



# Convention on the Rights of the Child

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## Committee on the Rights of the Child Eighty-fifth session

### 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. 40/2018\*, \*\*

<i>Communication submitted by:</i>	S.M.A. (represented by counsel, Francisco Soláns Puyuelo)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Spain
<i>Date of communication:</i>	9 February 2018
<i>Date of adoption of Views:</i>	28 September 2020
<i>Subject matter:</i>	Determination of the age 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>	3, 8, 12, 18 (2), 20 (1), 20, 27 and 29
<i>Articles of the Optional Protocol:</i>	6 and 7 (f)

1.1 The author of the communication is S.M.A., a national of Guinea born on 11 February 2001. He claims that his rights under articles 3, 8, 18 (2), 20, 27 and 29 of the Convention have been violated. Although the author does not make explicit mention of article 12 of the Convention, the communication also appears to raise issues under this article. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 In accordance with article 6 of the Optional Protocol, on 12 February 2018, the working group on communications, acting on behalf of the Committee, requested the State party to take interim measures – that is, to stay the enforcement of the order to deport the author pending the consideration of his case by the Committee and to transfer him to a child protection centre.

\* 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.



### The facts as submitted by the author

2.1 The author was arrested by Almería police officers on 22 January 2018, as he arrived in the city of Almería aboard a small boat. The author asserts that he informed the police that he was a minor and that his date of birth was 11 February 2001. On 23 January 2018, the Office of the Director General of the Police issued a removal order. The author reports that in this order it is possible to see how his year of birth, 2001, was scratched out by hand and replaced with 1998.<sup>1</sup>

2.2 On 25 January 2018, the author was brought before Almería Court of Investigation No. 4, which decided on the same day that the author should be transferred to the migrant holding centre in Valencia and remain there until the case that had been brought against him had concluded.<sup>2</sup> The Court noted that the author could remain in the holding centre for up to 60 days. The author states that he was a minor when he was placed in the holding centre.

2.3 On 31 January 2018, the author was taken to a hospital for an X-ray of his wrist, which, according to the Greulich and Pyle atlas, showed that he was 19 years old. For that reason, the Almería Provincial Prosecutor's Office, on the same day, issued a decree stating that he was an adult.<sup>3</sup> The author's lawyer was verbally informed that X-rays of the author's clavicle and jaw, to which neither the author nor his lawyer had had access, had also been taken. The author was not properly informed of the procedure or of the possible consequences of these tests in a language that he could understand.

2.4 On the same date, the author's lawyer filed a challenge to the decree that stated that the author was an adult. The lawyer, citing a report by the Spanish Ombudsman, which stated that X-rays used to determine a person's age had margins of error and recommended using a holistic method, including psychosocial examinations, to make such determinations, contended that the medical tests the author had undergone were flawed and insufficient. The lawyer also pointed out that the author looked like an adolescent and that it was therefore inexplicable for him to have been declared an adult.<sup>4</sup> The author noted that the challenge was rejected and that the decree issued by the Almería Provincial Prosecutor's Office, which stated that he was an adult, was therefore confirmed. No reference was made to the margin of error of about two years that characterizes bone-age readings of the hand.

2.5 On 8 February 2018, the author received a copy of his birth certificate – according to which his date of birth is 11 February 2001<sup>5</sup> – through the email of the Red Cross at the centre in which he was detained, and officials at the centre itself requested a review of the finding that the author was an adult. The Prosecutor's Office, which stated that the document provided by the author was “a document in French that seems to be a birth certificate but cannot be verified”, rejected the request on the same day, as it was of the view that the document was not a certificate that, as required by the Civil Proceedings Act, provided proof of the author's claim.<sup>6</sup>

2.6 On 23 February 2018, the author was released. According to the State party, his whereabouts are unknown.

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<sup>1</sup> The author provides a copy of the order.

<sup>2</sup> The author provides a copy of the decision.

<sup>3</sup> The author provides a copy of the decree.

<sup>4</sup> The author provides a copy of the challenge.

<sup>5</sup> The author provides a copy of the birth certificate, which was issued by the Conakry Court of Appeal.

<sup>6</sup> The decision refers to article 323 of the Act, the relevant part of which states:

1. For procedural purposes, foreign documents that, by virtue of international treaties or conventions or special laws, are to be assigned the probative value provided for in article 319 of this Act shall be considered public documents.

2. When no international treaty or convention or special law is applicable, the documents that meet the following conditions shall be considered public documents:

1. The document is issued or produced in accordance with the rules of the country of issuance, thereby giving it full probative value;

2. The document is authenticated or contains an apostille and meets the other requirements necessary for it to be valid in Spain.

## The complaint

3.1 The author submits that the State party violated his rights under articles 3, 8, 18 (2), 20, 27 and 29 of the Convention. He also submits that the State party failed to respect his right to be presumed a minor in the event of doubt or uncertainty about his age and thus acted against his best interests and in violation of article 3 of the Convention,<sup>7</sup> in particular since he has documentation proving he is a minor. The author cites the Committee's concluding observations on the implementation of the Convention by the State party, in which the Committee expressed concern that despite the inclusion of the principle of the best interests of the child in its domestic legislation, the State party had not adopted a uniform process to determine what constituted the best interests of the child and highlighted differences in each autonomous community in the understanding and application of the principle. The Committee also expressed concern about the State party's failure to consider the best interests of the child and the disparities in the methods used to assess the age of unaccompanied children.<sup>8</sup> In addition, the author refers to various studies to support his claim that the medical estimates used in the State party – and the one used in his case in particular – have a wide margin of error, as the studies as part of which the estimates were produced were conducted among other population groups with very different racial and socioeconomic characteristics.

3.2 Although he does not invoke a specific article, the author also contends that the State party's failure to appoint a guardian to defend his interests, a step that is a key procedural means of ensuring respect for the best interests of an unaccompanied minor,<sup>9</sup> is a violation of his rights under the Convention. In addition, he is of the view that his rights were violated as a result of the State party's failure to provide him with protection, even though he was a defenceless and highly vulnerable unaccompanied child migrant. The author asserts 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 are in the 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.<sup>10</sup>

3.3 The author likewise submits that the State party has violated his right, enshrined in article 8 of the Convention, to the preservation of his identity, as age is a fundamental aspect of a person's identity and the State party has a duty not to interfere in this regard. In view of the situation of vulnerability minors such as the author find themselves in as a result of their age and their lack of family ties in the host country, the State party is also obliged to preserve and recover any available data on their identity. The State party, however, attributed to him an age that is different from his real age and a date of birth that does not match the date on which he claims to have been born, the one that appears in his identity document.

3.4 The author also claims that his rights under articles 27 and 29 of the Convention have been violated, as his proper all-round development has been impeded. The author is of the view that not having a guardian to guide him has prevented him from developing in an age-appropriate manner.<sup>11</sup>

3.5 In addition, the author contends that, because of the situation of defencelessness and social exclusion in which the decisions and actions of the State party left him, his rights

<sup>7</sup> The author cites general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, para. 31.

<sup>8</sup> CRC/C/ESP/CO/3-4, paras. 27 and 59.

<sup>9</sup> The author cites general comment No. 6 (2005).

<sup>10</sup> The author cites the report of La Merced Migraciones-Mercedarios, Office of the United Nations High Commissioner for Refugees, Save the Children, Santander Chair on the Law and Minors of Comillas Pontifical University, Baketik and Accem, *Aproximación a la protección internacional de los menores extranjeros en España* (Approach to the international protection of foreign minors in Spain), 2009, p. 96: "As soon as unaccompanied foreign minors are identified [...] they must be appointed a guardian or legal representative with the knowledge necessary to ensure that their interests are safeguarded and that their legal, social, medical and psychological needs are appropriately addressed."

<sup>11</sup> The author cites general comment No. 6 (2005), para. 44.

under article 20 of the Convention have been violated. He claims that the State party denied him protection when, without any conclusive evidence, and despite the document he submitted that showed he was a minor, it deemed him an adult. He cites general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, according to which this right must be interpreted in the light of the circumstances in which the child finds him or herself and his or her age and ethnic, cultural and linguistic background.

3.6 The author proposes the following possible solutions:

(a) That the State party 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 be integrated into society;

(c) That the State party acknowledge that it is impossible to establish his age on the basis of the medical tests he was given;

(d) That it be made possible to submit to the judicial authorities legal challenges to age determination decrees issued by prosecutors.

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

4.1 The State party submitted its observations on the admissibility and merits of the communication on 9 March and 2 August 2018.

##### *Account of the facts*

4.2 In its observations on the admissibility of the communication and the lifting of the request for interim measures, the State party, noting that the author's account was partial and inaccurate, reviews the facts of the case. The State party submits that after the author arrived in its territory aboard a small boat, on 22 January 2018, the Almería Provincial Prosecutor's Office requested a medical report, which included a forensic opinion, based on a wrist X-ray, indicating that he was over 18 years of age.<sup>12</sup> On 23 January, the Almería Immigration and Borders Brigade initiated deportation proceedings. The deportation, which involved the issuance of a relevant order, was ordered by the Government Sub-Delegation of Almería Province. The State party notes that the Almería Immigration and Borders Brigade mistakenly failed to change the author's age when he was found to be an adult and that the author's date of birth was amended by hand, in pen, to reflect the findings of the Almería Provincial Prosecutor's Office for Minors. That amendment to the deportation order was endorsed by the court-appointed lawyer and the interpreter.

4.3 On 31 January 2018, medical tests to determine the author's age, for which the author gave his informed consent,<sup>13</sup> were authorized at the request of his legal representative. On the day that the tests were performed, the Prosecutor's Office issued a decree stating that the author was an adult. On 8 February 2018, the author, providing a photocopy of his birth certificate, requested a review of this decision. The Prosecutor's Office rejected the request and in a new decree finding him to be an adult gave greater weight to the medical tests the author went through than to the birth certificate he had submitted. On 10 February, the author applied to the director of the migrant holding centre for international protection. He was interviewed on 12 February and informed on 16

<sup>12</sup> The State party provides a copy of a document issued by the Almería Provincial Prosecutor's Office on 24 January 2018, which states that the author, having given informed consent, was put through the appropriate bone-age tests and that the radiological examination shows that he is over 18 years of age. The State party also provides a copy of the results, dated 23 January 2018, of the medical tests, which were performed using the Greulich and Pyle atlas, and a document indicating that the author consented to the tests.

<sup>13</sup> The State party provides a copy of an "informed consent" form of 31 January 2018 signed by the author.

February that his application for protection had been rejected. On 20 February, the court-appointed lawyer requested reconsideration of the application. On 22 February, the author was informed that the request for reconsideration had been rejected. The author was released on 23 February 2018, as he could not be documented. The State party is unaware of his whereabouts.

4.4 On 27 February 2018, the Ombudsman requested the General Commissariat for Immigration and Borders to put an end to the detention of the author and to take the necessary steps to transfer him to a child protection centre pending the consideration of the communication by the Committee. On 28 February, the National Police informed the Ombudsman of the release of the author on 23 February and of the decisions the authorities had made. For the National Police, those decisions had been lawful under domestic law.

#### *Interim measures*

4.5 The State party is of the view that there is no reason for the Committee not to withdraw its request for interim measures, as the author's whereabouts have been unknown since his release on 23 February 2018. The State party also notes that in all the proceedings concerning the author, the authorities acted in accordance with domestic legislation, in which there is a protocol for dealing with cases involving the presence of unaccompanied foreign minors in Spain. According to that protocol, if an "illegal" immigrant states that he or she is a minor and clearly appears to be one, he or she is entrusted to the child protection authorities and entered in the register of unaccompanied minors. On the other hand, if, despite the immigrant's statement, his or her physical appearance raises doubts about his or her age, as was the case with the author, the person undergoes medical tests, with his or her consent, to determine how old he or she is, in accordance with criteria accepted by the forensic medical community. In the author's case, the protocol was followed to the letter.

#### *Inadmissibility of the communication*

4.6 In its observations of 9 March 2018, the State party maintains that the communication is inadmissible because the author is of age. The State party refers to article 7 (f) of the Optional Protocol, according to which a communication must be considered inadmissible if it is manifestly ill-founded or not sufficiently substantiated. The State party is of the view that the communication is not duly substantiated, as there is medical evidence that the author is over 18 years of age.

4.7 The State party notes that the author is not a child and reiterates that the document he submitted in an attempt to prove his age cannot be considered reliable or authentic, since it does not include anthropometric information that would make it possible to identify him as the person in respect of whom the document was issued. It also lacks a photograph and was issued a few days before the communication was submitted, raising more doubts about its reliability. The State party takes the position that foreign documents such as birth or other registration certificates can prove the identity of the person submitting them provided that the identity of the person concerned has been previously established, which was not the case for the author. The certificates in question are of no authority on their own "because, lacking photos or other identifying information, they offer no assurances that the person whose name appears on the certificate and the bearer of the certificate are the same person". Consequently, the author does not comply with the chief requirement for turning to the Committee – namely, to be under 18 years of age at the time of submission of the communication.

4.8 The State party points out that, even if the Committee did find the communication admissible, it should, given that the reasons for the submission of the communication have become moot, discontinue its consideration thereof, as provided for in rule 26 of the rules of procedure under the Optional Protocol.

#### *Observations on the merits of the communication*

4.9 The State party refers to domestic legislation applicable to persons who claim that they are unaccompanied minors on arrival on Spanish territory, legislation that, in the author's case, was complied with at all times. The State party refers to Organic Act No.

4/2000 on the Rights and Freedoms of Foreign Nationals in Spain and Their Integration into Society and in particular to the entry requirements, which include presenting a passport or travel document that proves the bearer's identity and is deemed valid under the international conventions signed by the State party. The author did not satisfy this requirement. The State party also refers to Organic Act No. 1/1996 on the Legal Protection of Minors, which provides that when a person's age cannot be established, the prosecutor must consider the reliability of the identity document submitted by the person and organize the necessary medical tests, while respecting the dignity of the person, who must give his or her informed consent. The authorities complied with these requirements in the author's case.

4.10 The State party also contends that, because the author is an adult, it has not failed to comply with its obligation, enshrined in article 3 of the Convention, to make the best interests of the child a primary consideration. The State party specifies that a person should be presumed to be a minor only "in the event of uncertainty", not when it is clear that the person is of age, and concludes that, "in this case, where the totally undocumented person appears to be of age, the authorities may legally consider him an adult without the need for any evidence". As the author claimed that he was a minor, however, the State party decided to carry out medical tests, with his informed consent, as 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 that they are minors. Those tests were carried out, and they showed that the author was clearly an adult. The State party argues that considering an adult a minor in the absence of reliable evidence, and on the strength of nothing but the person's word, would seriously endanger minors protected in reception centres (who could be subjected to abuse or ill-treatment by the adult), an outcome that would, in fact, constitute a violation of the principle of the best interests of the child.

4.11 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 documentation and was immediately offered the services of a lawyer and an interpreter at the State's expense;

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

(d) As soon as he claimed that he was a minor, the Public Prosecution Service, which is the institution responsible for protecting the best interests of the child, was informed and provisionally determined that he was 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.

4.12 According to the State party, even if the author was indeed a minor, there was no violation of the right to an identity, enshrined in article 8 of the Convention, since his right to preserve his identity has been respected – the authorities recorded the identity he gave as soon as he set foot, illegally, on Spanish soil.

4.13 The State party maintains that the rights enshrined in 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 evidence that the author is an adult, the rights in question do not apply.

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

5.1 The author submitted his comments on the admissibility and merits of the communication on 4 December 2018. These comments touch on the State party's factual allegations. He argues that the State party does not specify what kind of medical tests for age determination he underwent or acknowledge that the results did not take into account a possible margin of error, an omission he considers crucial, since if such an

acknowledgement had been made, the results would not have been incompatible with his stated and documented age. Similarly, the author claims that the State party fails to acknowledge that the medical tests concerned, in which the Greulich and Pyle atlas was used, have been called into question and disparaged by the scientific community for their lack of precision, especially when the results indicate no margin of error. Even the Public Prosecution Service has acknowledged that this type of evidence is simply an approximation.

5.2 As for the State party's argument that the date of birth appearing in the deportation order was changed by hand because of a mistake, the author claims that there was no mistake – what was done was done deliberately in a bid to prove that he was an adult. This deliberate behaviour by the authorities is shown by the following facts: (a) the author stated from the outset that he was a minor, and this statement was taken down in his report; (b) his statement was dismissed for no reason, and he was put through invasive and unnecessary testing; (c) the alleged informed consent that the author was made to provide was in fact coerced, since if he had refused to sign the consent form, he would have been considered an adult and therefore been expelled as a matter of course; (d) all these procedures were conducted without the involvement of a truly independent lawyer or expert; and (e) given the “predetermined” outcome of the tests, the results, which were not in the author's interest, led to the conclusion that he was an adult and to an administrative decision that nevertheless contained the author's original date of birth, which was later changed by the authorities in slapdash fashion to make it seem as if he were an adult.

5.3 The author states that Court No. 4 of Almería ordered that he be placed in the migrant holding centre in furtherance of a State policy of closing the borders to foreigners and giving no consideration to their interests as unaccompanied minors. The author is also of the view that the migrant holding centre is unsuitable for minors because, as has been shown in reports by a number of institutions, including non-governmental organizations, it offers an insufficient array of services and is under constant police surveillance. In addition, the author believes that, in its observations, the State party seems to be implying that he first claimed that he was a minor at the holding centre, which is incorrect, as he had made that claim on his arrival in Spain. With regard to the State party's argument that he underwent new medical tests, as requested by his representative, while he was in the holding centre, the author explains that these tests were of the same type as those done previously. It was hardly surprising that the results, which made no mention of a margin of error, were unchanged.

5.4 Similarly, the author maintains that the State party, despite having documentary evidence that he was a minor, failed to contact the Guinean authorities to verify the information in the birth certificate he supplied, opting instead for nothing but the medical tests. The author is of the view that although the birth certificate he submitted on 8 February 2018 does not qualify as an authentic instrument with full probative value, it provided sufficient evidence to require the authorities to take steps to fulfil their obligation to protect minors by contacting both the Consulate of Spain in Guinea and the Consulate of Guinea in Spain.

5.5 The author claims that, even when he submitted his birth certificate to the Prosecutor's Office, it refused to review the decree declaring him to be an adult, basing its refusal exclusively on the results of the medical tests. According to the prosecutor's decree, there was nothing in the certificate submitted by the author to suggest that it was valid. The Prosecutor's Office relied solely on the results of the medical tests, which, if interpreted with the scientifically recommended margin of error, would show the author to be the age that appears in his documents. The author adds that at present, the scientific community and even the Attorney General's Office are of the view that evidence should be holistic, that it should include several X-rays, not just one, that other aspects, such as emotional and intellectual maturity, should also be taken into account and that the conclusion that is reached can never be precise and should therefore have a margin of error of at least two years. The author argues that if this method had been used, he would have been classified as a minor.

5.6 With regard to the State party's request that the communication be found inadmissible because the medical evidence showing that the author is over 18 means that it

is manifestly unfounded, the author is of the view that, as he has noted, the birth certificate he supplied is authentic and a valid means of identification, that it should, at the very least, be considered evidence of his age and that, in view of the State party's obligations under the Convention, the State party, as suggested above, should have taken steps to contact the relevant Consulates.

5.7 The author maintains that the State party acted against his best interests, in violation of article 3 of the Convention, by failing to presume that he was a minor – at no time did it consider the possibility that he was a minor, and the protocol for dealing with unaccompanied foreign minors was not followed. In this respect, the author believes that the State party's reference to the domestic legislation applicable to persons claiming to be unaccompanied minors, Organic Act No. 1/1996 on the Legal Protection of Minors in particular, has no bearing on his case, since the authorities acted in violation of that Act, specifically article 12 thereof, which states that if it is unclear whether a person is of legal age, the person will be considered a minor unless it is shown otherwise. The author claims that the authorities acted in flagrant violation of this law, since they "abusively" found him to be of age at all times, both provisionally and definitively.

5.8 As for the State party's arguments that it did not fail to make the author's best interests a primary consideration because a person should be presumed to be a minor only "in the event of uncertainty", not when it is clear that he or she is older, and because the Convention does not prohibit objective medical tests to determine the age of persons who appear to be older, lack documentation and claim that they are minors, the author contends that it was presumed conclusively from the outset that he was an adult, that his claim that he was a minor was disregarded and that he was subjected to unscientific medical tests whose purpose was not to shed light on actual fact but to lend a patina of legitimacy to a predetermination of his age. The State party precluded any possibility that the documentary evidence submitted by the author was compelling when it concluded that it was false, but it took no action to investigate its alleged falseness, justifying its views with general statements about its unreliability and lack of authenticity.

5.9 The author also reiterates that his rights were violated because he was never appointed a guardian who could look after his interests and that he did not even have a lawyer until the first phase of the proceedings was drawing to a close, as he was given a deportation notice, at which point he had already been made to sign a form giving what was purported to be informed consent to medical tests that offered no safeguards. The author notes that the Public Prosecution Service, reluctant to hinder the work of the border police, was negligent, disregarding its obligation to act in the best interests of the child, as shown by the falsification of evidence in the case file and the failure even to attempt to check the veracity of his birth certificate with the competent consular authorities. The author also notes that States parties have an obligation to make care and accommodation arrangements for children deprived of their family environment. Such arrangements, however, were never made in his case; on the contrary, he was taken to the migrant holding centre, which is as bad as or worse than prison.

5.10 The author submits that the State party, in violation of article 8 of the Convention, changed key components of his identity by attributing to him an age and a date of birth different from those that appear in his official identity document, while also calling into question the accuracy of the birth certificate and suggesting that, as it did not have a photograph, the birth certificate was not his.

5.11 The author asserts that the State party failed to comply with its obligations under article 27 of the Convention because it categorized him as an adult, and as a result he had no access to protection from exclusion or other forms of social protection, which, as a minor, he was entitled to.

### Third-party submission<sup>14</sup>

6.1 On 3 May 2018, the Defender of Rights of France made a third-party submission on the issue of age assessment and the detention of minors in facilities for adults pending deportation.<sup>15</sup> This submission was transmitted to the parties, who were invited to submit comments. The parties did so in the case *J.A.B. v. Spain*<sup>16</sup> and stated that their comments were applicable to all the communications that the third-party submission concerned. The Committee refers to paragraphs 8 to 10 of that communication for the sake of brevity.

6.2 The author submitted comments on the third-party submission on 13 May 2019.<sup>17</sup> The author believes that it is applicable to the cases involving unaccompanied minors that are commonplace in the State party and calls on the authorities to act on the recommendations made in the submission. He gives an account of the difficulties encountered by unaccompanied minors from the moment of their arrival in Spain:

(a) A number of unaccompanied minors claim that when they arrived on Spanish territory they had identity documents proving that they were minors but that after they handed those documents over to the border authorities, they never again had access to them or saw them destroyed or thrown into the sea by those authorities;

(b) Although the minors state from the outset that they are minors, the electronic report contains different dates showing that they are adults. Consequently, the file received by the Government Sub-Delegate and the examining judge contains dates of birth different from those declared by the minors, an inconsistency aggravated by the failure to require the person concerned to sign or agree to the report and by the practice of issuing collective detention orders;

(c) This lack of procedural safeguards is not remedied by the provincial high courts, which almost always uphold the decisions made by lower courts;

(d) Once they are in a migrant holding centre, many unaccompanied minors state that they are minors and their statements are brought to the attention of the relevant Prosecutor's Office, which, in most cases, does not allow age determination tests, on the grounds that there is no evidence suggesting that the date in the report is incorrect;

(e) Where testing is allowed, the examiners, who do only bone-age tests and make no mention of a margin of error, generally confirm that the person undergoing the test is an adult;

(f) Where the minor receives from his or her country a copy of a document, often without a photograph but with the minor's name, the Prosecutor's Office finds it inadmissible on the grounds that it is unsuitable or has been falsified;

(g) The means of contesting age determination decrees are ineffective, as they are indirect and do not have immediate effect. For example, an administrative appeal of a deportation order requires proof of representation, which, given the immediate detention of the minor, is very difficult to obtain; moreover, applications to act as guardians with custody over minors are generally rejected, thereby making it necessary to appeal to a competent judge, a lengthy process.

6.3 The author asserts that the situation as described above is a vicious circle characterized by official interest in defending not the best interests of the child but the policy of border surveillance. He makes a number of recommendations – namely, that:

<sup>14</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>15</sup> A summary of the submission by the French Defender of Rights can be found in *N.B.F. v. Spain* (CRC/C/79/D/11/2017), paras. 8.1–8.6.

<sup>16</sup> CRC/C/81/D/22/2017, paras. 9 and 10.

<sup>17</sup> The author commented on the third-party submission in relation to communications No. 40/2018, No. 41/2018 and No. 42/2018 (in a single document).

(a) Age determination decisions depend not on a single person – the police officer writing the report, the prosecutor issuing the age decree, the forensic examiner responsible for the medical tests – but on different people from different institutions, a method that would prevent errors and false reports, enable improved oversight of the decision to institute age determination proceedings and ensure that the tests done on minors are corroborated by specialists in a range of fields;

(b) A mechanism for the automatic, direct and effective judicial review of decisions made as part of age determination proceedings be set up.

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

#### *Consideration of admissibility*

7.1 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.

7.2 The Committee notes the State party's argument that the communication is inadmissible because it has not been substantiated, given that there is medical evidence that the author is over 18 years of age. The Committee also notes, however, that the author stated that he was a minor when he arrived in Spain and that he provided a copy of his birth certificate from Guinea, which confirmed that he was a minor, to the Prosecutor's Office. In addition, the Committee notes the State party's argument that the birth certificate produced by the author in an attempt to prove his age cannot be considered reliable or authentic, since it does not include anthropometric information that would make it possible to ensure that the certificate is not another person's, lacked a photograph or physical description and was issued a few days before the communication was submitted. The Committee stresses that the burden of proof does not rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. Moreover, the Committee notes that the State party does not indicate to what extent the authenticity of the birth certificate submitted by the author is called into question by its issuance a few days before the submission of the communication, especially as it has not been found false or otherwise inauthentic by the judicial authorities. In the light of the foregoing, the Committee is of the view that article 7 (f) of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.3 The Committee is also of the view 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.

7.4 The Committee nonetheless finds that the author has sufficiently substantiated his claims under articles 3, 8 and 20 of the Convention – namely, that the best interests of the child were not a primary consideration in the age determination process, in which the author's rights to be presumed a minor and to preserve his identity were not respected, and that he did not receive the protection that, as a minor, he was entitled to. The Committee also notes that the author was not appointed a representative during the age determination process and therefore concludes that in the circumstances of the case, the claim in respect of article 12 of the Convention has been sufficiently substantiated. Consequently, the Committee finds the communication admissible and proceeds to consider it on the merits.

#### *Consideration of the merits*

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

7.6 One of the issues before the Committee is whether, in the circumstances of the case, the procedure for assessing the age of the author, who claimed that he was a minor and later supplied a copy of his birth certificate to support his claim, violated his rights under the

Convention. In particular, the author has claimed that, because of the type of medical test used to assess his age and the failure to provide him with a guardian or representative, the best interests of the child were not taken into consideration during the age assessment procedure.

7.7 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. Moreover – and this point is of vital importance to the Committee – the enjoyment of the rights enshrined in the Convention flows from that determination. It is therefore imperative for there to be a fair process for determining a person’s age, as well as the opportunity to challenge the outcome through an appeal. While the age determination process or any appeal is under way, the person should be given the benefit of the doubt and treated as a child. Accordingly, the Committee considers that the best interests of the child should be a primary consideration throughout the age determination process.<sup>18</sup>

7.8 The Committee is also of the view that such documents as are available should be considered genuine unless there is evidence that they are not. Only in the absence of identity documents or other appropriate evidence should States, 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, including interviews of children [...] in a language the child understands.”<sup>19</sup> The benefit of the doubt should be given to the individual being assessed.<sup>20</sup> In the present case, the Committee notes that the validity of the official document submitted by the author – his birth certificate – was not formally challenged by the State party.

7.9 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, later, clavicle and dental X-rays (neither the author nor his lawyer had access to either of the latter two) but no supplementary tests, psychological tests in particular, or, it seems, an interview;

(b) On the strength of the medical tests, 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, in which an estimated standard deviation for that age group is not calculated, draws on findings that cannot be extrapolated to individuals with the author’s characteristics;

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

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

(e) The author was released, as he could not be documented;

(f) The author did not have the assistance of a representative during the age determination procedure.

7.10 The Committee also takes note of the ample information in the file suggesting that X-ray evidence lacks precision and has a wide margin of error and is therefore not suitable for use as the sole method of assessing the chronological age of a young person who claims to be a minor and provides documentation in support of his or her claim. The Committee notes the author’s argument that if the relevant margins of error were applied, the results of

<sup>18</sup> *N.B.F. v. Spain*, para. 12.3.

<sup>19</sup> Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/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, para. 4.

<sup>20</sup> *N.B.F. v. Spain*, para. 12.4.

the medical tests would support rather than contradict his statements and the information in his official documentation.

7.11 The Committee also takes note of the State party's conclusion that the author clearly appeared to be an adult. As the Committee stated in its general comment No. 6 (2005), however, age assessment should take into account not only the physical appearance of the individual but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner, and, in the event of remaining uncertainty, the individual should be accorded the benefit of the doubt such that if there is a possibility that the individual is a child, he or she should be treated as such.<sup>21</sup>

7.12 In addition, the Committee takes note of the author's claims that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age determination process, which led to the issuance of a decree stating that he was an adult. The Committee reiterates that States parties should appoint a qualified legal representative and, if need be, an interpreter, for all young people claiming to be minors, as soon as possible on arrival and free of charge.<sup>22</sup> The Committee is of the view that the provision of a representative to such people during the age determination process is essential to safeguarding their best interests and their right to be heard and that the role played by the Office of the Prosecutor for Minors in this respect is insufficient.<sup>23</sup> Failure to ensure that a representative is provided amounts to a violation of articles 3 and 12 of the Convention, as the age assessment procedure is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

7.13 The Committee notes the State party's assertion that an unaccompanied minor will be considered documented if he or she is in possession of a passport or travel document that attests to his or her identity and is considered valid under the international conventions signed by the State party – i.e., a document that, with photographs or a physical description, can prove the identity of the bearer. The Committee also notes, however, that, as determined by the State party's own Supreme Court,<sup>24</sup> doubts about the reliability of an official birth certificate issued by a sovereign country cannot take precedence if there has not been an official legal challenge to its validity.<sup>25</sup>

7.14 The Committee is therefore of the view that the age determination procedure undergone by the author, who claimed to be a minor, did not offer the safeguards needed to protect his rights under the Convention. In this case, the author underwent the age determination procedure without the necessary safeguards because his official birth certificate, issued by his country of origin, was not given proper consideration and because a guardian was not appointed to assist him during the procedure. The Committee is therefore of the view that the best interests of the child were not a primary consideration in the age determination procedure, in violation of articles 3 and 12 of the Convention.

7.15 The Committee also takes note of the author's claims that the State party violated his rights under article 8 of the Convention insofar as it changed components of his identity by attributing to him an age different from that appearing in the official document issued by his country of origin. The Committee believes 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

<sup>21</sup> General comment No. 6 (2005), para. 31 (i).

<sup>22</sup> *A.D. v. Spain* (CRC/C/83/D/21/2017), para. 10.14, and *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8.

<sup>23</sup> *Ibid.* and *J.A.B. v. Spain*, para. 13.7.

<sup>24</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:

The doubts raised by the Public Prosecution Service concerning the reliability of the age reflected in an official document that has not been found invalid or proved 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 his or her status as such for the purpose of obtaining the protection to which minors are entitled.

<sup>25</sup> *M.B.S. v. Spain* (CRC/C/85/D/26/2017), para. 9.14.

preserve his or her identity without depriving him or her of any of the components thereof. In this 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 have put him at any risk. The Committee therefore concludes that the State party violated article 8 of the Convention.<sup>26</sup>

7.16 The Committee also notes the author's allegations, 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 highly vulnerable unaccompanied child migrant. In addition, the Committee notes that protection was not provided 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 document him.<sup>27</sup> The Committee is therefore of the view that this inaction constitutes a violation of article 20 (1) of the Convention.

7.17 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 amount to a violation of articles 3, 8, 12 and 20 (1) of the Convention.

8. Consequently, the State party must provide the author with effective reparation for the violations. 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 people claiming to be minors 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 people are taken into consideration and, if issued or authenticated by the issuing States or the relevant embassies, accepted as genuine;

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

(b) Ensure that unaccompanied young people 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 old to apply for a review of any official decrees finding them to be adults 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 general comment No. 23 (2017) of the Committee on the Rights of the Child.

<sup>26</sup> Ibid., para. 9.16.

<sup>27</sup> See para. 4.3.

9. 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 disseminate them widely.

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