



Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 25/2017*, **

<i>Communication submitted by:</i>	H.B. (represented by the non-governmental organization Fundación Raíces)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	12 July 2017
<i>Date of adoption of Views:</i>	7 February 2020
<i>Subject matter:</i>	Procedure for determining the age of an alleged unaccompanied minor
<i>Procedural issues:</i>	Inadmissibility <i>ratione personae</i> ; non-exhaustion of domestic remedies
<i>Articles of the Convention:</i>	2, 3, 8, 12, 18 (2), 20, 27 and 29
<i>Article of the Optional Protocol:</i>	6

1.1 The author of the communication is H.B., a citizen of Guinea born on 20 December 2001. He claims to be the victim of a violation of articles 2, 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 On 13 July 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.

* Adopted by the Committee at its eighty-third session (20 January–7 February 2020).

** 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, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aïssatou Alassane Moulaye Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.



The facts as submitted by the author*Arrival in Spain and steps taken to secure a guardian*

2.1 The author lived in Guinea. He left his country in November 2016 and arrived in Almeria, Spain, on 3 June 2017, having travelled from Nador, Morocco, in a small boat. He was found by the navy in the open sea and was rescued by the Red Cross. When he arrived in Spain, the author was transferred to the Almeria police station and taken straight to a cell, where he remained for three days alongside adults. The author was travelling unaccompanied by an adult and informed both the police and the Red Cross that he had been born on 20 December 2001 and was therefore a minor. At the Almeria police station, he did not have an interpreter and received no legal assistance while the police fingerprinted him, photographed him and took down his information. The author was not subject to any special measures during the initial reception phase.

2.2 On 4 June 2017, the author was taken to hospital for an X-ray of his left hand, which was assessed according to the Greulich and Pyle method and showed him to be more than 19 years old. At the hospital, the author was not told why the tests were being done or what the results were. He was accompanied only by the police officers, with no one present to protect his interests.

2.3 On 5 June 2017, a removal order was initiated against the author by agreement No. 1459/17, which showed his date of birth as 20 December 1998.

2.4 On 6 June 2017, the Almeria Provincial Prosecutor's Office issued a decree finding the author to be an adult and the Almeria Court of Investigation No. 1 issued order No. 1431/2017 for his placement in the holding centre for adult migrants located in Aluche, Madrid. On the same day, a court-appointed lawyer brought some papers to the author and informed him that he was required to sign them in order to go to the holding centre. The author signed the papers, but was not informed of his rights, nor of the consequences of moving to Madrid or staying in Almeria. That was the only contact he had with his lawyer. The author explains that, after being placed in the migrant holding centre, he again stated that he was a minor, but no one at the centre took any action in that regard.

2.5 On 13 June, a worker from Fundación Raíces went to the holding centre to meet the author, having been informed of his case by a colleague from the non-governmental organization SOS Racismo. The author confirmed his age and stated that his family had his birth certificate which proved it. The worker contacted the family, which then sent to Fundación Raíces by email an extract of the author's birth certificate and a legal certificate confirming its authenticity. The originals of the documents were sent to Spain by post.

2.6 On 14 and 15 June, Fundación Raíces, acting on behalf of the author, sent letters, with his documentation attached, to the Almeria Court of Investigation No. 1, the Madrid Provincial Prosecutor's Office, the Ombudsman, the Directorate-General for Family and Minor Affairs of the Community of Madrid and the Embassy of Guinea in Spain. In the letters it urged the various institutions to take protective measures in respect of the author and to suspend immediately his placement in the migrant holding centre.

2.7 On 20 June 2017, the Almeria Provincial Prosecutor's Office issued a decree dated 16 June that did not allow for a review of the author's age.

2.8 On 21 June, the Almeria Court of Investigation No. 1 requested Fundación Raíces to resubmit the documentation on the grounds that it was illegible. Fundación Raíces resent the documentation the same day.

2.9 On 29 June, the Almeria Court of Investigation No. 1 notified Fundación Raíces that it would not suspend the author's placement in the migrant holding centre "since the bone age assessment test carried out at Torrecárdenas Hospital in Almeria shows him to be more than 18 years old".

2.10 On 3 July, Fundación Raíces transmitted the author's original documentation to the Almeria Provincial Prosecutor's Office and to Court of Investigation No. 1. On 25 July 2017, the Prosecutor's Office issued a decree denying a review and the Court of Investigation dismissed the application for reconsideration on the grounds that the documents were mere photocopies and contradicted the age determination tests.

2.11 The author remained at the Aluche migrant holding centre throughout the aforementioned process.¹

The complaint

3.1 The author submits that, as a consequence of the failure to recognize the validity of his original official identity documents, as issued by his country of origin, and in view of the bone age assessment test carried out at the hospital, he was wrongly considered to be an adult, and was left defenceless, without the protection of the State party and in a situation of absolute vulnerability, having been held for more than a month in a place that was entirely unsuitable for a minor.

3.2 The author claims to be a victim of a violation of article 2 of the Convention because he suffered discrimination on the basis of his status as an unaccompanied foreign minor. He adds that he would not have ended up as an unprotected minor if he had been accompanied by his family, or if he had not been a foreigner and a national of a sub-Saharan African country since, in the case of adults or accompanied minors, neither the individual's age, nor the documentation issued by the authorities of another country, nor the documentation of other citizens of the author's country, is ever called into question.

3.3 The author also claims that, despite his status as an asylum-seeking foreign unaccompanied minor, the State party failed to take into account the principle of the best interests of the child enshrined in article 3 of the Convention. He submits that the State party violated this principle by failing to respect his right to be presumed to be a minor in the event of doubt or uncertainty, especially when there is a real risk of irreparable harm.² He indicates that he is in possession of documentation confirming his status as a minor: an extract of his birth certificate and the accompanying legal certificate. The author claims that living in a centre for adults is causing him harm as it is a place that is entirely unsuitable for minors. Moreover, there is a risk that the removal order against him might be executed, which would result in the expulsion of an asylum-seeking minor from Spanish territory.

3.4 The author points out that, although Spanish law includes the principle of the best interests of the child, there is still no uniform protocol for assessing age because of the differences in how each autonomous community understands that principle.³

3.5 The author also 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 the State party failed to assign him a guardian or representative, a practice that is a key procedural safeguard to ensure respect for the best interests of an unaccompanied child.⁴ He submits that the State party, in declaring him to be an adult solely on the basis of X-ray tests, without accepting the validity of documentation from his country of origin, deprived him of all his Convention rights as a minor.

3.6 The author maintains that the State party violated his right to preserve his identity, which is 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 preserve and recover the elements thereof.

3.7 The author further claims that his right to be heard has not been respected and that he has thus been the victim of a violation of article 12 of the Convention. He points out that the State party has not respected this principle since it has not allowed the author to express his views in all matters affecting him.⁵ The author submits that he has not been heard given that he did not have the opportunity to receive the assistance of a lawyer before the age determination tests were carried out and that, during the only time he had access to a lawyer, at no point did that lawyer inform him of his rights.

3.8 He also claims that article 20 of the Convention was violated, since the State party failed to provide him with due protection as a child deprived of his family environment. He

¹ The author spent 52 days at this centre.

² The author cites general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 31 (i).

³ The author cites CRC/C/ESP/CO/3-4, para. 27.

⁴ The author cites general comment No. 6, para. 21.

⁵ The author cites general comment No. 12 (2009) on the right of the child to be heard, para. 26.

adds that the State party immediately considered the author to be an adult, without any conclusive evidence thereof.

3.9 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 State party's failure to take his best interests into account impeded his proper development in all its aspects. The author maintains that not only was he unable to develop in a manner appropriate to his age because he lacked a guardian to guide him, but he was also prevented from developing properly because he was placed in a migrant holding centre, where living conditions are unsuitable for minors.

3.10 The author proposes the following possible solutions: (a) that the State party recognize him as a minor, stay his removal to his country of origin and refer him to the protection services; (b) that all the rights to which he is entitled as a minor be recognized, including the rights to State protection, to a legal representative, to education, and to the residency and work permits that will enable the full development of his personality and his integration into society; (c) that the State party acknowledge that it is impossible to establish the author's age on the basis of the medical tests carried out; (d) that it recognize the right to lodge an appeal with the judicial authorities against decrees issued by a government prosecutor's office to determine an individual's age; (e) that it recognize the minor's right to be heard through a person or institution specialized in children's rights; (f) that it recognize the minor's right to be assisted by a lawyer or representative of his choice before his case is considered by the Administration; and (g) that the minor and his lawyer are notified of any decision affecting the minor.

State party's observations on admissibility

4.1 In its observations of 17 January 2018 on the admissibility of the communication, the State party notes that the author's account of the facts is partial and inaccurate. It indicates that on, 3 June 2017, 33 men and 3 women, including the author, attempted to enter Spanish territory illegally, arriving by sea on the coast of Almeria. The Spanish coastguard rescued the vessel, the occupants were disembarked and the Spanish Red Cross took care of them. They were then detained at the Almeria police station, where they were identified and informed of their rights, in the presence of an interpreter. Since four of those detained claimed to be minors, they were offered medical tests to determine their age, subject to their prior informed consent. On 4 June 2017, an X-ray was taken of the author's left hand; according to the Greulich and Pyle atlas, this showed the author to be more than 19 years of age.

4.2 On 6 June 2017, the Almeria provincial prosecutor issued a decree which determined, very provisionally, that the author should be considered of legal age. Since he had entered Spanish territory illegally, proceedings were initiated to return him to his country of origin.

4.3 With the assistance of a lawyer and an interpreter, he was personally notified of the removal order. He was also informed that he could seek a judicial remedy. He was placed in the migrant holding centre on 6 June 2017. The author appointed Fundación Raíces as his legal representative and that organization provided the Court with ordinary photocopies of his alleged birth registration documents, calling for him to be moved from the migrant holding centre and referred to the child protection services. The State party indicates that the documents submitted do not include biometric data and that they are a record of an uncontradicted private statement reflecting a statement made, allegedly before a judge on 6 June 2017, by persons whose relationship with the author is not recorded.

4.4 On 14 June 2017, Fundación Raíces made several requests. On 16 June 2017, the Prosecutor's Office reconsidered the matter and issued a new decree specifying that the author was of legal age and that the documents submitted were photocopies in another language, with no translation and of doubtful authenticity. The Almeria Court of Investigation No. 1 denied a review of the measure taken to provisionally determine the author's age. On 3 July 2017, an application for reconsideration of that ruling was filed.⁶

⁶ In his comments, the author provides the following information: On 25 July 2017, the Prosecutor's Office issued a decree denying a review and the Almeria Court of Investigation dismissed the application for reconsideration on the grounds that the documents are mere photocopies and contradict the age determination tests.

4.5 The State party claims that the communication is inadmissible *ratione personae*, under article 7 (c) and (f) of the Optional Protocol and rules 16 (e) and (h) and 18 of the rules of procedure of the Committee, because the author is of legal age. This is clear from the fact that: (a) the author failed to present official identity documents with verifiable biometric data at the time of his arrival in Spain; (b) his appearance is that of an adult based on the photographs taken of him at the time of his illegal entry into Spain; (c) an objective medical test was carried out, which showed him to be 19 years of age; (d) the documents that the author subsequently presented do not have the necessary characteristics to corroborate the author's identity.⁷ The State party submits that paragraph 35 (i) of general comment No. 6 clearly indicates that an individual should be presumed to be a minor only "in the event of remaining uncertainty", not when the person is obviously an adult.⁸

4.6 The State party adds that, as there is no reliable evidence that the author is indeed a minor, declaring this communication admissible "would only benefit the mafias that traffic in illegal migrants, which the author paid and whose services he used" and that casting unfounded suspicions on social services professionals, health-care workers and the national security forces is grossly unfair and has the undesirable consequence of demotivating them.

4.7 The State party further submits that, under article 7 (e) of the Optional Protocol, the communication is inadmissible on the grounds of failure to exhaust all domestic remedies, given that the author could have: (a) requested the Public Prosecution Service to conduct different medical tests in addition to those carried out; (b) requested a review of any autonomous community decision in which he is not considered to be a minor for child protection purposes, in accordance with the procedure set out in article 780 of the Civil Procedure Act; (c) brought an appeal before the administrative courts against both the removal order and any denial of asylum; (d) initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015.

4.8 The State party also submits that, according to Constitutional Court order No. 172/2013 of 9 September 2013 under *amparo* application No. 952/2013, age assessments carried out by the Public Prosecution Service are highly provisional and the final determination as to whether an undocumented person is a minor or an adult may be sought from the judicial authorities, through the appropriate channels, which, in this case, have not been exhausted.

State party's observations on the merits

5.1 In its observations of 17 January 2017, the State party, referring to article 7 (f) of the Optional Protocol, maintains that the communication is not sufficiently substantiated; not a single word in the complaint goes towards explaining the alleged violations of the Convention rights in the case in question.

5.2 With respect to the author's claim that his best interests were not taken into account, the State party submits that "the interests of a minor can hardly have been disregarded" when objective medical tests show the author to be an adult. It adds that the complaint is generic in nature and does not specify the exact nature of the infringement of the principle of the best interests of the child that the author is attempting to attribute to the State party. Furthermore, it is seemingly based on the argument that any result of a medical age-determination test that shows the age of majority to have been attained constitutes a violation of the Convention. The Committee's general comment No. 6 establishes that a person should be presumed to be a minor in the event of uncertainty, but not when it is obvious that the person is an adult, in which case the national authorities may legally consider him or her as such without having to conduct any tests. However, in this case, the authorities gave the author the opportunity to undergo objective medical testing to assess his age, for which he gave his prior informed consent.

⁷ The State party specified that the witnesses who sent the birth certificate are students who do not share a family name with the author, contrary to the provisions of Guinean law.

⁸ The State party refers also to the judgment of the European Court of Human Rights in *Ahmade v. Greece*, application No. 50520/09, paras. 77 and 78, and to *M.E.B. v. Spain* (CRC/C/75/D/9/2017), the author of which was eventually found to be 22 years old, as had also been determined by the medical tests officially carried out in Spain.

5.3 The State party could not, in the absence of reliable evidence and on the basis of his statement alone, afford the author the legal treatment reserved for the protection of minors. The State party submits that placing adults in holding centres intended for minors may expose actual minors to abuse and ill-treatment.

5.4 The State party further submits that there has been no violation of the principle of the best interests of the child in relation to articles 18 (2) and 20 (1) of the Convention, stating that the author was rescued by Spanish authorities in the open sea, on board a very flimsy boat; that he was looked after by health-care services upon his arrival on Spanish soil and provided with a lawyer and an interpreter free of charge; that his status was reported without delay to the competent judicial authority to ensure that his rights were respected; and that, as soon as he claimed to be a minor, this was reported to the Public Prosecution Service, the institution responsible for upholding the best interests of the child. 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.

5.5 With regard to the author's allegations based on his right to preserve his identity, the State party considers that the Spanish authorities registered him under the name that he gave when he illegally entered Spanish territory and that the resulting documentation is what is currently allowing him to exercise rights.

5.6 The State party also maintains that, even if the author were a minor, articles 27 and 29 of the Convention have not been violated; it submits that the author was cared for directly by the State and that, in the absence of identity documents, he was released and is benefiting from coordinated assistance measures and health coverage.

5.7 Regarding the possible 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 his age may be determined with certainty. Regarding the request that it should be made possible to lodge an appeal with the judicial authorities against decrees issued by a government prosecutor's office to determine an individual's age, 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 final decisions issued by other judicial authorities. With regard to the author's remaining requests, the State party points out that the author has already received State protection and assistance from court-appointed lawyers, judges and the Public Prosecution Service.

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

6.1 In his comments of 19 April 2018, with regard to the exhaustion of domestic remedies, the author notes that various institutions have expressed concern regarding the lack of safeguards in the age determination process in Spain,⁹ which prevents minors from effectively defending their rights and thereby causes them irreparable harm. The author points out that age assessment decrees cannot be directly challenged in the courts,¹⁰ which is particularly important given his placement in the migrant holding centre and the risk that he could be returned to his country without a formal assessment of his best interests or of family reunification.

6.2 With regard to his right to appeal the impact of the decree finding him to be an adult, the author insists that it would be ineffective to request new medical tests, as they do not yield reliable results and are not an effective solution for determining an individual's age.

⁹ The author cites Save the Children, *Infancia y Justicia: una cuestión de Derechos* (Childhood and Justice: A Matter of Rights), 2012, available at https://www.savethechildren.es/sites/default/files/imce/docs/infancia_y_justicia.pdf, and *Infancias invisibles* (Invisible Childhoods), 2016, available at <https://www.savethechildren.es/sites/default/files/imce/docs/infancias-invisibles-ninos-migrantes-refugiados-trata-save-the-children.pdf>. He also cites United Nations Children's Fund (UNICEF), Spanish Committee, *Informe Complementario al V y VI Informe de Aplicación de la Convención sobre los Derechos del Niño en España* (Alternative report to the combined fifth and sixth periodic report of Spain on the implementation of the Convention on the Rights of the Child), 2017, available at https://www.unicef.es/sites/unicef.es/files/comunicacion/CRC-UNICEF_ESP_publicacion.pdf.

¹⁰ The author cites the age assessment decrees issued by the Public Prosecution Service under article 35.3 of Organic Act No. 4/2000 of 11 January on the rights, freedoms and social integration of foreign nationals in Spain.

Secondly, he was unable to object to any revocation of guardianship under article 780 of the Civil Procedure Act, since no decision had been taken and the author was in the migrant holding centre awaiting deportation. Thirdly, the author submits that an appeal against the removal order would not be an effective remedy for the lack of protection provided to him as a minor placed in a holding centre without a guardian; it would counter only the effects of his deportation, not those stemming from his unprotected status.¹¹ Fourthly, the author notes that Fundación Raíces initiated non-contentious proceedings for determining a person's age on other occasions but its applications were dismissed on the grounds that they were not the appropriate procedure.

6.3 With regard to the assessment of his age, the author submits that photographs taken by the police at the time of his arrival in Spain, to which he has not had access, are the basis for the State party's estimate of his age. The author emphasizes that the State party's assessment is entirely subjective, as the mere observation of a person's physical appearance is not sufficient to determine his or her age.

6.4 The author reiterates the facts and states that the Public Prosecution Service, asserting that his documentation contradicts the medical tests carried out, has not reviewed the decree finding him to be an adult, even though in early August 2017 the author submitted documentation issued by the Embassy of Guinea that confirms his status as a minor. The author notes that the State party did not take any steps to verify his age in the light of the photocopies or the extract of the birth certificate and legal certificate received. On 28 July 2017, after 52 days in the migrant holding centre, the author was assigned to an adult centre managed by the Spanish non-governmental organization Movimiento por la Paz, as part of a programme funded by the Ministry of the Interior. A few months later, given the failure of Spain to comply with the interim measure, the author decided to go to France.

6.5 Concerning the State party's observations as to inadmissibility *ratione personae*, the author submits that the substantive issue raised in the communication is precisely the matter of his age; for that reason it should not be considered as grounds for inadmissibility. The author notes that: (a) in this case there was documentation proving that he was a minor; (b) all these arguments show that the principle that a person should be presumed to be a minor has been violated; (c) he did not have documents with biometric data because he was unable to access them, as he was locked up in a migrant holding centre, and the birth certificate submitted does not contain such data because birth certificates never have biometric features; (e) he has not provided medical evidence because it has been proven that the existing methods are not reliable; (f) it cannot be stated that the author consented to undergo the medical test since he was not even informed of what it involved; (g) the State party's subjective assessment of his physical appearance illustrates the complete lack of safeguards in the age determination process; and (h) even if the documents submitted do not provide the State party with sufficient guarantees, that does not mean he is an adult.

6.6 The author states that he was 16 years old when he submitted the communication and that X-ray tests, the results of which indicated that he was over 19 years old, "do not determine a person's age exactly but rather provide an estimate of his or her age with a margin of error, according to experts, of plus or minus two years"; furthermore, such tests are based on the Caucasian population.¹² 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 issued by his country of origin is reliable evidence of his status as a minor and should be assessed and considered as evidence.¹³

¹¹ The author also wishes to state that an appeal against the removal order must first be lodged with the administrative authorities, which have three months to respond; the appeal in question does not have a suspensive effect on the removal order. Given that the maximum period of placement in the migrant holding centre is 60 days, no remedy exists to avoid the irreversible effects of deportation.

¹² The author cites the "*Documento de Consenso de Buenas Prácticas entre los Institutos de Medicina Legal de España*" (consensus document setting out the best practices of Spanish forensic medicine institutes), 2011, and the judgment of 9 October 2017 of the Administrative Litigation Chamber of the National High Court of Spain, Second Division (JUR/2017/272319).

¹³ The author again cites the judgment mentioned in the previous footnote.

6.7 With regard to the State party's claim that, if the communication were to be declared admissible, it would benefit the mafias trafficking in illegal migrants, the author submits that, during the age determination process, the State party has made it clear that it gives precedence to a "presumption of adulthood", contrary to the best interests of the child and in the service of other Spanish interests such as controlling migration flows in Spanish territory.

6.8 Regarding the violation of the principle of the best interests of the child set out in article 3 of the Convention, the author reiterates that the State party has not respected the principle that a person should be presumed to be a minor, especially when there is an imminent risk of irreparable harm, such as deportation. 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 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, which stipulates that documents submitted as part of an age determination process should be considered genuine 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 given the benefit of the doubt. The author claims that he should have been transferred immediately to a centre for minors or, in case of doubt, the Spanish authorities should have contacted the consular authorities of Guinea to confirm his identity.

6.9 He adds that the medical test he underwent cannot be viewed as objective or considered to allow an accurate assessment of his age; such tests must be interpreted in the light of the child's best interests. That would involve applying the principle that a person should be presumed to be a minor, since the tests carried out have a margin of error of plus or minus two years. The author maintains that, in the present case, the margin of error was not taken into account and the documentation he provided in support of his age has not been challenged in the courts.

6.10 Regarding his claims that his best interests were not taken into account, with regard to articles 18 (2) and 20 (1) of the Convention, the author submits that, contrary to the State party's assertions, it cannot be affirmed that the role played by the Public Prosecution Service in the process of assessing his age served as an adequate substitute for him being assigned a guardian or legal representative by the authorities as soon as they learned that he might be a minor. He adds that article 20 of the Convention obliges States parties to make care and accommodation arrangements for children deprived of their family environment. The author reiterates that he has not benefited from any such arrangements.

6.11 Regarding the violation of his right to an identity, the author claims that, under article 8 of the Convention, the State party has a negative obligation to preserve the identity of a child and a positive obligation to re-establish the identity of a child where he or she has been deprived of any element thereof. He claims that a person's age is an element of his or her identity and therefore must be protected under article 8. He explains that, when the State party attributed a date of birth to him that did not match the date of birth appearing on his identity papers issued by the authorities of his country of origin, it violated his right to an identity. The author states that, under the State party's own law and according to the Supreme Court's jurisprudence, documentation issued by the authorities of a country of origin constitutes the authoritative attestation of a foreign national's identity.

6.12 The author reiterates that his right to be heard under article 12 of the Convention was denied. This right was violated the moment that he arrived in Spain and was assigned the wrong age upon registration, despite having stated that he was a minor. He was also held in a cell at the Almeria police station despite having indicated that he was a minor. He reiterates that he had neither legal assistance nor an interpreter during the age determination process.

6.13 The author submits that the conditions in the migrant holding centre were not conducive to the proper exercise of his right to be heard as it was a hostile environment that was unsuitable for minors. The author refers to general comment No. 12 (2009) on the right of the child to be heard, according to which States parties must allow a child to decide how to be heard, whether directly or through a representative, and, above all, ensure that the child is able to express his or her views freely and is adequately informed, on the understanding that being allowed to express his or her views freely also means that the

child must not be manipulated or subjected to undue influence or pressure. The Committee makes the following point:

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate.¹⁴

6.14 Regarding the violation of article 27 of the Convention, the author submits that the State party did not provide him with the necessary conditions to ensure his physical, mental, spiritual and social development. The author adds that even when he was released, he was still not properly cared for. In particular, he was not assigned a guardian, he was not placed in a child protection centre, he did not have access to health coverage and he was not provided with the psychological assistance that he needed after his long journey from his country of origin to the coast of Almeria.

6.15 With regard to the principle of non-discrimination enshrined in article 2, the author reiterates that the age of minors who are from non-African countries or who are accompanied by their legal representatives is never called into question.

6.16 The author submits that the State party has failed to comply with the interim measures requested by the Committee since, after his release from the migrant holding centre, he was never transferred to a child protection centre or assigned a guardian. The State party's failure to comply with the interim measures requested constitutes a violation of article 6 of the Optional Protocol.

6.17 Lastly, the author reiterates that he is requesting recognition as a minor, based on his documentation and not on medical tests for age assessment.

Third-party submission¹⁵

7. 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.¹⁶

Additional information submitted by the author

8. On 20 July 2018, the author reported that he is currently in a village near Lyon, France, in a reception centre for minors. The author has indicated to Fundación Raíces that he wishes to continue his proceedings before the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 The Committee takes note of the State party's argument that the communication is inadmissible *ratione personae* under article 7 (c) and (f) of the Optional Protocol 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 that he stated that he was a minor when he arrived in Spain, that he then submitted to the Spanish Public Prosecution Service and the Court of Investigation a copy and an extract of his birth certificate from Guinea establishing that he was a minor, and that he requested a review of the age assessment decree; that request was rejected by the Public Prosecution Service, without further justification. The Committee also notes that the Embassy of Guinea later issued

¹⁴ General comment No. 12, para. 34.

¹⁵ This submission concerns communications Nos. 11/2017, 14/2017, 15/2017, 16/2017, 18/2017, 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.

¹⁶ A summary of the submission by the Defender of Rights of France can be found in *N.B.F. v. Spain* (CRC/C/79/D/11/2017), paras. 8.1 to 8.6.

documentation attesting to the author's status as a minor. The Committee takes note of the State party's argument that, since the birth certificate submitted lacks biometric data, it cannot be checked against the information on 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 holds the relevant information. 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 consular authorities of Guinea 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.

9.3 The Committee also takes note of the State party's argument that the author did not exhaust all available domestic remedies because: (a) he could have requested the Public Prosecution Service to conduct different medical tests in addition to those carried out; (b) he could have requested a review of any autonomous community decision in which he is not considered to be a minor, in accordance with the procedure set out in article 780 of the Civil Procedure Act; (c) he could have brought an appeal before the administrative courts against the removal order; (d) he could have initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015. However, the Committee takes note of the author's assertion that the Public Prosecution Service denied his request for a review of the decree finding him to be an adult, even though he provided documentation issued by the Embassy of Guinea confirming his status as a minor, on the grounds that the documentation in question contradicted the results of the medical tests carried out. The Committee considers that, in the context of the author's imminent deportation from Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order cannot be considered effective.¹⁷ The Committee notes that the State party has not shown that the remedies invoked would suspend the author's deportation. As a result, the Committee concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

9.4 The Committee considers that the author's claims under articles 18 (2), 27 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.

9.5 However, the Committee considers that the author has sufficiently substantiated his claims under articles 2, 3, 8, 12 and 20 (1) of the Convention. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

10.1 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.

10.2 One of the issues before the Committee is whether, in the circumstances of the present case, the age determination process undergone by the author, who stated that he was a minor and presented his birth certificate and documentation issued by the Embassy of Guinea in support of his statement, violated his Convention rights. Specifically, the author claims that he was a victim of discrimination because the original official documents issued by the authorities of his country of origin were not taken into account; the best interests of the child were not considered at any point during the process of assessing his age; his right to be heard has not been respected and his identity has not been respected.

10.3 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 contained 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

¹⁷ *N.B.F. v. Spain*, para. 11.3.

through an appeals process. While that process is under way, the person should be given the benefit of the doubt and treated as a child. Accordingly, the Committee reiterates that the best interests of the child should be a primary consideration throughout the age determination process.¹⁸

10.4 The Committee notes the State party's argument that general comment No. 6 does not preclude or prohibit the use of objective medical tests in order to determine the age of persons who appear to be adults, have no documents and claim to be minors (para. 6.3). The Committee recalls, however, that documents that are available should be considered genuine unless there is proof to the contrary.¹⁹ Furthermore, in the absence of identity documents or other appropriate means to make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner and should include interviews of children, in a language the child understands. The benefit of the doubt should be given to the individual being assessed.

10.5 In the present case, the Committee notes that: (a) for the determination of his age, the author, who arrived in Spanish territory undocumented, underwent medical tests consisting of an X-ray of his wrist, with no additional tests, in particular psychological tests, being administered, and there is no record of the author having been interviewed as part of the process; (b) on the strength of the tests carried out, the hospital in question determined that the author's bone age was 19 years according to the Greulich and Pyle atlas, without establishing any possible margin of error; (c) on the basis of that result, the Public Prosecution Service issued a decree finding the author to be an adult; and (d) the Public Prosecution Service did not consider the documentation issued by the Embassy of Guinea confirming his status as a minor as the basis for a potential review of the decree finding him to be of age.

10.6 The Committee notes, however, that there is ample information to suggest that bone age assessments lack precision and have a wide margin of error, and that they are therefore not suitable for use as the sole method for assessing the chronological age of a young person who claims to be a minor and who provides documentation attesting to his or her claim.

10.7 The Committee takes note of the State party's conclusion that the author clearly appeared to have reached the age of majority. However, the Committee recalls its general comment No. 6, in which it states that an age assessment should 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 remaining uncertainty, it should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.²⁰

10.8 The Committee also notes the author's allegations, which have not been refuted by the State party, that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant, before and during the age determination process that led to the issuance of a decree finding him to be an adult. The Committee recalls that States parties should appoint a qualified legal representative, and an interpreter where necessary, 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 the provision of a representative to such persons during the age determination process is essential to safeguarding their best interests and their right to be heard.²¹ 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 absence of timely representation can result in a substantial injustice.

¹⁸ Ibid., para. 12.3.

¹⁹ 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, para. 4.

²⁰ Para. 31 (i).

²¹ *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8 and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 13.7.

10.9 In the light of the foregoing, the Committee considers that the age determination process undergone by the author, who claimed to be a minor and provided evidence to support that 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 test used to assess the author's age, the absence of a representative to assist him during that process and the almost automatic dismissal of the probative value of the birth certificate provided by the author, without the State party even formally assessing the information that it contained and clearing up any doubts with the Guinean 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.

10.10 The Committee also takes note of 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 documentation issued by the Embassy of Guinea confirming his status as a minor to the Spanish authorities. The Committee considers that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements thereof. In the present case, the Committee notes that, although the author provided the Spanish authorities with a copy and an extract of his birth certificate, the State party failed to respect the identity of the author, by denying that the copy of his birth certificate had any probative value, without either seeking a prior formal assessment by a competent authority of the information contained in the certificate or checking the information 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.

10.11 Lastly, the Committee takes note of the author's claims concerning the State party's failure to apply the interim measure of transferring him to a child protection centre. The Committee points out that, by ratifying the Optional Protocol, States parties take on an international obligation to comply with 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.²² In the present case, the Committee notes the State party's argument that the author's transfer to a child protection centre might have posed a serious risk to the children in those centres. However, the Committee notes that this argument is based on the premise that the author is an adult. The Committee also notes the risk involved in sending someone who may be a child to a centre that is reserved for individuals who have been 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.

10.12 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 reveal violations of articles 3, 8, 12 and 20 (1) of the Convention and article 6 of the Optional Protocol.

10.13 Having found a violation of articles 3, 8, 12 and 20 (1) of the Convention, the Committee will not separately consider the author's claim that the same acts constituted a violation of article 2.

11. 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 determining the age of young persons claiming to be minors are in line with the Convention and, in particular, that in the course of these procedures: (i) the documents submitted by those young persons are taken into consideration and, if issued or authenticated by the relevant State authority or embassy, accepted as genuine; and (ii) the young persons concerned are assigned a qualified legal representative or other representatives without delay and free of charge, any private lawyers appointed to represent them are recognized and all legal and other representatives are allowed to assist such persons during the age determination process;

²² *N.B.F. v. Spain*, para. 12.11.

(b) Ensure that young unaccompanied asylum seekers claiming to be under 18 years of age are assigned a competent guardian as soon as possible to enable them to apply for asylum as minors, even if the age determination process is still pending;

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

(d) Provide training to immigration officers, police officers, members of the Public Prosecution Service, judges and other relevant professionals on the rights of asylum-seeking and other migrant children and, in particular, on the Committee's general comment No. 6 and joint general comments Nos. 22 and 23.

12. 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 on 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 disseminate them widely.
