española de Migración (Spanish Catholic Migration Association), entitled "Aproximación a la protección internacional de los menores no acompañados en España" (Approach to the International Protection of Unaccompanied Minors in Spain) (Madrid, La Merced Migraciones, 2009), p. 96: "As soon as an unaccompanied foreign minor is identified ... he or she must be assigned a guardian or legal representative with the knowledge necessary to ensure that his or her interests are safeguarded and that his or her legal, social, medical and psychological needs are appropriately addressed."

<sup>6</sup> The author cites general comment No. 6 (2005), para. 44.

unaccompanied minors. On 29 October 2018, the Office of the Prosecutor for Minors of the Santa Cruz de Tenerife Provincial High Court authorized tests to determine the author's age.

4.2 On 31 October 2018, the Office of the Prosecutor for Minors issued decree No. 24/2018, in which it stated that the author had reached the age of majority. On the same day, at the Tenerife Sur police station and pursuant to a decision of the Government Sub-Delegation of Santa Cruz de Tenerife, deportation proceedings were initiated, on the basis of article 53 (8) (b) of Act No. 4/2000, for illegal entry into Spanish territory. The author was notified of the proceedings on 2 November 2018.

4.3 On 3 November 2018, Court of Investigation No. 4 of Arona authorized the author's placement at the migrant holding centre. On 5 November, the author was temporarily admitted to the short-stay centre for immigrants attached to the Tenerife Sur police station, as the Hoya Fría migrant holding centre was full.

4.4 On 16 November 2018, the author was admitted to the Hoya Fría centre. On 7 December 2018, he was released on the grounds that it was impossible to obtain documentary evidence in his regard and was referred to the Red Cross in Tenerife. The State party claims that the National Police are currently unaware of the author's whereabouts.

#### *Argument for inadmissibility*

4.5 The State party argues that the communication is inadmissible *ratione personae*, as the author is an adult, as has been proved by medical evidence indicating that he is at least 18 years old and a specific report by forensic physicians, which also concluded that the author is of age.<sup>7</sup>

4.6 The State party also maintains that the communication is inadmissible under article 7 (e) of the Optional Protocol because the author has failed to exhaust all available domestic remedies.<sup>8</sup> The author could have: (a) requested the Public Prosecution Service to conduct additional medical tests to prove that he was a minor; (b) petitioned the civil court with jurisdiction over the place in which he was held for a review of any finding by the authorities of the autonomous community that he was an adult, in accordance with the procedure set out in article 780 of the Civil Procedure Act; (c) challenged the removal order before the administrative courts; and (d) initiated non-contentious proceedings for age determination before the civil courts, in accordance with the Non-Contentious Proceedings Act (No. 15/2015).

#### *Observations on the merits*

4.7 The State party argues that even if the communication is found admissible, there are no substantive grounds for the Committee to intervene. First, the State party cites domestic legislation according to which, in cases of reasonable doubt, the Public Prosecution Service is responsible for age determination, since it is the institution tasked with defending the rule of law, citizens' rights and the public interest, as protected under the law. Under the current system, the basic principle in cases in which a person's age cannot be established is that he or she is presumed to be a minor until his or her age is determined. Simultaneously, objective medical tests are conducted, with the person's prior informed consent and respect for his or her dignity, to determine his or her age.<sup>9</sup>

4.8 Second, the State party submits that the principle of the best interests of the child enshrined in article 3 of the Convention has not been violated, since the author is an adult. The State party notes that persons should be presumed to be minors only "when there is doubt" as to their age, not when it is obvious that they are adults. The State party argues that the Spanish authorities gave the author the opportunity, with his informed consent, to undergo objective medical tests to determine his age, the results of which clearly showed that he was

<sup>7</sup> The State party reproduces the Prosecutor's Office decree finding the author to be an adult, which states that two medical tests were carried out (an X-ray and a dental panoramic radiograph) and that a report was drawn up by two forensic physicians on the basis of a physical examination, an interview and the results of the medical tests.

<sup>8</sup> The State party emphasizes the need to exhaust "all" available remedies.

<sup>9</sup> In accordance with article 12 of Organic Act No. 1/1996 on the Legal Protection of Minors.

an adult. These age tests were conducted in a scientific, safe and fair manner, in accordance with paragraph 31 of general comment No. 6 (2005). The State party maintains that the general comment does not preclude or prohibit the testing of persons who appear to be adults, have no documents and claim to be minors. For the State party, considering an adult to be a minor in the absence of reliable evidence and based solely on the word of the person concerned would seriously endanger minors placed in reception centres (who could suffer abuse or ill-treatment at the hands of that person), endangerment that would, in fact, constitute a violation of the principle of the best interests of the child.

4.9 The State party also submits that there was no violation of the principle of the best interests of the child in relation to articles 18 (2) and 20 (1) of the Convention. In that respect, it maintains that:

(a) The author was tended to by health workers as soon as he set foot on Spanish soil;

(b) He was given documentation and offered a lawyer and interpreter free of charge by the State, and was immediately informed of his rights;

(c) The competent judicial authority was immediately notified of his situation in order to ensure that his rights were respected during the procedures relating to his irregular status;

(d) As soon as he claimed to be a minor, the Public Prosecution Service, which is the institution responsible for protecting the best interests of the child, was informed.<sup>10</sup>

4.10 With regard to the right to an identity enshrined in article 8 of the Convention, the State party argues that there was no violation because “[the author’s] stated identity was recorded as soon as he was rescued at sea and entered Spanish territory illegally” and that “the resulting documents provided by the Spanish authorities are, in fact, what allows him to exercise his rights today”.

4.11 The State party maintains that the author’s rights under articles 20, 27 and 29 of the Convention have not been violated, as these rights apply only in cases where there is no doubt that the person is a minor. Since there is no doubt that the author is an adult, the rights in question do not apply.

4.12 The State party concludes not only that the author has failed to provide original documents with authentic biometric data to substantiate the presumption or his claim that he was a minor but also that the authorities, having ordered medical tests and a forensic examination, have evidence that contradicts the author’s claim. As the author is an adult, the State party requests that the Committee declare the communication inadmissible and discontinue its consideration thereof or, if not, find it without merit, since there are no substantive grounds for establishing that there has been a violation of the rights enshrined in the Convention.

#### **Author’s comments on the State party’s observations on admissibility and the merits**

5.1 In his comments on admissibility and the merits submitted on 14 August 2019, the author points out that he spent more time than was necessary on police premises and that at no stage was he attended to by the child protection services. He arrived in the State party on 28 October 2018, and it was not until 2 November that he was notified of the removal order and not until 3 November that his placement in detention was ordered. Moreover, the author insists that between 28 October and 16 November 2018 he was locked up in very poor conditions in the aforementioned police premises, without an adult to protect his interests or the assistance of a non-governmental organization (since such organizations were not authorized to enter the premises), while the food that was provided was always cold and insufficient. The author adds that the short-stay centre for immigrants referred to by the State party is not a temporary care centre but a number of large huts annexed to the police station.

<sup>10</sup> The State party cites domestic legislation that explains the impartial and independent role of the Public Prosecution Service (including article 124 (1) of the Constitution, article 435 of the Organic Act on the Judiciary, article 1 of Act No. 50/1981 and articles 3 (7) and 7 of the Organic Statute of the Public Prosecution Service).

They do not meet the minimum requirements for holding anybody, let alone presumed minors such as the author, in flagrant violation of the protocol on unaccompanied minors.<sup>11</sup>

5.2 The author explains that the State party's entire argument rests on his not being a minor and the consequent inapplicability of the Convention. However, the author attaches a copy of his passport, which was issued on 25 March 2019 and proves that he was a minor at the time of the relevant events. According to the author, not only does this evidence completely undermine the State party's argument but it also shows that the State party's methods are unsuitable for the detection and protection of unaccompanied minors.

5.3 As for the age determination procedure, the author reiterates that his lawyer went in person to the court and was able to verify that the medical evidence that formed the basis for the Prosecutor's Office decree was not in the case file. For that reason, on 8 November his lawyer submitted a brief to the Prosecutor's Office requesting that this evidence be made available to her.

5.4 Regarding the evaluation of the medical evidence, the author attaches a document from the Ombudsman dated 26 July 2019 concerning the proceedings initiated to determine the age of the persons, including the author, who reached the coast of Santa Cruz de Tenerife on 28 October 2018. According to that document, it would have been "altogether impossible" to interpret the panoramic radiograph of the author's upper and lower jaw, since the hospital reported that "it did not have a doctor qualified for that task". The document also states that the decree declaring the author to be an adult "contains an error, since it indicates that a panoramic radiograph was taken but does not reflect the fact that it could not be interpreted because there was no doctor qualified to issue the corresponding report". The Ombudsman concludes by claiming that "the widely held view of the most reputable forensic medical experts is that [...] the results of a single test based on a wrist X-ray cannot confirm that the bone age of the person concerned is the same as his or her chronological age".

5.5 The author claims that the prosecutor adopted the decree without the necessary tests having been performed, in violation of the established laws on protection of minors. He makes this claim because:

(a) The panoramic radiograph was taken, but the results were never made available;

(b) No forensic report containing an interpretation of the radiograph was issued because no one trained to interpret it was available that day;

(c) The person who would have assessed this evidence, in the absence of a report, is likely to have been the prosecutor, and the Prosecutor's Office is not competent to make medical assessments;

(d) Neither the wrist X-ray nor the medical report presumably containing the assessment thereof was provided;

(e) The author was not informed of the medical tests that were going to be conducted, and his informed consent was not obtained.

5.6 With regard to the non-exhaustion of domestic remedies, the author reiterates that his lawyer went to the Prosecutor's Office on 8 November 2018 with the intention of collecting all the information contained in his case file and thus to have all the information that might guarantee him an adequate legal defence. However, the Prosecutor's Office failed to provide the lawyer with any documents relating to the author, thus impairing his defence. Age determinations made by the Public Prosecution Service cannot be appealed in court, as confirmed by the Constitutional Court in decision No. 172/2013. Although the State party indicates that the author could have undergone additional medical tests with a view to contesting the determination, his financial situation was such that he could not afford such

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<sup>11</sup> The author cites article 3 of the decision of the Office of the Under-Secretary of 13 October 2014, a decision in which the agreement on the adoption of the framework protocol on specific measures in relation to unaccompanied foreign minors was published.

tests. Moreover, none of the available remedies would have prevented the execution of the order to remove him, thus rendering them ineffective.

5.7 Regarding the merits of the communication, the author claims that the State party has provided no evidence that it obtained his informed consent to carry out the tests, let alone that it assigned a guardian to him during the proceedings. Concerning the other alleged violations, the author refers to his initial submission, as the State party's submission, in his view, consists of nothing more than the denial of these violations.

#### **State party's additional observations**

6. In its observations of 3 September 2019, the State party states that migrant holding centres are temporary detention centres for foreign nationals awaiting deportation. The State party explains that these centres are non-prison facilities administered by the Ministry of the Interior, where foreign nationals stay until they are deported (thus serving a preventive and precautionary purpose). According to the State party, the author seems to imply that he spent several months in a "dismal police dungeon", which is far from the truth. The author was admitted to the migrant holding centre as a result of his illegal entry into the State party's territory. Detention in cases such as that of the author is merely temporary – it is of a non-penitentiary character and is effected on a precautionary basis prior to deportation.

#### **Author's comments on the State party's additional observations**

7.1 In his comments of 17 October 2019 on the State party's additional observations, the author reiterates that on the day he arrived off the coast of Tenerife, he was taken to the police station at Playa de las Américas in the municipality of Adeje, where he remained until he was transferred, together with other minors, to the Hoya Fría migrant holding centre on 16 November 2018.

7.2 The author repeats that he was held in police custody from 28 October to 16 November 2018 and in conditions even worse than those of a migrant holding centre. The facility where he was held consisted of airless huts with only one bathroom for 17 people. The persons in custody were locked up at 7 p.m. every night until the following day. The food was cold and insufficient. The author explains that this facility was neither a short-stay centre for immigrants nor a migrant holding centre. A detention order from a court is required in order to admit somebody to a migrant holding centre and confine him or her for more than 72 hours, as was done with the author and the other minors.

7.3 The author reproduces sections of the detention order of 3 November 2018, claiming that none of the measures mentioned therein was taken, since he remained in an unauthorized centre until 16 November. Neither he nor the other minors, who were held in a wholly unregulated facility operating outside the law, were treated as minors, in breach of constitutional guarantees and international agreements.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

8.1 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, whether the communication is admissible.

8.2 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* because there is medical evidence demonstrating that the author is at least 18 years old and because a specific report by forensic physicians concluded that he is an adult. The Committee also notes, however, that the author stated that he was a minor when he arrived in Spain and that he has an official passport confirming this statement, to which the State party has not referred in its observations. At the same time, the Committee points out that the burden of proof does not rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. In the present case, the Committee notes the author's argument that the State party has failed to demonstrate that the medical tests were in fact conducted and evaluated by specialized

medical personnel. In particular, the Committee notes that the State party's Ombudsman himself indicated that it had not been possible to evaluate the panoramic radiograph and that it had been included in the Prosecutor's Office decree by mistake. The Committee is therefore of the view that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

8.3 The Committee also takes note of the State party's argument that the author failed to exhaust the domestic remedies available to him because he could have: (a) requested the Public Prosecution Service to conduct additional medical tests; (b) petitioned the competent civil court to review the decision denying him a guardian, in accordance with the procedure set out in article 780 of the Civil Procedure Act; (c) challenged the removal order before the administrative courts; and (d) initiated non-contentious proceedings for age determination before the civil courts, in accordance with the Non-Contentious Proceedings Act. The Committee notes, in turn, the author's argument that the domestic remedies mentioned by the State party are either unavailable or ineffective. It also notes the author's argument, which is not disputed by the State party, that his lawyer was denied access to the documentation that presumably formed the basis for the decree in which the author was declared an adult, thus preventing her from giving him the legal assistance he needed to prove that he was a minor. Moreover, the Committee is of the opinion 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.<sup>12</sup> The Committee notes that the State party has not specified whether the remedies mentioned would lead to suspension of the author's deportation. Accordingly, the Committee finds that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

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

8.5 However, the Committee is of the view that the author has sufficiently substantiated his claims under articles 3, 8 and 20 of the Convention – namely, that he was not assigned a representative during the age determination process, that his right to be presumed to be a minor and his right to preserve his identity were not respected during that process and that he did not receive the protection to which he was entitled as a minor. The Committee therefore finds that this part of the complaint is admissible and proceeds to consider it on the merits.

#### *Consideration of the merits*

8.6 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.

8.7 One of the issues before the Committee is whether, in the circumstances of this case, the process of determining the age of the author, who stated that he was a minor, violated his rights under the Convention. In particular, the author has claimed that, owing to the type of medical test used to determine his age and the failure to appoint a guardian or representative to assist him, the best interests of the child were not a consideration in the process of determining his age.

8.8 The Committee notes 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 set out 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. The best interests of the child should be a primary consideration throughout the age determination process.<sup>13</sup>

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<sup>12</sup> *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 11.3.

<sup>13</sup> *Ibid.*, para. 12.3.

8.9 It is the Committee's view that the benefit of the doubt should be given to the individual being assessed<sup>14</sup> and that

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 [...] in a language the child understands.<sup>15</sup>

8.10 The Committee notes that:

(a) For the determination of his age, it seems that the author, who arrived in Spain without documents, underwent a bone age test based on a wrist X-ray; while a dental panoramic radiograph was also taken, no report on this test was prepared owing to a lack of specialized medical personnel. There is no record to suggest that any additional tests, such as psychological tests, or interviews were conducted as part of the process;

(b) As a result of the wrist X-ray, the author's bone age was determined to be at least 18 years, according to the Greulich and Pyle atlas, without taking into account the fact that this study, which does not establish standard deviation parameters for that age range, cannot be used to extrapolate reliable data on individuals with the author's characteristics;

(c) On the basis of the results of the medical tests, the Prosecutor's Office issued a decree stating that the author was an adult;

(d) As a result of this decree, the competent court ordered that the author be placed in a centre for adults;

(e) The author was released on the grounds that "it was impossible to obtain documentary evidence in his regard" and was referred to the Red Cross in Tenerife;

(f) The author was not assisted by a representative during the age determination procedure.

8.11 The Committee also notes that there is ample information in the case file to suggest that bone age tests lack precision and have a wide margin of error and are therefore not suitable for use as the sole method of assessing the chronological age of a young person who claims to be a minor and provides documents supporting that claim.

8.12 The Committee also notes the author's claims that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age determination process that led to the issuance of a decree declaring him to be an adult. In addition, the Committee notes that States parties should appoint a qualified legal representative and, if need be, an interpreter, for all young persons claiming to be minors, as soon after their arrival as possible and at no charge.<sup>16</sup> The Committee is of the view that providing a representative for such persons during the age determination process is an essential guarantee of respect for their best interests and their right to be heard, and that the role played by the Office of the Prosecutor for Minors is insufficient in this regard.<sup>17</sup> Failure to provide a representative constitutes 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.

8.13 The Committee consequently believes that the age determination procedure undergone by the author, who claimed to be a minor, was not accompanied by the safeguards needed to protect his rights under the Convention. Adequate tests to determine the author's age were not conducted, he was denied access to the medical reports that presumably formed

<sup>14</sup> Ibid., para. 12.4.

<sup>15</sup> 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 (2017), para. 4.

<sup>16</sup> *A.D. v. Spain* (CRC/C/83/D/21/2017), para. 10.14.

<sup>17</sup> Ibid., *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8, and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 13.7.

the basis for the decree declaring him to be an adult and he was not assigned a guardian to accompany him during the procedure. The Committee is therefore of the view that the best interests of the child were not a primary consideration in the determination of the author's age, in violation of articles 3 and 12 of the Convention.

8.14 The Committee also notes the author's claims that the State party violated his rights under article 8 of the Convention insofar as it altered elements of his identity by attributing to him an age that did not match the information contained in the official document issued by his country of origin. The Committee considers that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements thereof. In the present case, the State party failed to respect the author's identity by assigning him an incorrect date of birth, without contacting the authorities of his country of origin, even though the author was not an asylum seeker and there was no reason to believe that contacting those authorities would put him at any risk. Consequently, the Committee finds that the State party violated article 8 of the Convention.

8.15 In addition, the Committee notes the author's claims, which have not been contested by the State party, that the State party failed to provide him with protection, even though he was defenceless and extremely vulnerable. This failure occurred even before the author had been placed in the migrant holding centre, since he was held for days in a detention centre other than the one stipulated in the court order and, in particular, after the holding centre itself had released him on the grounds that it was impossible to obtain the documentary evidence needed to carry out the deportation. The Committee is of the view that this failure to provide protection constitutes a violation of article 20 (1) of the Convention.

8.16 Lastly, the Committee notes the State party's failure to accede to the Committee's request to transfer the author to a child protection centre pending its consideration of his communication. The Committee stresses that, by ratifying the Optional Protocol, States parties assume an international obligation to take the interim measures requested under article 6 of the Optional Protocol, as such measures, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.<sup>18</sup> In the present case, the Committee takes note of the State party's argument that the author's transfer to a child protection centre could have posed a serious risk to the children in those centres. However, this argument is based on the premise that the author is an adult. Consequently, the Committee considers that the failure to adopt the interim measure it requested is itself a violation of article 6 of the Optional Protocol.

9. The Committee on the Rights of the Child, acting under article 10 (5) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, is of the view that the facts of which it has been apprised amount to a violation of articles 3, 8, 12, and 20 (1) of the Convention and article 6 of the Optional Protocol.

10. The State party should therefore provide the author with effective reparation for its violation of his rights. The State party is also under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

(a) Ensure that all procedures for determining the age of young persons claiming to be children are in line with the Convention and, in particular, that in the course of these procedures:

(i) The documents submitted by the young person concerned are taken into consideration and, if issued or authenticated by the relevant State authority or Embassy, accepted as genuine;

(ii) The young person concerned is assigned a qualified legal representative or other representatives without delay and free of charge, any private lawyers chosen to represent the young person are recognized and all legal and other representatives are allowed to assist the young person during the age determination procedure;

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<sup>18</sup> *N.B.F. v. Spain*, para. 12.11.

(b) Ensure that unaccompanied young persons claiming to be under 18 years of age are assigned a competent guardian as soon as possible, even if the age determination procedure is still ongoing;

(c) Develop an effective and accessible redress mechanism that allows young unaccompanied migrants claiming to be under 18 years of age to apply for a review of any decrees declaring them adults issued by the authorities in cases where the age determination process was not accompanied by the safeguards needed to protect the best interests of the child and the right of the child to be heard;

(d) Provide training to immigration officers, police officers, officials of the Public Prosecution Service, judges and other relevant professionals on the rights of migrant children and, in particular, on the Committee's general comment No. 6 (2005), joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017) and joint general comment No. 4/No. 23 (2017).

11. 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 that 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 to disseminate them widely.

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