



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. 26/2017* **

<i>Communication submitted by:</i>	M.B.S. (represented by the non-governmental organization Fundación Raíces)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	19 July 2017
<i>Date of adoption of Views:</i>	28 September 2020
<i>Subject matter:</i>	Age determination procedure in respect of an unaccompanied minor
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; incompatibility <i>ratione personae</i> ; non-substantiation of claims
<i>Articles of the Convention:</i>	2, 3, 8, 12, 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 M.B.S., a national of Guinea born on 1 January 2000. He claims to be the victim of violations of articles 2, 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 Pursuant to article 6 of the Optional Protocol, on 20 July 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt interim measures consisting of staying the execution of the expulsion order against the author pending the consideration of his case by the Committee and of transferring him to a child protection centre.

The facts as submitted by the author

2.1 The author arrived in Almería on 5 July 2017 after the small boat in which he was travelling was intercepted by the local police. He claimed to be a minor and was transferred to a hospital, where an X-ray of his wrist was taken. According to the Greulich and Pyle atlas, the X-ray showed that he was 19 years of age. On that basis, the Almería Provincial

* Adopted by the Committee at its eighty-fifth session (14 September–1 October 2020).

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



Prosecutor's Office issued a decree declaring him to be an adult. The author was not properly informed about the procedure or the possible consequences of such medical tests in a language that he could understand. On 7 July 2017, Almería Court of Investigation No. 5 decided that the author should be placed in the holding centre for foreign nationals in Madrid. He was notified of a decision to return him to his country of origin, which his court-appointed lawyer subsequently appealed. After his arrival at the holding centre, the minor was taken to a hospital, where he had dental and wrist X-rays taken; these reportedly showed that he was an adult (the first indicated that he was at least 18 years of age and the second that he was 19 years of age).

2.2 On 17 July 2017, Fundación Raíces wrote to eight different authorities¹ on the author's behalf, asking for him to be removed from the holding centre for foreign nationals and placed in the care of the Madrid child protection services. In doing so, Fundación Raíces explained that steps were being taken to obtain documents that would prove that the author was a minor. On 18 July, a photograph of the author's birth certificate was sent to the relevant courts and prosecutors' offices.² On 28 July, the author submitted the original document, having received it by post.

2.3 On 1 August 2017, the author was released and subsequently found accommodation in a shelter for adults, without having been assigned a guardian and without receiving the treatment to which minors are entitled under both national and international law.

The complaint

3.1 The author maintains that the State party failed to respect his right to be presumed to be 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.³ This violation is all the more flagrant, as there was a 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 Committee's concluding observations, in which it expresses concern at the State party's failure to consider the best interests of the child and at the disparities in the methods used to determine the age of unaccompanied children.⁴ The author also refers to various studies to support his claim that the medical estimates used in the State party, particularly the one 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 claims to be the victim of a violation of his rights under article 3 of the Convention, read in conjunction with article 18 (2), owing to the State party's failure to appoint a guardian to protect his interests, a practice that serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied minor.⁵ He also alleges a violation of his rights under article 3 (2), read in conjunction with article 20 (1), on the grounds that the State party failed to provide him with protection, even though he was a defenceless and extremely vulnerable unaccompanied child migrant. The author maintains that the best interests of the child should prevail over public order concerns regarding foreign nationals and that, when dealing with persons who claim to be minors and who are in the

¹ The Embassy of the Republic of Guinea in Spain; Almería Court of Investigation No. 5; the Almería Provincial Prosecutor's Office; the Directorate General for Family and Children's Affairs of the Community of Madrid; the Ombudsman; the supervisory court responsible for the holding centre for foreign nationals; the Madrid Provincial Prosecutor's Office; and the Almería provincial police.

² The author maintains that, according to the case law of the Constitutional Court (decision No. 172/2013 of 9 September 2013 of the First Chamber of the Constitutional Court), age determination decrees issued by the Public Prosecution Service cannot be appealed directly before the courts and that, as a result, the available remedies cannot be used to challenge the assessment of his age.

³ The author cites general comment No. 6 (2005), para. 31.

⁴ CRC/C/ESP/CO/3-4, para. 59.

⁵ The author cites general comment No. 6 (2005).

process of obtaining documents to prove their age, the State party should set in motion its administrative apparatus and appoint a guardian as a matter of course.⁶

3.3 In addition, the author submits that the State party violated his right to preserve his identity, which is enshrined in article 8 of the Convention. He points out that age is a fundamental aspect of identity and that the State party has an obligation not to interfere in this regard. Moreover, the State party's obligation includes the duty to preserve and recover any data on the identity of the author that exist or may exist. Yet, the State party attributed to him an age that is different from his real age and a date of birth that does not match his stated date of birth or the one in the identity document that was later submitted.

3.4 The author claims that his right to be heard, which is enshrined in article 12 of the Convention, was violated because the information provided about his rights was not translated into French and he was not able to communicate with his lawyers until after the decisions regarding his detention and return had been made.⁷

3.5 The author also 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.⁸

3.6 The author also claims that his rights under article 20 of the Convention were violated because he was left in a situation of defencelessness and social exclusion as a result of the State party's decisions and actions. He claims that the State party denied him protection by considering him to be an adult without any conclusive evidence, and cites the Committee's general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, which states that this right must be interpreted in the light of the child's circumstances, age and ethnic, cultural and linguistic background.

3.7 The author maintains that he has suffered discrimination on account of his status as an unaccompanied foreign minor, in violation of article 2 of the Convention. He claims that he would not have been denied protection if he had been accompanied by his family or if he had not been a national of a sub-Saharan African country, since, in the case of nationals of other countries and Guinean citizens who are adults or accompanied minors, neither the person's age nor the documents issued by the relevant national authorities are ever called into question.

3.8 The author proposes the following possible solutions:

(a) That the State party recognize him as a minor on the basis of the official documents submitted, stay his removal to his country of origin and place him in the care of the child protection services;

(b) 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;

(c) That his right to receive assistance from the State be recognized;

(d) That he and his lawyers be notified of any decision affecting him;

⁶ The author cites a report by La Merced Migraciones (Mercedarios), 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* (Approaches 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."

⁷ The author cites general comment No. 12 (2009), para. 26.

⁸ The author cites general comment No. 6 (2005), para. 44.

(e) That the State party acknowledge that it is impossible to establish his age on the basis of the medical tests carried out;

(f) That the possibility of appealing age determination decrees issued by the Public Prosecution Service before the judicial authorities be recognized.

State party's observations on admissibility

Account of the facts

4.1 In its observations of 24 August and 6 November 2017 on the admissibility of the communication and the lifting of the interim measures requested, the State party points out that the author's account of the facts is biased and inaccurate. The State party claims that the police report of 5 July 2017 on the interception of the small boat states that the boat was carrying 29 men "who appeared to be adults" and no minors. After the author claimed to be a minor, an X-ray of his wrist was taken on 6 July; the X-ray showed that he was 19 years of age. On 7 July, the Almería Provincial Prosecutor's Office issued a decree declaring him to be an adult. When the author arrived in Madrid, another X-ray was taken of his hand, which showed that he was 19 years of age, in addition to a dental X-ray, which indicated that, as at 13 July 2017, he was over 18 years of age.

4.2 The State party explains that, on 25 July 2017, the Public Prosecution Service decided to reject the request of Fundación Raíces for the decree declaring him to be an adult to be amended. Its decision followed that of Madrid Court of Investigation No. 19, which, on 19 July, had ruled that the author had reached the age of 18, basing this determination on a report issued by the forensic doctor. On 17 August, the prosecutor's office attached to Almería Court of Investigation No. 5 requested the Court to order the author's retention in the holding centre for foreign nationals.

4.3 The State party argues that, although the author submitted a birth certificate, there is no document proving that this certificate belongs to him, as he did not have it with him at the time of his arrest and it does not contain any biometric data. There are therefore doubts as to the authenticity of the document, especially as it contradicts the results of the medical tests carried out. As for the author's questioning of the reliability of the medical tests, the State party claims that this is an attempt to justify an argument that is unjustifiable, namely, that scientific methods are less reliable than a mere copy of a document whose authenticity has never been proven. Lastly, the State party does not know the author's current whereabouts, as he was released on 1 August 2017.

Grounds for inadmissibility

4.4 The State party argues that the communication is inadmissible *ratione personae* because the author is an adult. The State party maintains that he is an adult on the grounds that: (a) his appearance is that of an adult, as shown by the photographs taken of him at the time of his arrest; and (b) after he stated that he was a minor, objective medical tests were carried out, the results of which showed that he was at least 18 years of age, bearing in mind that there is no standard deviation for this age group. Furthermore, the birth certificate cannot be taken as proof of age based on the author's statement alone because it does not contain any biometric data.

4.5 According to the State party, declaring the communication admissible when there is objective evidence that the author is an adult would only "encourage migrant smuggling rings", whom the author paid and who "recommend that migrants travel without documents and then claim to be minors".

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. He could have:

- (a) Requested the Public Prosecution Service to conduct additional medical tests;
- (b) Petitioned the civil court with jurisdiction over the place where he was detained for a review of any autonomous community decision finding that he was an adult, in accordance with the procedure set out in article 780 of the Civil Procedure Act;

- (c) Challenged his removal order before the administrative courts;
- (d) Initiated non-contentious proceedings for age determination before the civil courts, in accordance with the Non-Contentious Proceedings Act (No. 15/2015).

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

5.1 In his comments on admissibility of 29 December 2017, the author responds to the State party's account of the facts. He claims that the medical report of 6 July 2017 stated that he had a bone age of 19 years without specifying whether or not there was a standard deviation for that age group, even though these methods have margins of error that prevent definite conclusions from being drawn. If those margins of error had been applied, the test results would not have contradicted the author's claim regarding his age, which he subsequently proved. In addition, the State party maintains that the "necessary checks" were carried out when the author claimed to be a minor. However, these checks consisted solely of medical tests and there is no record of the authorities of Guinea having been contacted in order to verify the author's identity on the basis of the original copy of the official document that he submitted.

5.2 The author was not provided with the necessary legal safeguards during the age determination procedure, such as information about the consequences that the medical tests would have, even if he provided identity documents. Furthermore, there is no record of his having been assigned a lawyer or representative for the age determination process who could have informed him about the test that he was to undergo and made sure that he had given his express and informed consent. It is worth noting that the date of birth given in the removal order is 5 July 1999, which would mean that the author was exactly 18 years of age when he entered Spanish territory.

5.3 In describing events that occurred after the submission of the communication, the author reports that, in early August 2017, after his release from the holding centre for foreign nationals, he went to the Embassy of Guinea in Madrid, where he showed the original documents from his country of origin. Since the Embassy cannot issue passports, as they must be applied for in person in Guinea, when he submitted his comments on admissibility, the author had: (a) a consular card with a photo by which he could be identified; (b) a consular registration certificate; and (c) a certificate stating that the consular authorities of Guinea do not issue passports. In other words, Guinea, a sovereign country, has issued documents stating that the author is a minor. There is therefore nothing more that the author can do to prove his identity.

5.4 The author claims that, even when he submitted the above-mentioned documents to the Public Prosecution Service, it refused to review the decree declaring him to be an adult, basing its refusal solely and exclusively on the results of the medical tests. According to the decree, the Public Prosecution Service does not consider the information in the documents provided by the author to be reliable, even though all the documents are originals and he has submitted all the documents that the Embassy is able to issue to him. The Public Prosecution Service only considered valid the results of the medical tests, which, if interpreted with the scientifically recommended margin of error, would show him to be the age that is reflected in his documents.

5.5 With regard to the State party's request for the communication to be declared inadmissible *ratione materiae* because the author is an adult, the author argues that this claim cannot be considered grounds for inadmissibility because his age is precisely the substantive issue raised in the communication. As stated above, the documentation provided by the author is genuine and valid proof of his identity, and should be considered reliable evidence of his status as a minor, requiring, at the very least, that the above-mentioned procedures be set in motion, in accordance with the principle of the best interests of the child and the right to be presumed to be a minor.⁹

⁹ The author cites the National High Court judgment of 9 October 2007 (JUR/2017/272319), which states that "a birth certificate issued by the applicant's State is reliable evidence of his or her status as a minor ... and should be assessed and considered as evidence".

5.6 With regard to the claim that the communication is inadmissible because domestic remedies have not been exhausted, the author explains that the remedies available under domestic law are ineffective, either because they do not provide effective redress for the rights violations in question, or because it takes too long to obtain them, and that the State party has not fulfilled its obligation to prove otherwise.¹⁰ Firstly, the author notes that it is actually impossible for him to have the decree declaring him to be an adult reviewed by the Public Prosecution Service, as illustrated by the fact that, even when he provided all the documents that he was able to obtain from the Embassy, the Public Prosecution Service refused to review the decree on the grounds that the documents contradicted the results of the medical tests. Secondly, an administrative appeal against a removal order does not stay the execution of the order and can take up to three months to be decided upon. Only after a decision has been reached or three months have passed can administrative proceedings be brought. There is therefore no effective remedy that makes it possible to avoid the harmful and irreversible effects of an expulsion, especially as individuals are notified of their removal just 12 hours in advance. The author therefore turned to the Committee because he had been left completely defenceless after various Spanish institutions, despite their having been informed that a possible minor was to be returned to his country of origin, took no action, and because he was unlikely to obtain effective redress through domestic remedies and was seeking to avoid irreparable harm. Moreover, the author does not agree with the State party's interpretation of article 7 (e) of the Optional Protocol, which would oblige him to exhaust each and every remedy available to him under domestic law. This interpretation is not in keeping with the purpose of the article, which is to provide the national authorities with the opportunity to remedy any human rights violations that may have occurred. It is therefore sufficient to have exhausted just one of the available domestic remedies, as has been stated by the Committee against Torture¹¹ and the European Court of Human Rights.¹²

State party's observations on the merits

6.1 In its observations of 15 January 2018, the State party maintains that the principle of the best interests of the child, enshrined in article 3 of the Convention, has not been violated because the author is an adult. The State party asserts that persons should be presumed to be minors only "in the event of uncertainty", not when it is obvious that they are adults.¹³ The State party concludes that "in this case, where a person with no documents whatsoever appears to be an adult, the authorities can legally consider him an adult without conducting any tests". However, when the author claimed to be a minor, the State party decided to carry out medical tests, with his prior informed consent, since general comment No. 6 (2005) does not preclude, let alone prohibit, the use of objective medical tests to determine the age of persons who appear to be adults, have no documents and claim to be minors. The State party argues that 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 the adult), which would, in fact, constitute a violation of the principle of the best interests of the child.

6.2 The State party also maintains 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 and claims that: (a) as soon as the author set foot on Spanish soil, he was provided with medical assistance; (b) he was provided with documents and the services of a lawyer and an interpreter at the expense of the State; (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; and (d) as soon as he claimed to be a minor, the Public Prosecution

¹⁰ The author cites European Court of Human Rights, *Akdivar and others v. Turkey* (application No. 21893/93), judgment of 16 September 1996; and Inter-American Court of Human Rights, *Galindo Cárdenas et al. v. Peru*, judgment of 2 October 2015, series C, No. 301.

¹¹ *Osmani v. Serbia* (CAT/C/42/D/261/2005), para. 7.1.

¹² The author cites, inter alia, *Karakó v. Hungary* (application No. 39311/05), judgment of 28 April 2009, para. 14; and *Riad and Idiab v. Belgium* (applications No. 29787/03 and No. 29810/03), judgment of 24 January 2008, para. 84.

¹³ The State party cites general comment No. 6 (2005).

Service, which is the institution responsible for protecting the best interests of the child,¹⁴ was informed and provisionally determined him to be an adult. The State party argues that the author cannot be said to have been deprived of legal assistance or left unprotected, even supposing that he was a minor.

6.3 According to the State party, even if the author was a minor, there was no violation of his right to preserve his identity, which is protected by article 8 of the Convention, as “his stated identity was recorded as soon as he was rescued at sea and entered Spanish territory illegally”.

6.4 The State party also maintains that there was no violation of his right to be heard, which is protected by article 12 of the Convention. It claims that the author always had the opportunity to be heard and to make any claims that he wished to make. He was heard and assisted by counsel in all the legal proceedings concerning him.

6.5 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 only apply in cases where there is no doubt that the person is a minor. Since there is evidence that the author is an adult, the rights in question do not apply.

Author’s comments on the State party’s observations on the merits

7.1 In its comments of 20 April 2018, Fundación Raíces explained that the author had left the shelter for adults at the beginning of the year and that his whereabouts and situation were unknown.¹⁵

7.2 With regard to article 3 of the Convention, the author maintains that the State party acted against his best interests by failing to respect his right to be presumed to be a minor, since he was not considered a possible minor at any time and the unaccompanied foreign minors protocol was not activated.¹⁶ The State party’s claim that the author had “no documents whatsoever” is false because, although he had no documents when he arrived in Spain, a copy of his birth certificate was sent to the authorities on 18 July 2017, followed by the original document on 28 July 2017. Under these circumstances, the State party should have arranged for his immediate transfer to a centre for minors or, if it still had doubts, it should have contacted the consular authorities of Guinea in order to verify his identity. Moreover, notwithstanding the State party’s view that the right to be presumed to be a minor applies only in the event of doubt, it failed to recognize that the documents provided by the author caused, at the very least, some uncertainty in this respect. Regarding the medical examinations, the author argues that, according to the National High Court and the relevant scientific literature,¹⁷ a margin of error of approximately two years should always be applied because such examinations lack precision. In this case, no such margin was applied. If it had been applied, the author would have been considered a minor.

7.3 The author maintains that it cannot be said that the Public Prosecution Service acted as a sort of legal representative for him and protected his interests, since, in reality, its role differed greatly from the one provided for in the legislation mentioned by the State party.

¹⁴ 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).

¹⁵ On 20 July 2018, Fundación Raíces submitted additional information indicating that the author was in a reception centre for minors in Lyon, France, and wished to continue with the proceedings before the Committee. The relevant statement was enclosed.

¹⁶ The author cites general comment No. 6 (2005), para. 31 (i); 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 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.

¹⁷ Judgment of 9 October 2017 (JUR/2017/272319). The author also cites the Committee’s concluding observations on the combined fifth and sixth periodic reports of the State party, in which it expressed concern that the Public Prosecution Service was empowered to undertake procedures for determining the age of unaccompanied foreign minors (CRC/C/ESP/CO/5-6, para. 44).

Firstly, it did not initiate age determination proceedings at any point after the minor submitted his birth certificate. It simply declared the matter to fall outside its jurisdiction on the grounds that the minor had already been placed in the holding centre for foreign nationals in Madrid. Secondly, the Public Prosecution Service cannot be described as an independent institution, but as a strictly hierarchical one that is pervaded by the policies set by the national executive. In fact, the Spanish courts have, on occasion, found there to be some kind of conflict of interest between unaccompanied foreign minors and the Public Prosecution Service, and have emphasized the need to assign a defence lawyer to such minors or to recognize their capacity to bring legal proceedings when their interests do not coincide with those of the entity serving as a guardian.¹⁸ It cannot be said that the Public Prosecution Service properly fulfilled the role that should have been performed by a guardian or legal representative, who were never appointed. Consequently, the author was never under guardianship. Article 20 of the Convention requires States parties to make care and accommodation arrangements for children deprived of their family environment. However, after his release on 1 August 2017, and despite the Committee's request for interim measures, M.B.S. was never taken to a protection centre.

7.4 With regard to the violation of article 8 of the Convention, the author maintains that the State party altered important elements of his identity by attributing to him an age and a date of birth that differed from those reflected in his official documentation, which was never officially contested. In fact, according to both article 4 of Organic Act No. 4/2000 on the Rights and Freedoms of Foreign Nationals in Spain and their Social Integration and the case law of the Supreme Court, in the case of foreign nationals, it is the documents issued by the country of origin that constitute proof of identity, not the records kept by the authorities of the State party.¹⁹

7.5 The author argues that it cannot be said that he was properly heard because, even though he stated that he was a minor when he arrived in Spain, he was registered under an age that was not his real age, and then, even though he stated again at Almería police station that he was a minor, he was made to undergo X-ray examinations. He had no access to legal assistance at the time, which shows that the safeguards relating to the right to be heard were not provided. The author recalls that his being placed in a holding centre for foreign nationals at 17 years of age means being placed in conditions that are not conducive to the proper exercise of the right to be heard, since it is an environment that is hostile and inappropriate for children.²⁰ Article 12 of the Convention was therefore violated.

7.6 With regard to the right enshrined in article 27 of the Convention, the author asserts that the only argument put forward by the State party is that he is supposedly an adult. Thus, the State party itself acknowledges that it did not fulfil the obligations set forth in that article because it considered him to be an adult. According to the author, there is no doubt that the State party failed to provide the conditions necessary for his physical, mental, spiritual and social development. The author points out that, under domestic legislation introduced in 2012, migrants in an irregular situation are not entitled to health care in the State party.²¹

7.7 The author asserts that the State party did not comment on the alleged violations of article 2 of the Convention. He expands on his claims by pointing out that, although the Convention requires the State party to actively seek to eliminate discrimination against

¹⁸ Constitutional Court judgment No. 183/2008 of 22 December.

¹⁹ The author quotes the article in question, which reads: "Foreign nationals who are in Spanish territory have the right and duty to keep the identity documents issued by the competent authorities of their country of origin." He also cites reasons 3 and 4 of judgment No. 368/2015 of 18 June handed down by the Civil Division (section 1) of the Supreme Court: "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 additional age determination tests."

²⁰ The author cites paragraph 34 of general comment No. 12 (2009) on the right of the child to be heard, which states that: "A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age."

²¹ The author cites Royal Decree-Law No. 16/2012 of 20 April on urgent measures to ensure the sustainability of the national health system and to enhance the quality and safety of its services, which allegedly had a severe impact on migrants in an irregular situation and caused a 15 per cent increase in their mortality rate.

children, in this case it is the State party itself that is responsible for the discrimination. The grounds mentioned in article 2 of the Convention are merely examples. In this case, the author suffered discrimination on account of his status as an unaccompanied foreign national, since, as a result of that status, he was deprived of legal representation and was not properly protected by the State party.

7.8 Lastly, the author claims that article 6 of the Optional Protocol was violated because the State party failed to apply the interim measures requested by the Committee. Although he was released on 1 August 2017, he was never transferred to a child protection centre or placed under the guardianship of the Autonomous Community of Madrid.

Third-party submission²²

8. On 3 May 2018, the French Ombudsman made a third-party submission on the issue of age determination and detention in centres for adults pending expulsion.²³ This submission was transmitted to the parties, who were invited to submit comments thereon. The parties did so in the case of *J.A.B. v. Spain*²⁴ and stated that their comments were applicable to all the cases concerned by the third-party submission. For the sake of brevity, the Committee refers to paragraphs 8 to 10 of that communication.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* because: (a) the author's appearance is that of an adult; (b) the objective medical tests carried out showed that he was at least 18 years of age; and (c) the birth certificate cannot be used as proof of age because it does not contain any biometric data. The Committee notes, however, that the author stated that he was a minor when he arrived in Spain and that he submitted a copy of his birth certificate from Guinea, which confirmed that he was a minor, to the Public Prosecution Service and the relevant court of investigation. The Committee notes the State party's argument that, since the birth certificate lacks biometric data, it cannot be checked against the information provided by the author. The Committee recalls that the burden of proof does not rest solely with 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, if the State party had doubts as to the validity of his birth certificate, it should have contacted the consular authorities of Guinea to verify his identity, which it did not do.²⁵ In the light of the foregoing, the Committee considers that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

9.3 The Committee also notes the State party's argument that the author failed to exhaust the available domestic remedies 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 his removal order before the administrative courts;

²² This submission concerns communications No. 11/2017, No. 14/2017, No. 15/2017, No. 16/2017, No. 20/2017, No. 22/2017, No. 24/2017, No. 25/2017, No. 26/2017, No. 28/2017, No. 29/2017, No. 37/2017, No. 38/2017, No. 40/2018, No. 41/2018, No. 42/2018 and No. 44/2018, which have been registered with the Committee.

²³ A summary of the French Ombudsman's submission can be found in *N.B.F. v. Spain* (CRC/C/79/D/11/2017), paras. 8.1–8.6.

²⁴ CRC/C/81/D/22/2017, paras. 9 and 10.

²⁵ See, inter alia, *M.A.B. v. Spain* (CRC/C/83/D/24/2017), para. 9.2, and *H.B. v. Spain* (CRC/C/83/D/25/2017), para. 9.2.

and (d) initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015. The Committee notes, in turn, the author's argument that the domestic remedies mentioned by the State party are either unavailable or ineffective. 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 expulsion order cannot be considered effective.²⁶ The Committee notes that the State party has not indicated that the remedies to which it refers would have suspended the author's deportation. Accordingly, the Committee concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

9.4 The Committee considers that the author's claims under articles 2, 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.

9.5 However, the Committee is of the view that the author has sufficiently substantiated his claims under articles 3, 8, 12 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 this part of the complaint admissible and proceeds to consider it on the merits.

Consideration of the merits

9.6 The Committee has considered the present 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.

9.7 One of the issues before the Committee is whether, in the circumstances of the present case, the process of determining the age of the author, who stated that he was a minor and then submitted his birth certificate to support his claim, 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 test used to determine his age and the failure to appoint a guardian or representative to accompany him during the age determination process.

9.8 The Committee recalls 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. Accordingly, the Committee recalls that the best interests of the child should be a primary consideration throughout the age determination process.²⁷

9.9 The Committee also recalls that the documents available should be considered genuine unless there is proof to the contrary. Only in the absence of identity documents or other appropriate evidence should States proceed as follows:

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.²⁸

²⁶ *N.B.F. v. Spain*, para. 11.3.

²⁷ *Ibid.*, para. 12.3.

²⁸ Joint general comment No. 4/No. 23 (2017), para. 4.

The benefit of the doubt should be given to the individual being assessed.²⁹ In the present case, the Committee notes that the official documentation submitted by the author, namely, his birth certificate, was not contested by the State party.

9.10 The Committee notes that:

(a) For the determination of his age, the author, who arrived in Spain without documents, underwent bone age tests consisting of a wrist X-ray and then a dental X-ray, without any additional tests, such as psychological tests, being administered, and there is no record of his having been interviewed as part of the process;

(b) On the strength of the tests carried out, the hospital in question determined the author's bone age to be 19 years according to the Greulich and Pyle atlas, without taking into account that this study, which does not establish a standard deviation for that age group, is based on findings that cannot be extrapolated to individuals with the author's characteristics;

(c) Based on this medical test result, the Public Prosecution Service issued a decree declaring the author to be 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 after he submitted his official birth certificate;³⁰

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

9.11 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 for assessing the chronological age of a young person who claims to be a minor and provides documents supporting that claim. The Committee notes the author's argument that, if the relevant margins of error were applied, the results of the medical tests would support, rather than contradict, the author's statements and the information in his official documentation.

9.12 The Committee notes the State party's conclusion that the author's appearance was clearly that of an adult. However, the Committee recalls its general comment No. 6 (2005), which states that age assessment should take into account not only the physical appearance of the individual, but also his or her psychological maturity, that the assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner and that, in the event of uncertainty, the individual should be accorded the benefit of the doubt such that if there is a possibility that the individual is a child, he or she should be treated as such.³¹

9.13 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 and during the age determination process that led to the issuance of a decree declaring him to be an adult. The Committee recalls that States parties should appoint a qualified legal representative and, where necessary, an interpreter, for all young persons claiming to be minors, as soon as possible on their arrival and free of charge.³² 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.³³ 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.

²⁹ *N.B.F. v. Spain*, para. 12.4.

³⁰ On 18 August 2017, Almería Court of Investigation No. 5 ordered the author's release, when he had already been released by the holding centre for foreign nationals on 1 August 2017 on the grounds that it was "impossible to obtain the documentary evidence needed to expel the foreign national".

³¹ General comment No. 6 (2005), para. 31 (i).

³² *A.D. v. Spain* (CRC/C/83/D/21/2017), para. 10.14.

³³ *Ibid.*; *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8; and *J.A.B. v. Spain*, para. 13.7.

9.14 The Committee also notes the State party's assertion that unaccompanied minors are to be considered documented if they are found to be in possession of a passport or similar identity document that contains biometric data attesting to their age. Not only is this requirement absent from the case law of the State party's own Supreme Court (see footnote 23 above), but it also cannot be imposed in opposition to what is stated in the original copy of an official birth certificate issued by a sovereign country, without the document in question being officially contested. Moreover, the Committee notes that the State party's own Supreme Court recently issued a ruling that follows the same line of reasoning.³⁴

9.15 In the light of the foregoing, the Committee considers 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. In the present case, this is due to the failure to take proper account of the original copy of the official birth certificate issued by his country of origin and the failure to appoint a guardian to assist him during the age determination procedure. Consequently, the Committee is of the view that the best interests of the child were not a primary consideration in the age determination procedure, contrary to articles 3 and 12 of the Convention.

9.16 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 Committee notes that the State party failed to respect the author's identity by rejecting as evidence his birth certificate, which confirmed that he was a minor, without even assessing its validity or verifying the information that it contained with 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. The Committee therefore concludes that the State party violated article 8 of the Convention.

9.17 The Committee also 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 a defenceless and extremely vulnerable unaccompanied child migrant. The Committee notes that this failure to provide protection continued even after the author had submitted his birth certificate to the Spanish authorities and, in particular, after the holding centre itself had released him on the grounds that it was impossible to obtain the documentary evidence needed in order to carry out the expulsion (see footnote 34 above). The Committee is of the view that this failure to provide protection constitutes a violation of article 20 (1) of the Convention.

9.18 Lastly, the Committee notes the author's claims regarding the State party's failure to apply the interim measure consisting of his transfer to a child protection centre. The Committee recalls 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, which, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.³⁵ 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 that centre. However, the Committee notes that this argument is based on the premise that the author is an adult. Consequently, the Committee considers that the failure to apply the requested interim measures in itself constitutes a violation of article 6 of the Optional Protocol.

³⁴ Spanish Supreme Court, Civil Division, procedural violation appeal No. 2629/2019, judgment No. 307/2020, 16 June 2020, p. 15. The Supreme Court stated that:

The doubts raised by the Public Prosecution Service concerning the reliability of the age reflected in an official document that has not been found to be invalid or proved to be false by the issuing authorities and that, in addition, shows no signs of having been tampered with, cannot take precedence over what is stated in the document provided by the minor as proof of age for the purpose of obtaining the protection to which minors are entitled.

³⁵ *N.B.F. v. Spain*, para. 12.11.

9.19 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, finds that the facts before it disclose 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 the violations suffered. 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 minors 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;

(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 pending;

(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 to be adults issued by the authorities in cases where the age determination procedure 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) on the general principles regarding the human rights of children in the context of international migration, and the aforementioned 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.
