



# 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. 28/2017\* \*\*

<i>Communication submitted by:</i>	M.B. (represented by Fundación Raíces)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	20 July 2017
<i>Date of adoption of Views:</i>	28 September 2020
<i>Subject matter:</i>	Age assessment procedure in respect of an unaccompanied minor
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of the right of submission; incompatibility <i>ratione personae</i> ; non-substantiation of claims
<i>Articles of the Convention:</i>	3, 8, 12, 18 (2), 20 (1), 27 and 29
<i>Articles of the Optional Protocol:</i>	6 and 7 (c), (e) and (f)

\* 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.



1.1 The author of the communication is M.B., a Guinean national born on 1 January 2000. He claims to be the victim of a violation of articles 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 25 July 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt interim measures consisting of a stay in the execution of the expulsion order against the author pending the consideration of his case by the Committee, and his transfer to a child protection centre.

1.3 On 1 March 2018, the Working Group on Communications, acting on behalf of the Committee and in accordance with rule 18 (5) of its rules of procedure under the Optional Protocol, rejected the State party's request for the admissibility of the communication to be considered separately from the merits.

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

2.1 The author arrived in Almería on 3 June 2017 after the small boat in which he was travelling was picked up by the Red Cross. The author told Red Cross staff that he was a minor. He again stated that he was a minor upon coming into contact with the police. However, the police registered him as an adult and recorded his date of birth as 1 January 1996. On 5 June 2017, Almería Court of Investigation No. 1 notified the author of a decision to return him to his country of origin, which was subsequently appealed by his court-appointed lawyer. The following day, the same court ordered the minor's detention in the holding centre for foreign nationals in Madrid, to which he was transferred.

2.2 On 17 July 2017, the author applied for asylum and was interviewed the next day, accompanied by his lawyer and an interpreter. During the interview, the author did not say that he was a minor because he was not asked and because he thought that, as a minor, he could not apply for asylum. His asylum application was rejected four days later. Also on 17 July, the organization SOS Racismo, which assists persons detained in the holding centre for foreign nationals, wrote to inform the Ombudsman and Court of Investigation No. 19 (the supervision court responsible for the holding centre) that five minors were being held there, including the author, and that they were at imminent risk of deportation. On 19 July, the Court ordered that the director of the holding centre for foreign nationals and the prosecutor responsible for foreign nationals be informed of the situation.

2.3 On 20 July 2017, Fundación Raíces submitted a request to eight different authorities<sup>1</sup> on the author's behalf, asking that he be released 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. Copies of the author's birth certificate and of the legal certificate accompanying it were sent to the relevant courts and prosecutors' offices on 21 July. On 28 July, the author submitted the original documents, having received them by post. The same day, after having spent 52 days in the holding centre for foreign nationals, 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.<sup>2</sup> This violation is all the more flagrant, as there

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<sup>1</sup> The Embassy of the Republic of Guinea in Spain; Almería Court of Investigation No. 1; 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 station.

<sup>2</sup> The author cites general comment No. 6, para. 31.

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 concluding observations issued in respect of the State party in which the Committee expresses concern at the lack of a uniform protocol in its territory for taking proper account of the principle of the best interests of the child when assessing the age of unaccompanied children.<sup>3</sup>

3.2 The author also 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 failure to appoint a guardian to protect his interests as an unaccompanied minor, which serves as a key procedural safeguard to ensure respect for his best interests.<sup>4</sup> He also alleges a violation of article 3 (2), read in conjunction with article 20 (1), on the ground 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, especially when they are in possession of documents that prove their age, the State party should set in motion its administrative apparatus and appoint a guardian as a matter of course.<sup>5</sup>

3.3 In addition, the author submits that the State party has 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 still exist or that may exist.

3.4 The author further alleges a violation of his right to be heard enshrined in article 12 of the Convention.

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.<sup>6</sup>

3.6 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. The author cites general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, according to which this right must be interpreted in the light of the child's circumstances, age, and ethnic, cultural and linguistic background.

3.7 The author proposes the following potential solutions:

- (a) That the State party recognize him as a minor, stay his removal to his country of origin and place him in the care of the child protection services;
- (b) That the documents issued by Guinea be recognized as valid;
- (c) 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;
- (d) That the minor's right to be assisted by a lawyer or representative of his own choosing be recognized before his case is considered by the Spanish authorities; and

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

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

<sup>5</sup> The author cites the report of 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 Accem, entitled *Aproximación a la protección internacional de los menores extranjeros en España* (Approach to the international protection of foreign 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, para. 44.

- (e) That he and his lawyer be notified of any decision affecting him.

### **State party's observations on admissibility**

#### *Account of the facts*

4.1 In its observations of 13 November 2018 on the admissibility of the communication, the State party points out that the author's account of the facts is biased and inaccurate. It claims that the police report of 5 June 2017 on the interception of the small boat states that there were 36 individuals aboard, all of whom "appeared to be adults". On the same day, expulsion proceedings were instituted against the author and he was notified of removal decision No. 1480/2017. The following day, 6 June, the author was detained in the holding centre for foreign nationals in Madrid.

4.2 On 17 July, he applied for international protection with a statement signed by him, an interpreter and his lawyer. In his statement, the author: (a) never claimed to be a minor; (b) stated his date of birth to be 1 January 1996 – that is, that he was 21 years of age when he entered Spain; and (c) when asked why he was applying for asylum, he replied that "my life is in danger because my father's second wife tried to poison me".

4.3 On 21 July, his asylum application was rejected; this decision was appealed on 21 July only to be rejected again on 26 July. At the appeal stage, the author still did not claim to be a minor. On 21 July, the author also submitted, through lawyers of his own choosing, a photocopy of what he claimed to be a copy of his birth certificate, requesting that it be made available to the child protection authorities. The State party argues that there is no document proving that this certificate belongs to the author, as he did not have it with him at the time of his arrest and it does not contain any biometric data. Thus, there are doubts as to the authenticity of the documents submitted (which, in addition, were merely copies), especially when they contradict the author's own actions when he arrived in Spain, since not only did he never claim to be a minor, but he signed an asylum application with another date of birth.

4.4 The State party argues that, when making its submission, it did not know the author's whereabouts and therefore proceeded to revoke the interim measures granted.

#### *Grounds for inadmissibility*

4.5 The State party argues that the communication is inadmissible *ratione personae* because the author is an adult. The State party submits that the author is an adult because:

(a) He has not submitted official identity documents with verifiable biometric data (the documents that he submitted do not include a photograph or fingerprints as proof as to whether the person to whom they belong is the same person who provided a photocopy of them, or whether they belong to someone else);

(b) His appearance is that of an adult, as can be seen from the photographs taken of him at the time of his arrest; and

(c) He did not claim to be a minor when he arrived in Spain, when his statement was taken, or when he entered the holding centre for foreign nationals (he only did so when he was advised accordingly by the lawyers representing him in connection with this communication).

4.6 Furthermore, the documents submitted by the author cannot be taken as proof of age based on the author's statement alone, as they are merely photocopies that do not contain any biometric data. 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".

4.7 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>7</sup> The author could have:

- (a) Requested the Public Prosecution Service to conduct medical tests to prove that he is a minor;
- (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 the removal order before the administrative courts;
- (d) Initiated non-contentious proceedings for age assessment before the civil courts, in accordance with Act No. 15/2015 on non-contentious jurisdiction.

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

5.1 In his comments of 8 February 2018, the author refutes some of the State party's factual claims. Firstly, the author claimed to be a minor at least twice: when he was picked up at sea by the Red Cross and when he was taken to the police station. The author claims not to have been heard on either occasion. During his asylum interview, the author did not say that he was a minor because he was not asked and because he thought that, as a minor, he could not apply for asylum. In fact, that very same day, the author of another communication<sup>8</sup> was prevented from formalizing his asylum application because he had claimed to be a minor. It was for that reason that the author decided not to give his real age, as it was the only way for him to formalize his application and stay his imminent expulsion.

5.2 Secondly, once the photocopy (and then the original) of the documents confirming the author's date of birth had been provided, the State party took no steps to verify whether or not they belonged to the author. The State party also failed to activate the foreign unaccompanied minors protocol in order to assess his age. Furthermore, on 1 August 2017, after the author had been released from the holding centre for foreign nationals, Almería Court of Investigation No. 1 decided not to place him in the care of the centre for minors, as it considered that the documentation that he had submitted was not valid because it lacked biometric data. It was up to the State party to conduct the necessary checks with the Guinean authorities in order to verify that the author is a national of Guinea and to obtain the details of his identity. In short, no tests have been carried out to assess the author's age nor has his identity been checked with the Guinean authorities.

5.3 Thirdly, the author asserts that, contrary to the State party's claims:

- (a) The fact that he was not carrying any documents when he arrived in Spanish territory does not negate the evidential value of the documents submitted or the fact that they confirmed his identity;
- (b) Such documents cannot be expected to include biometric data because birth certificates do not typically include this type of information. They should, however, still be sufficient to oblige the competent institutions to respect the author's right to be presumed to be a minor;
- (c) No prosecution has been brought for falsification before the domestic courts, nor has any evidence of the documents' lack of authenticity been produced, especially given that the author submitted the original documents shortly after his having submitted the photocopies; and
- (d) The author did everything in his power to prove his identity and cannot be ordered to provide documents or evidence that he is unable to obtain, bearing in mind that he was locked up in the holding centre for foreign nationals and was not allowed to go to his embassy to request such documents.

<sup>7</sup> The State party emphasizes the need to exhaust "all" available remedies.

<sup>8</sup> *R.K. v. Spain* (CRC/C/82/D/27/2017).

5.4 The author adds that the State party's subjective assessment of the author's physical appearance, which lacks any logical basis, cannot be considered a valid argument for setting aside the author's right to be presumed to be a minor. Similarly, it is not true that the author did not claim to be a minor, as he did so on two occasions: to Red Cross staff and to the police on the day of his arrest.

5.5 The author maintains that all this shows that the State party has reversed the presumption of minority by requiring proof of the authenticity of documents which, if found to show signs of falsification, would have to be checked by the Spanish authorities, particularly given the author's specific circumstances. As for the State party's claim that declaring the communication admissible would only serve to encourage migrant smuggling rings, the author submits that this statement is evidence that, for the State party, controlling migration flows takes precedence over respecting the best interests of the child.

5.6 Fourthly, Fundación Raíces explains that, when making its submission, the author's whereabouts were unknown. After he was released from the holding centre for foreign nationals, the author was placed in a centre for adults run as part of a programme funded by the State party's Ministry of the Interior. However, since the State party failed to apply the interim measures requested by the Committee and, frightened by the prospect of being expelled from Spanish territory, the author decided to flee to France.

5.7 With regard to the State party's request that the communication be declared inadmissible *ratione materiae* because the author is an adult, the author argues that this claim cannot be considered a ground for inadmissibility because his age is precisely the substantive issue raised in the communication. As stated above, the documents provided by the author are 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.<sup>9</sup>

5.8 Regarding the assertion that the communication is inadmissible for failure to exhaust domestic remedies, the author claims that all the remedies mentioned by the State party are either ineffective or inaccessible, and that the State party has not fulfilled its obligation to prove otherwise.<sup>10</sup> Moreover, the lack of a decision regarding the author's age left him all the more defenceless, as he has been deemed to be an adult without any follow-up action being taken or checks being carried out. On 1 August, Almería Court of Investigation No. 1 announced the decision by which it refused to place the author in the child protection system on the ground that the official documents submitted were not valid as evidence. The only available remedy was an administrative appeal against the removal order, which does not stay its execution and can take up to three months to be decided upon. Only after the appeal has been decided, or three months have passed, can administrative proceedings be brought. Thus, there is no effective remedy to prevent the harmful and irreversible effects of an expulsion; all the more so when removals are announced only 12 hours in advance. Furthermore, the author claims that the remedy in question would only serve to counteract the effects of a removal or an expulsion, but not those of the situation of defencelessness in which the minors would find themselves if the judges in the proceedings did not order measures concerning their guardianship and protection. 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.

5.9 As for the possibility of the author's initiating non-contentious proceedings before the civil courts, the author claims that, in another similar case in which Fundación Raíces

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<sup>9</sup> 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".

<sup>10</sup> 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.

served as counsel, the competent judge had rejected the request on the ground that the appropriate avenue of redress had not been pursued.

5.10 Lastly, the author reiterates that the State party never applied the interim measures requested by the Committee, since the author was never transferred to a child protection centre or placed under the guardianship of the Autonomous Community of Madrid. The State party is requesting the revocation of the interim measures on account of the author's alleged disappearance but, given that this situation is attributable to the State party's failure to apply the measures in question, it is both inadmissible and reprehensible that this argument be advanced to justify its request for them to be lifted.

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

6.1 In its observations of 19 January 2018, the State party maintains that the principle of the best interests of the child, which is 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. 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". 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 further 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, claiming that:

- (a) The author was tended to by health workers as soon as he set foot on Spanish soil;
- (b) He was issued with 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; and
- (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>11</sup>

6.3 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.

6.4 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".

6.5 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.

6.6 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 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.

<sup>11</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).

### Author's comments on the State party's observations on the merits

7.1 In his comments of 9 April 2018, regarding the admissibility of the communication, the author adds that he 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. The State party's 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 established by the Committee against Torture<sup>12</sup> and the European Court of Human Rights.<sup>13</sup>

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 never considered a possible minor and the unaccompanied foreign minors protocol was not activated.<sup>14</sup> The State party's claim that the author had "no documents whatsoever" is not true because, although he had no documents when he arrived in Spain, a copy of his birth certificate was sent to the authorities on 21 July 2017, followed by the original document on 28 July 2017. Under these circumstances, the State party should have transferred him immediately to a centre for minors or, if it still had doubts, it should have contacted the Guinean consular authorities 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.

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. Firstly, it did not initiate age assessment proceedings at any point after the minor submitted his birth certificate. It simply declared the matter to fall outside its jurisdiction on the ground that the minor had already been detained 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 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.<sup>15</sup> It cannot therefore 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, even though articles 18 (2) and 20 (1) of the Convention require it. Consequently, the author was never placed 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 28 July 2017, and despite the Committee's request for interim measures, the author 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 documents, which were never officially contested. In fact, both Organic Act No. 4/2000 on the rights and freedoms of foreigners in Spain and their social integration and the Supreme Court recognize that, in the

<sup>12</sup> *Osmani v. Serbia* (CAT/C/42/D/261/2005), para. 7.1.

<sup>13</sup> 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.

<sup>14</sup> The author cites general comment No. 6, para. 31 (i); and joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.

<sup>15</sup> Constitutional Court judgment No. 183/2008 of 22 December.



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.<sup>16</sup>

7.5 The author asserts that he cannot be said to have been properly heard as, even though he said that he was a minor when he arrived in Spain and again at Almería police station, during the registration process, he was assigned an age that was not his, without any steps having been taken to verify it. In particular, the author was not provided with legal assistance at that time, which violated the guarantees necessary for him to exercise this right, bearing in mind that he was in a particularly stressful situation. Furthermore, it cannot be said that, when he made his asylum application, the circumstances were conducive to his being heard, since the pressure of the situation prevented him from claiming to be a minor (he had been told that a minor could not apply for asylum and could therefore be returned to Guinea).<sup>17</sup> 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. This is all the more relevant in that the author was in an alarming psychological state, having lost his brother during the crossing in the small boat and having been orphaned.

7.7 Lastly, the author reiterates that article 6 of the Optional Protocol was violated because the State party failed to apply the interim measures ordered by the Committee. Although he was released on 28 July 2017, he was never transferred to a child protection centre or placed under the guardianship of the Autonomous Community of Madrid.<sup>18</sup>

### **Third-party submission<sup>19</sup>**

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.<sup>20</sup> 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*<sup>21</sup> 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

<sup>16</sup> Article 4 (1) of Act No. 4/2000 provides that: "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." See also reasons 3 and 4 of judgment No. 368/2015 of 18 June handed down by the Civil Division (section 1) of the Supreme Court, according to which 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 assessment tests.

<sup>17</sup> The author cites general comment No. 12 (2009) on the right of the child to be heard, para. 34, which states that: "A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age."

<sup>18</sup> On 19 July 2018, the organization representing the author submitted additional information indicating that the author was, at that time, in Lille (France), in a reception centre for minors, and that he wished to continue with the proceedings before the Committee.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> CRC/C/81/D/22/2017, paras. 9 and 10.

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) he never claimed to be a minor until he submitted the communication to the Committee; and (c) his birth certificate cannot be used as proof of age because it does not contain any biometric data. The Committee notes, however, that the author submitted to the relevant prosecutor's office and court of investigation copies (and later the originals) of his birth certificate from Guinea and the legal certificate accompanying it, which established that he was a minor. The Committee notes the State party's argument that, since the documents submitted lack biometric data, they 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. The Committee also notes that the author provided documentary evidence of his status as a minor, the validity of which was not denied by the authorities of the State party or of his country of origin. 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 the removal order before the administrative courts; and (d) initiated non-contentious proceedings for age assessment 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.<sup>22</sup> 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 present communication.

9.4 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.

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 despite his having claimed to be a minor, that his right to be presumed to be a minor and his right to preserve his identity were not respected, 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, despite the author's having submitted documents proving that he was a minor, his Convention rights were violated. In particular, the author has claimed that, because of the failure to recognize the validity of his documents and to provide him with a guardian or representative, the best interests of the child were not taken into consideration.

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<sup>22</sup> *N.B.F. v. Spain*, para. 11.3.

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 presumed to be a minor and treated as such. Accordingly, the Committee recalls that the best interests of the child should be a primary consideration throughout the age determination process.<sup>23</sup>

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, in order to make an informed estimate of age, 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 and should include interviews of the child in a language he or she understands.<sup>24</sup> The benefit of the doubt should be given to the individual being assessed.<sup>25</sup> In the present case, the Committee notes that the official documentation submitted by the author, namely, an extract of his birth certificate and the legal certificate accompanying it, were not contested by the State party.

9.10 The Committee notes that:

(a) The author claimed to be a minor at least on 20 July 2017, when he was detained at the holding centre for foreign nationals and was awaiting the execution of the removal order against him;

(b) The author submitted copies of documents proving that he was a minor on 21 July 2017;

(c) On 28 July 2017, the author submitted the originals of the above-mentioned documents and was released;

(d) Almería Court of Investigation No. 1 rejected the author's request (which included the Committee's request for interim measures) to be placed in a centre for minors on the ground that the documents submitted were invalid because they lacked biometric data; and

(e) A procedure for assessing the author's age was never carried out.

9.11 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, 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.<sup>26</sup>

9.12 The Committee also notes the author's allegations that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant. 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.<sup>27</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

<sup>23</sup> Ibid., para. 12.3.

<sup>24</sup> Joint general comment No. 4 and No. 23, para. 4.

<sup>25</sup> *N.B.F. v. Spain*, para. 12.4.

<sup>26</sup> General comment No. 6, para. 31 (i).

<sup>27</sup> *A.D. v. Spain* (CRC/C/83/D/21/2017), para. 10.14.

that the role played by the Office of the Prosecutor for Minors is insufficient in this regard.<sup>28</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.

9.13 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 16 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's being officially contested.<sup>29</sup> Moreover, the Committee notes that the State party's own Supreme Court has recently issued a ruling that follows the same line of reasoning.<sup>30</sup>

9.14 In the light of the above, the Committee considers that the lack of a process to assess the age of the author, who claimed to be a minor, the failure to take proper account of the official documents submitted by the author and issued by his country of origin, and the failure to appoint a guardian, constitute a violation of the author's Convention rights. Consequently, the Committee is of the view that the best interests of the child were not a primary consideration in the procedures in which the author took part, contrary to articles 3 and 12 of the Convention.

9.15 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 the official documents attesting to his being a minor, without even as much as assessing their validity or verifying the information that they contained with the authorities of his country of origin. The Committee therefore concludes that the State party violated article 8 of the Convention.

9.16 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 for foreign nationals itself had released him. The Committee is of the view that this failure to provide protection constitutes a violation of article 20 (1) of the Convention.

9.17 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.<sup>31</sup> 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

<sup>28</sup> *Ibid.*; *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8; and *J.A.B. v. Spain*, para. 13.7.

<sup>29</sup> *M.B.S. v. Spain* (CRC/C/85/D/26/2017), para. 9.14.

<sup>30</sup> 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 Prosecutor's Office concerning the reliability of the age reflected in an official document that has not been declared invalid or discredited by the authorities that issued it, and which, 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 his or her status as such for the purpose of obtaining the protection to which minors are entitled.

<sup>31</sup> *N.B.F. v. Spain*, para. 12.11.

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.

9.18 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 before it disclose a violation of articles 3, 8, 12, and 20 (1) of the Convention, and of 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 assessing the age of young persons claiming to be children are carried out in a manner consistent with the Convention and, in particular, that, in the course of such procedures: (i) the documents submitted by these young persons are taken into consideration and, where the documents have been issued or verified by the issuing States or by the embassies thereof, they are accepted as genuine; and that (ii) the young persons concerned are assigned a qualified legal representative or other representatives without delay and free of charge, any private lawyers chosen to represent the young persons are recognized and all legal and other representatives are allowed to assist the young persons during the age assessment 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 assessment 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 assessment 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; and

(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, joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, and the aforementioned joint general comment No. 23.

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.