



# Convention on the Rights of the Child

Distr.: General  
10 July 2019  
English  
Original: Spanish

## 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. 16/2017\* \*\*

<i>Communication submitted by:</i>	A.L. (represented by the non-governmental organization Fundación Raíces)
<i>Alleged victim:</i>	A.L.
<i>State party:</i>	Spain
<i>Date of communication:</i>	15 May 2017
<i>Date of adoption of Views:</i>	31 May 2019
<i>Subject matter:</i>	Determination of the age of an alleged unaccompanied minor
<i>Procedural issue:</i>	Inadmissibility <i>ratione personae</i> ; non-exhaustion of domestic remedies
<i>Articles of the Convention:</i>	3, 8, 12, 18 (2), 20, 27 and 29
<i>Articles of the Optional Protocol:</i>	7 (c), (e) and (f)

1.1 The author of the communication is A.L., a citizen of Algeria born on 29 February 2000. He claims to be the victim of violations of articles 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol on a communications procedure entered into force for the State party on 14 April 2014.

1.2 On 22 May 2017, in accordance with article 6 of the Optional Protocol, the Working Group on Communications, acting on behalf of the Committee, requested the State party not to return the author to his country of origin and to transfer him to a child protection centre while his case was under consideration by the Committee.

1.3 On 6 November 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request to consider the admissibility and merits of the communication separately.

\* Adopted by the Committee at its eighty-first session (13–31 May 2019).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Olga A. Khazova, Cephass Lumina, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.



**The facts as submitted by the author**

2.1 On 11 April 2017, the Spanish National Police and the Red Cross intercepted the small boat in which the author was travelling as he attempted to enter Almería, Spain, illegally. When he was arrested by the police, the author, who was undocumented, indicated that he was a minor.

2.2 On 13 April 2017, the author was transferred to a police station and then to Torrecárdenas Specialist Hospital, where, that same day, an X-ray test was performed on his left hand in order to determine his age, using the Greulich and Pyle atlas. The results of the X-ray showed that the author's bone age was "over 19 years".<sup>1</sup>

2.3 On 15 April 2017, the author was brought before the Public Prosecution Service of Almería Province. On the basis of the results of the X-ray test, later the same day the Public Prosecution Service issued a decree stating that the author was an adult.<sup>2</sup> Also on the same day, Almería Court of Investigation No. 5 ordered that the author be placed in a holding centre for foreign nationals, reserved for adults, in Aluche, Madrid. On 19 April 2017, after having spent four days in a cell on the premises of the Public Prosecution Service, the author was transferred to the holding centre. The author claims that at no point was he heard or informed of his rights and that he did not have access to a lawyer or to an Arabic or French language interpreter, despite the fact that he did not speak Spanish.

2.4 On 28 April 2017, an employee of the non-governmental organization Fundación Raíces (the author's legal representative) visited the author at the holding centre for foreign nationals. The author confirmed to her that he was a minor, that he was born on 29 February 2000 and that his family in Algeria had his birth certificate to prove it. On 12 May 2017, the author informed Fundación Raíces that the Red Cross had told him that he would probably be expelled to Algeria the following week, since every week there was a ship that left Almería for Algeria carrying Algerians from the holding centre.

2.5 The author claims that, on 17 May 2017, he was beaten with a stick by one of the guards in the holding centre. He says that this type of violent incident was common in the centre. The author claims that he did not receive any form of medical assistance after being beaten. That same day, the author began a hunger strike.

2.6 On 18 May 2017, Fundación Raíces received by fax a copy of the author's birth certificate in Arabic,<sup>3</sup> which confirmed that the author was born on 29 February 2000. On 22 May 2017, the birth certificate was submitted to Almería Court of Investigation No. 5 as the basis for a review of the age determination decree. The author claims that he never received a response from the Court.

2.7 The author notes that age determination decrees issued by the Public Prosecution Service cannot be appealed in the courts, as confirmed by the Spanish Constitutional Court in its decision No. 172/2013 of 9 September 2013, and that he has therefore exhausted all available domestic remedies.

**Complaint**

3.1 The author claims that during the age determination process to which he was subjected, no consideration was given to the best interests of the child, in violation of article 3 of the Convention. He points out that, as the Committee itself has noted, the State party does not have a uniform protocol for protecting unaccompanied minors, in view of the differences between the various autonomous communities.<sup>4</sup>

3.2 The author notes that the only methods of age determination currently used in Spain are medical opinion and estimates based on a person's physical characteristics. Other methods, such as "psychosocial and developmental estimates" based on a face-to-face

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<sup>1</sup> The author provided a copy of the test results, dated 13 April 2017, issued by the radiology department of Torrecárdenas Specialist Hospital.

<sup>2</sup> The age of majority in Spain is 18 years.

<sup>3</sup> The author provided a copy of his birth certificate.

<sup>4</sup> The author cites the Committee's concluding observations on the combined third and fourth periodic reports of Spain (CRC/C/ESP/CO/3-4).

interview to assess the level of development towards maturity and “estimates drawing on available documentation, knowledge and local information”, are not used. The main method used in Spain is an X-ray test compared against the Greulich and Pyle atlas – the outcome of a 1950s study of a sample of 6,879 healthy children of an upper-middle-class background from the United States of America. The test makes it possible to estimate the age range within which a person falls. The study, like other studies carried out subsequently, is merely indicative and was not designed to serve as a means of determining the chronological age of undocumented persons, but rather for other purposes. The author notes the need to differentiate between chronological age and bone age, which is a statistical concept developed through clinical experience that is useful for strictly medical purposes, such as the estimation of the pace of a person’s bone maturation or predictions about how tall a person will be. Chronological age, however, is the length of time a person has lived. Bone age and chronological age are not necessarily the same, as a child’s growth and development can be affected by genetic, pathological, nutritional, hygienic and health factors reflecting his or her social status.<sup>5</sup> The author adds that, according to several studies, a person’s socioeconomic status is a key determinant of his or her bone development.

3.3 The author maintains that the best interests of the child should be the primary consideration throughout the age determination process and that only necessary medical tests should be carried out, in conformity with medical ethics. The resulting medical reports should always indicate the margin of error. In addition, X-rays should be taken and read by medical personnel specialized in radiology,<sup>6</sup> and the overall assessment of the results should be carried out not, as often occurs, by radiology departments, but by medical personnel specializing in legal and forensic medicine. Lastly, age assessments should draw on a variety of pieces of supplementary evidence and tests.<sup>7</sup> Also, pursuant to article 35 of Organic Act No. 4/2000 on the rights, freedoms and social integration of foreign nationals in Spain, testing to determine a child’s age should not be carried out when he or she is in possession of identity papers.<sup>8</sup>

3.4 The author claims to be a victim of a violation of article 3, read in conjunction with articles 18 (2) and 20 (1), of the Convention, as he was not assigned a guardian or representative, a practice that is a key procedural guarantee of respect for the best interests of an unaccompanied child.<sup>9</sup> He submits that, having been declared an adult on the basis of an X-ray despite having declared that he was a minor and, later, having submitted his birth certificate attesting to this fact, duly provided by his country of origin, he was left defenceless.

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

<sup>5</sup> The author cites I. Díez López et al., “Valoraciones médico-legales sobre la determinación de la edad cronológica mediante pruebas radiológicas en torno a los 18 años” (Medical-legal perspectives on the determination of the chronological age of persons around 18 years old using X-ray tests), *Spanish Review of Paediatric Endocrinology*, vol. 3, No. 1, 2012, pp. 12–18.

<sup>6</sup> The author cites the report of the Ombudsman of Spain, *¿Menores o adultos? Procedimientos para la determinación de la edad* (Minors or adults? Age determination procedures), 2010.

<sup>7</sup> The author cites J.L. Prieto, *Determinación de la edad en jóvenes indocumentados (Protocolo de actuación médico forense)* (Determining the age of undocumented young persons (Forensic Medical Protocol)), Madrid Institute of Forensic Anatomy.

<sup>8</sup> The author also cites a report of the United Nations Children’s Fund (UNICEF), the General Council of Spanish Lawyers and Banesto, entitled *Ni ilegales ni invisibles, realidad jurídica y social de los menores extranjeros en España* (Neither illegal nor invisible: The judicial and social reality of foreign minors in Spain), 2009, and a report by La Merced-Migraciones-Mercedarios, the Office of the United Nations High Commissioner for Refugees, Save the Children, Santander Programme on Minors at the Pontifical University of Comillas, Baketik and the Asociación Comisión Católica Española de Migración, entitled *Aproximación a la protección internacional de los menores no acompañados en España* (Approaches to the international protection of unaccompanied minors in Spain), Madrid, La Merced Migraciones, 2009.

<sup>9</sup> The author cites the Committee’s general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 21.

preserve and recover the elements thereof, especially when the child concerned has no relatives in the country of reception.

3.6 The author claims to be a victim of a violation of article 12 of the Convention, as the State party did not afford him the opportunity to be heard.

3.7 The author also alleges a violation of article 20 of the Convention, since he was not afforded the protection he was owed by the State party as a child deprived of his family environment. He adds that the State party immediately considered him as an adult, without conclusive proof, thereby depriving him of the protection he was owed.

3.8 Lastly, the author claims that he is the victim of a violation of his rights under articles 27 and 29 of the Convention, as the failure to assign a guardian to look after his interests impeded his proper development.

3.9 The author proposes the following potential solutions: (a) that the State party recognize that it was impossible to establish his age on the basis of the medical test carried out; (b) that it be made possible to challenge age determination decrees issued by the Public Prosecution Service in the courts; and (c) that all the rights to which he is entitled as a minor be recognized, including the right to be heard, to receive protection from the public authority, 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.

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

4.1 In its observations of 16 August 2017, the State party submits that, on the day of his illegal entry into Spain, the author stated in the police station of Almería, in the presence of an interpreter, that his name was A.E.A., rather than A.L., and that he was born in Algeria on 21 February 1998. It adds that "having at one point claimed to be a minor", the author was offered the opportunity to undergo age determination tests, and maintains that the author gave his express and informed consent in that regard. The State party points out that, on account of the author's illegal entry into Spain, expulsion proceedings were initiated against him for the purpose of returning him to his country of origin.

4.2 The State party claims that the communication is inadmissible *ratione personae* on the ground that it constitutes an abuse of the right of submission and is not sufficiently substantiated, in accordance with article 7 (c) and (f) of the Optional Protocol, because the author is an adult. This is evident because: (a) he was undocumented at the time of his illegal entry into Spain and has never provided any identity documents; (b) he has the appearance of an adult, as shown by the photographs taken at the police station on the day of his illegal entry;<sup>10</sup> (c) an objective medical test was carried out, the results of which indicate that the author is over 19 years of age; and (d) he misled the Spanish authorities regarding his surname, first stating that it was E.A. and later that it was L. Since, in this case, there is no reliable evidence that the author is a minor, yet there is evidence that he has reached the age of majority, declaring this communication admissible "would only benefit the mafias that traffic in illegal migrants, which the author paid and whose services he used".

4.3 The State party further submits that, under article 7 (e) of the Optional Protocol, the communication is inadmissible on the ground of failure to exhaust all domestic remedies, given that: (a) if the author was of the view that the medical tests carried out were insufficient, he could have applied to the Public Prosecution Service for additional testing; (b) the author can apply for a review of any decision in accordance with the procedure set out in article 780 of Act No. 1/2000 on civil procedure; (c) the author can challenge his deportation order before the administrative courts; and (d) the author can initiate non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015 on non-contentious jurisdiction.

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<sup>10</sup> The State party provided copies of the photographs.

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

5.1 In his comments of 4 October 2017, the author maintains that he consistently claimed to be a minor to the authorities, as evidenced by the fact that the age determination process was initiated when he arrived in Almería. Regarding the confusion surrounding his surname alleged by the State party, the author maintains that the phonetic similarity between E.A. and L. can be imperceptible to someone who does not know the Arabic language and that E.A. may be the easiest way to write the surname for a Spanish-speaker. He further states that no one informed him of the medical test that they planned to perform on him and that he therefore did not give his express and informed consent, since he did not have access to any form of representation or assistance.

5.2 The author maintains that, contrary to the State party's claim, it cannot be affirmed that he is an adult. He claims that: (a) the fact that the author was undocumented when he entered Spain does not constitute evidence that he is an adult; (b) the State party's subjective evaluation of the author's physical appearance is not based on logical reasoning and cannot be taken into consideration; (c) the results of the X-ray test performed on the author cannot be considered as objective proof because such tests have a margin of error; and (d) on 22 May 2017, the author submitted a copy his birth certificate to the Public Prosecution Service and Almería Court of Investigation No. 5, attesting to his status as a minor. He further claims that even if the State party does not consider the birth certificate to be reliable proof of his status as a minor, he should be assumed to be a minor on the basis of the benefit of the doubt, in accordance with the best interests of the child.

5.3 Regarding the exhaustion of all domestic remedies, the author notes that article 7 (e) of the Optional Protocol provides that the exhaustion of all domestic remedies is not necessary where those remedies are unlikely to bring effective relief. He claims that the State party presents a list of formally available remedies without commenting on the accessibility or effectiveness of those remedies, yet the burden of proof falls to the State party.<sup>11</sup> The author reiterates that age determination decrees cannot be directly challenged in the courts, leaving children completely defenceless, irrespective of whether the effects of such decrees can be challenged by requesting guardianship or protection from the child protection services. The author submits that he did not have access to effective remedies through which he could prove his status as a minor before the execution of his deportation order, since none of the remedies listed by the State party has a suspensive effect on the execution of a deportation.

5.4 Lastly, the author claims that the State party has failed to implement fully the interim measure ordered by the Committee, given that he was released from the holding centre for foreign nationals only because the maximum duration of his stay in the centre (60 days) had elapsed, and he was neither transferred to the child protection centre nor provided protection by the Autonomous Community of Madrid. He adds that the Ombudsman of Spain issued a statement on the matter on 22 September 2017, in which he observed: "Although the person concerned has been released, the law enforcement authorities have not taken into consideration the proceedings initiated before the Committee on the Rights of the Child or the request made by that Committee."<sup>12</sup>

### State party's observations on the merits

6.1 In its observations of 14 March 2018, the State party reiterates its account of the events and its arguments on the admissibility of the communication. It notes that the author has not submitted a request for asylum in Spain. The State party notes that there is no evidence that the author's return to his country of origin, where he has personal and family ties, would put him at risk of irreparable harm, nor would it constitute an exceptional circumstance. It adds that the author has not provided any evidence of the potential imminent danger that he would face if deported.

<sup>11</sup> The author cites the European Court of Human Rights in the case of *Akdivar and Others v. Turkey*, 16 September 1996, and the Inter-American Court of Human Rights in the case of *Galindo Cárdenas et al. v. Peru*.

<sup>12</sup> The author provided a copy of the Ombudsman's statement on his situation, dated 22 September 2017.

6.2 The State party maintains that a minimum criterion for the admission of a communication under the Optional Protocol should be the provision of at least basic evidence that the author is a child. In this connection, the State party claims that a photocopy of a birth certificate lacking biometric data that can be checked against the data of the author does not constitute evidence. There is nothing to indicate that the data on the certificate corresponds to that of the author. The State party also provides information on the application in Spain of a special protocol for dealing with presumed unaccompanied minors (MENA Protocol) and mentions that in cases where a person claims to be a minor and “clearly appears to be a minor”, he or she is immediately referred to the Spanish child protection authorities.

6.3 The State party notes that the compatibility of medical age determination tests with respect for human rights was confirmed by the European Court of Human Rights in its judgment in the case of *Ahmade v. Greece*.<sup>13</sup> In that judgment, the Court interpreted the author’s refusal to undergo a dental X-ray as a sign that he was afraid the test would reveal that he was not the age he claimed to be. In addition, the State party cites the case of *M.E.B. v. Spain*,<sup>14</sup> in which the author claimed to be a minor despite the existence of X-ray evidence concluding that he was 18 years old. Following investigations by the Spanish police in the author’s country of origin, it was found that he had tried to use a false identity and that he was actually 20 years old.

6.4 Regarding the exhaustion of all domestic remedies, the State party claims that the author cannot argue that the remedies are ineffective if he has not attempted to pursue any of them.

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

6.6 The State party could not, in the absence of reliable evidence and on the basis of his statement alone, hold the author in a centre with minors, as this could pose a serious risk of abuse and ill-treatment for those minors.

6.7 Regarding the author’s claim of an alleged violation of his best interests, in relation to articles 18 (2) and 20 (1) of the Convention, the State party points out that the author has omitted to report that he was rescued by Spanish authorities while aboard a flimsy boat; that he was looked after by health services on arrival on Spanish soil and provided with a lawyer and an interpreter free of charge; that as soon as he claimed to be a minor, this was reported to the Public Prosecution Service, the institution responsible for protecting the best interests of the child; and that the author is currently at liberty and is receiving social assistance. Consequently, one can hardly speak of a lack of legal assistance or protection, even if the author were a minor, which is not the case.

6.8 Regarding the claims concerning the author’s right to an identity, the State party stresses that the author has not provided any official identity document in his name, let alone one with verifiable biometric data. Nonetheless, the Spanish authorities registered him under the name he gave when he illegally entered Spanish territory.

6.9 The State party further claims that there has been no violation of articles 27 and 29 of the Convention. It maintains that the author was cared for by the State party until the maximum stay in the holding centre had elapsed, at which point he was released and

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<sup>13</sup> European Court of Human Rights, *Ahmade v. Greece*, application No. 50520/09, 25 September 2012 paras. 77–78.

<sup>14</sup> *M.E.B. v. Spain* (CRC/C/75/D/9/2017).

proceeded to receive “coordinated assistance” and health coverage. His right to development has therefore not been violated.

6.10 Regarding the potential solutions proposed by the author in his initial communication, the State party submits that the author is neither requesting nor proposing “any means by which the author’s age could be determined with certainty”. Nor is he proposing that the authorities of his presumed country of origin perform an investigation to verify his information. Requesting that Spain recognize the impossibility of establishing the age of A.L. is therefore not a solution, since it is unacceptable that a person who appears to be of legal age should be presumed to be a minor on the basis of his or her statement alone. Regarding the request that the age determination decrees issued by the Public Prosecution Service should be able to be challenged in the courts, the State party claims that such decisions are highly provisional, that they can be reviewed by the prosecutor that issued them if new evidence is presented and that they can be replaced by definitive decisions issued by other judicial bodies. With regard to the author’s remaining requests, the State party points out that the author has already received State assistance. The author would automatically receive free education if he was a minor. Lastly, Spanish residence and work permits can be acquired only if the general legal requirements are met; they are not met by the author, as he entered the country illegally and did not apply for international protection.

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

7.1 In his comments of 6 July 2018, the author insists that he did not enjoy the necessary safeguards throughout the age determination process, that there are no documents certifying that he was appointed a lawyer or a representative who could inform him about the medical test and its implications, and that there is no proof that he gave his informed consent. He reiterates that deportation orders may only be appealed through administrative channels and that such appeals do not have a suspensive effect on the deportation order under review. He states that in the absence of protection by the State party, he left Spanish territory and is currently residing in France, and he expresses his intention to pursue the procedure before the Committee.

7.2 The author reiterates his claims regarding the admissibility of the communication. He maintains that the State party’s claims regarding the author’s presumed majority are precisely the substantive issue raised in the present communication. They therefore cannot constitute grounds for inadmissibility. The author states that he was 17 years old when he submitted the communication and that the X-ray test, whose results indicated that he was over 19 years old, “does not determine a person’s age exactly but rather provides an estimate of his or her age with a margin of error, according to experts, of plus or minus two years”.<sup>15</sup> In this case, the State party did not take the test’s margin of error into consideration. The author further maintains that his birth certificate should be considered valid and that it constitutes “basic evidence” that he is a minor. He adds that a birth certificate sent from his country of origin is reliable evidence of his status as a minor and should be assessed and considered as evidence.<sup>16</sup>

7.3 The author claims that the State party has made it clear that during age determination procedures a “presumption of adulthood” takes precedence over the best interests of the child, in the service of other Spanish interests, such as controlling migration flows in Spanish territory.

7.4 In relation to the violation of the best interests of the child under article 3 of the Convention, the author refers to 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, which underlines that documents submitted as part of an age determination process must be considered valid unless there is proof to the contrary, that statements by children should be taken into consideration and that, in the event of uncertainty regarding an individual’s age, the individual should be

<sup>15</sup> The author cites the judgment of 9 October 2017 of the Administrative Litigation Chamber of the National High Court of Spain, Second Division (JUR/2017/272319).

<sup>16</sup> *Idem*.

given the benefit of the doubt.<sup>17</sup> The author claims that, in his case, the State party never considered that he might be a minor and did not apply the MENA Protocol. On the contrary, it did not recognize the probative value of his birth certificate attesting to his status as a minor. The author further claims that, under article 3, the State party should have immediately transferred him to a children's centre or, in the event of uncertainty, it should have contacted the Algerian consular authorities to verify his identity. However, the State party did neither of those things.

7.5 The author claims that no State party may use the presumed majority of a child to justify a violation of the rights recognized in the Convention, yet this is what Spain did when it deprived the author of the protection owed to him as an unaccompanied minor deprived of his family environment under article 20 (1) of the Convention. He submits that the State party seems to be suggesting that the Public Prosecution Service acted as a sort of legal representative of A.L. and was looking out for his best interests, which was not the case. The State party should have appointed a guardian or a legal representative as soon as it became aware of the possibility that the author might be a minor, yet A.L. never received protection. Moreover, A.L. did not benefit from any care and accommodation arrangements as a child migrant deprived of his family environment. He was never taken to a child protection centre.

7.6 The author argues that States parties have a positive obligation to re-establish the identity of a child where he or she has been deprived of any element of his or her identity. He argues that article 8 of the Convention lists specific elements of a child's identity, including his or her nationality, name and family relations, but that this list must not be understood as exhaustive. He claims that a person's age and date of birth are elements of his or her identity and are therefore protected under article 8. When the State party attributed an age and a date of birth to the author that did not match the age and date of birth recognized on his birth certificate, it altered elements of his identity in violation of article 8 of the Convention.<sup>18</sup>

7.7 The author claims that his right to be heard was violated the moment he arrived in Spain and declared that he was a minor and yet was assigned the wrong age upon registration, without at any moment during the age determination process having had access to legal assistance or safeguards that would have kept him informed and thus enabled him to express his views.

7.8 The author maintains that the State party did not provide him with the necessary conditions to ensure his physical, mental, spiritual and social development. In particular, he was not assigned a guardian, he was not placed in a child protection centre and he was not provided with the psychological assistance he needed after travelling across the sea from Algeria to the coast of Almería, Spain. The author adds that the State party has not provided evidence that he effectively received health care.

7.9 Lastly, the author submits that the State party has violated article 6 of the Optional Protocol by failing to comply with the interim measures requested by the Committee on 22 May 2017.

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

8.1 On 3 May 2018, the French Ombudsman presented a third-party submission on the issue of age assessment. The Ombudsman maintains that age assessment processes should incorporate the safeguards necessary to ensure respect for the best interests of the child.

<sup>17</sup> The author cites 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, para. 4.

<sup>18</sup> The author cites article 4 of Organic Act No. 4/2000 on the rights, freedoms and social integration of foreign nationals in Spain.

<sup>19</sup> This submission concerns communications Nos. 11/2017, 14/2017, 15/2017, 16/2017, 20/2017, 22/2017, 24/2017, 25/2017, 26/2017, 28/2017, 29/2017, 37/2017, 38/2017, 40/2018, 41/2018, 42/2018 and 44/2018, registered with the Committee.

According to a 2017 Council of Europe report, the procedural safeguards recognized under international treaties are “not upheld consistently across member States”.<sup>20</sup>

8.2 Age assessment procedures should be initiated only in cases of serious doubt as to a person’s age, since age should be verified on the basis of the documents or statements of the person concerned. In these procedures, States should not only consider the person’s physical appearance but also their psychological maturity, adopting a multidisciplinary approach. If doubt persists after the conclusion of the procedure, the benefit of the doubt should be given to the person concerned.

8.3 There are no common rules or agreements on age assessment in European States. Several States use a combination of medical and non-medical tests. Medical tests performed include X-rays of the left wrist (23 States), dental X-rays (17 States), collarbone X-rays (15 States), dental examinations (14 States) and estimates based on physical appearance (12 States). Although bone age assessment is common, it is unreliable; it undermines children’s dignity and physical integrity; and there are no medical grounds for it, as confirmed by the Royal College of Radiologists in London. In a resolution issued on 12 September 2013, the European Parliament condemned the inappropriate and intrusive nature of medical techniques used for age assessment based on bone age, which can be traumatic, have wide margins of error and are sometimes carried out without the consent of the child.

8.4 The Greulich and Pyle method is inappropriate and not applicable to the migrant population, which consists mainly of adolescents from Saharan Africa, Asia and Eastern Europe who are fleeing their countries of origin, often in precarious socioeconomic conditions. Several studies have shown that bone development differs according to a person’s ethnic origin and socioeconomic status, making this method unsuitable for assessing the age of the non-European population.<sup>21</sup> This method also has significant margins of error, especially among persons aged between 15 and 18 years old.<sup>22</sup> According to the Council of Europe Commissioner for Human Rights, European paediatric associations have categorically stated that bone and dental maturation cannot be used to determine the exact age of a child, but can provide only estimates with a wide margin of error of between two and three years. Moreover, the interpretation of data may vary from one country to another or even from one specialist to another.<sup>23</sup> The Committee has also urged States not to use bone age assessment techniques.<sup>24</sup>

8.5 The Ombudsman therefore recommends: (a) that age assessment should be based on a multidisciplinary approach and that medical tests should be used only as a last resort when there are serious grounds for doubting age; (b) that the child should be informed and afforded the opportunity to give his or her prior consent; (c) that the individual should be presumed to be a child during the age assessment process and protective measures should be adopted, such as appointing a legal representative to assist the person throughout the procedure; (d) that the test should be administered in strict respect for the rights of the child, including his or her dignity and physical integrity; (e) that the child’s right to be heard should be respected; (f) that, if doubt persists at the conclusion of the procedure, the individual should be given the benefit of the doubt; (g) that an application for protection

<sup>20</sup> D. Wenke, *Age Assessment: Council of Europe member states’ policies, procedures and practices respectful of children’s rights in the context of migration*, Council of Europe, 2017, p. 6.

<sup>21</sup> See M. Mansourvar et al., “The applicability of Greulich and Pyle atlas to assess skeletal age for four ethnic groups”, *Journal of Forensic and Legal Medicine*, vol. 22 (February 2014), pp. 26–29.

<sup>22</sup> The Ombudsman cites, inter alia, T. Smith and L. Brownlees, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011; National Academy of Medicine of France, “Rapport sur la fiabilité des examens médicaux visant à déterminer l’âge à des fins judiciaires et la possibilité d’amélioration en la matière pour les mineurs étrangers isolés” (Report on the reliability of medical tests to determine age for judicial purposes and possible improvements in this area for unaccompanied foreign minors), *Bulletin de l’Académie nationale de médecine*, vol. 191, No. 1 (January 2007), pp. 139–142; and S. Depallens et al., “Détermination de l’âge des jeunes migrants. Position de la Société Suisse de Pédiatrie” (Determining the age of young migrants. Position of the Swiss Paediatric Society), *Paediatrica*, vol. 28, No. 2 (2017), p. 3.

<sup>23</sup> Council of Europe Commissioner for Human Rights, Human Rights Comments, *Methods for assessing the age of migrant children must be improved*, 2011.

<sup>24</sup> General comment No. 6 and joint general comment No. 4 and No. 23.

should not be refused solely because the person refuses to undergo medical tests; and (h) that there should be an effective remedy for challenging a decision based on an age assessment procedure.

8.6 The Ombudsman recalls that the detention of migrant children, even for short periods or for age assessment purposes, is prohibited by international law and that States should use alternative measures. States should prohibit the deprivation of liberty of children and their detention in adult facilities.<sup>25</sup> Child protection services should be informed immediately so that they can assess the child's protection needs.<sup>26</sup>

#### **Parties' comments on the third-party submission**

9.1 In its observations of 3 August 2018, the State party notes that none of the cases against Spain submitted to the Committee concerns detained persons. The authors of the communications referred to in the third party's submission were offered the option of staying in open centres while their administrative and judicial cases were under way. It adds that none of these cases concerns asylum seekers, but rather economic migrants.

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

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

9.4 When the person appears to be a minor or is in possession of a passport or identity card with biometric data, he or she is not subjected to age assessment tests. Lastly, the French Ombudsman does not specify which age assessment tests should be used.

10. In his comments of 17 August 2018, the author maintains that the submission confirms that the X-ray test used to assess his age was not reliable, given its wide margin of error, particularly in his age group. He states that an age assessment should be used only as a last resort and that primacy should be given to the statements of the presumed unaccompanied child migrant and any documentation he or she is able to provide. He maintains that, in Spain, tests are routinely performed on all unaccompanied child migrants, without assessing the statements and documents that they provide, as in the author's case.

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<sup>25</sup> European Court of Human Rights, Grand Chamber, *Tarakhel v. Switzerland*, application No. 29217/2012.

<sup>26</sup> European Court of Human Rights, *Abdullahi Elmi and Aweys Abubakar v. Malta*, applications Nos. 25794/2013 and 28151/2013.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

11.2 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* under article 7 (c) and (f) of the Optional Protocol on the ground that it constitutes an abuse of the right of submission because the author is an adult and has not provided any "basic" or "reliable" evidence to the contrary. The Committee notes, however, that the author claims to have declared that he was a minor upon entry into Spain, that he has provided a detailed and consistent account of the events, and that he submitted a copy of his Algerian birth certificate attesting to his status as a minor to the Spanish Public Prosecution Service and Court of Investigation, but did not get a response from these authorities. The Committee takes note of the State party's argument that since the birth certificate lacks biometric data it cannot be checked against the data of the author. The Committee recalls 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.<sup>27</sup> In the present case, the Committee takes note of the author's argument that if the State party had doubts as to the validity of his birth certificate it should have contacted the Algerian consular authorities to verify the identity of the author, which it did not do. 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.

11.3 The Committee also takes note of the State party's argument that the author did not exhaust all available domestic remedies because: (a) if the author was of the view that the medical tests carried out were insufficient, he could have applied to the Public Prosecution Service for additional testing; (b) the author could have applied for a review of any decision in accordance with the procedure set out in article 780 of the Civil Procedure Act; (c) he could have challenged his deportation order before the administrative courts; and (d) he could have initiated non-contentious proceedings for age assessment before the civil courts, in accordance with Act No. 15/2015. However, the Committee notes that, according to the State party, age determination decrees issued by the Public Prosecution Service may be reviewed only if new evidence is brought forward. The Committee further notes that, on 22 May 2017, a copy of the author's birth certificate attesting to his status as a minor was submitted to the Public Prosecution Service, but that the Public Prosecution Service did not take it into consideration. The Committee considers that, in the context of the author's imminent expulsion from Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order cannot be considered effective.<sup>28</sup> The Committee notes that the State party has not specified that the remedies invoked would suspend the author's deportation. Accordingly, the Committee finds that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

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

11.5 The Committee is nonetheless of the view that the author has sufficiently substantiated his claims under articles 3, 8, 12, 20 and 27 of the Convention, in connection with the failure to give consideration to the best interests of the child and the failure to appoint a guardian or representative during the age determination process. The Committee

<sup>27</sup> See, inter alia, the Views of the Human Rights Committee in relation to communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

<sup>28</sup> See the Committee's Views in relation to the case of *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 11.3.

therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

*Consideration of the merits*

12.1 The Committee has considered 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.

12.2 The issue before the Committee is whether, in the circumstances of the present case, the process of determining the age of the author, who stated that he was a minor and presented a copy of his birth certificate attesting to his statement, violated his rights under the Convention. In particular, the author has claimed that, because of the type of medical test used to determine his age and the failure to provide him with a guardian or representative, the best interests of the child were not a consideration in the process he underwent.

12.3 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 must be given the benefit of the doubt and treated as a child. Accordingly, the Committee recalls that the best interests of the child should be a primary consideration throughout the age determination process.<sup>29</sup>

12.4 The Committee recalls that, in the absence of identity documents or other appropriate evidence, to make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in taking account of various 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. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children must be considered. It is crucial that the benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on bone and dental examination, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal procedures.<sup>30</sup>

12.5 In the present case, the Committee notes that: (a) for the determination of his age, the author, who arrived in Spanish territory undocumented, underwent a medical test consisting of an X-ray of his left hand, with no additional tests, psychological tests in particular, being administered, and there is no record of the author having been interviewed as part of the process; (b) on the strength of the single test carried out, the hospital in question determined that the author's bone age was more than 19 years according to the Greulich and Pyle atlas, without indicating a possible margin of error; (c) on the basis of this result, the Public Prosecution Service of Almería Province issued a decree stating that the author was an adult; and (d) the Public Prosecution Service did not consider the copy of the birth certificate provided by the author on 22 May 2017 as the basis of a potential review of the age determination decree.

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

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<sup>29</sup> Ibid., para. 12.3.

<sup>30</sup> Joint general comment No. 4 and No. 23, para. 4.

determining the chronological age of a young person who claims to be a minor and who provides documentation attesting to his or her claim.<sup>31</sup>

12.7 The Committee notes the State party's conclusion that the author clearly appeared to have reached the age of majority, and that, although he could immediately have been considered an adult without the need to conduct any tests, an X-ray test was nonetheless carried out to determine his age. However, the Committee recalls its general comment No. 6, which states that age assessment must not only take into account 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>32</sup>

12.8 The Committee also notes the author's allegations that he was not appointed a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age determination process. The Committee recalls that States parties should appoint a qualified legal representative, with the necessary linguistic skills, for all young persons claiming to be minors, as soon as possible on arrival and free of charge. The Committee is of the view that to provide a representative for such persons during the age determination process is to give them the benefit of the doubt and is an essential guarantee of respect for their best interests and their right to be heard.<sup>33</sup> Failure to do so implies a violation of articles 3 and 12 of the Convention, as the age determination process is the starting point for the application of the Convention. The failure to provide timely representation can result in a substantial injustice.

12.9 In the light of the foregoing, the Committee considers that the age determination process undergone by the author, who claimed to be a child and who later provided evidence to support this claim, was not accompanied by the safeguards needed to protect his rights under the Convention. In the circumstances of the present case, in particular the examination used to determine the author's age, the absence of a representative to assist him during this process and the almost automatic dismissal of the probative value of the birth certificate provided by the author, without the State party having even formally assessed the data and, in the event of uncertainty, having that data confirmed by the Algerian consular authorities, the Committee is of the view that the best interests of the child were not a primary consideration in the age determination process undergone by the author, in breach of articles 3 and 12 of the Convention.

12.10 The Committee also notes the author's allegations that the State party violated his rights insofar as it altered elements of his identity by attributing to him an age and a date of birth that did not match the information on his birth certificate, even after the author had presented a copy of the certificate to the Spanish authorities. The Committee considers that a child's age and date of birth form 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 of that identity. In the present case, the Committee notes that, although the author provided the Spanish authorities with a copy of his birth certificate, which contained data pertaining to the child's identity, the State party failed to respect the identity of the author by denying that the birth certificate had any probative value, without a prior formal assessment of the data contained in the certificate by a competent authority and without having, alternatively, checked the data contained in the certificate with the authorities of the author's country of origin. Consequently, the Committee finds that the State party violated article 8 of the Convention.

12.11 Having found a violation of articles 3, 8 and 12 of the Convention, the Committee will not separately consider the author's claim that the same acts constituted a violation of articles 20 and 27.

12.12 Lastly, the Committee notes the author's claims concerning the State party's failure to implement the interim measure of transferring him to a child protection centre while his

<sup>31</sup> *N.B.F. v. Spain*, para. 12.6.

<sup>32</sup> General comment No. 6, para. 31 (i), and *N.B.F. v. Spain*, para. 12.7.

<sup>33</sup> *N.B.F. v. Spain*, para. 12.8.

case was pending consideration. The Committee recalls that, by ratifying the Optional Protocol, States parties take on an international obligation to comply with the interim measures requested under article 6 of the Optional Protocol, which, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.<sup>34</sup> In the present case, the Committee notes the State party's argument that the author's transfer to a child protection centre could have posed a serious risk to the children in those centres. However, the Committee notes that this argument is based on the premise that the author is an adult. The Committee considers that the greater risk would be to send someone who may be a child to a centre reserved for individuals recognized as adults. Consequently, the Committee considers that the failure to implement the requested interim measure in itself constitutes a violation of article 6 of the Optional Protocol.

12.13 The Committee, acting under article 10 (5) of the Optional Protocol, finds that the facts before it reveal violations of articles 3, 8 and 12 of the Convention and article 6 of the Optional Protocol.

13. The State party should provide the author with adequate reparation. Furthermore, the State party is under an obligation to prevent similar violations in the future by ensuring that all procedures for determining the age of possible unaccompanied children are carried out in a manner consistent with the Convention and, in particular, that in the course of such procedures they are granted prompt access to a qualified representative free of charge.

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

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

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<sup>34</sup> Ibid., para. 12.11.