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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. 115/2020*, **

Communication submitted by:	H.M. (represented by counsel, José Luis Rodríguez Candela)
Alleged victim:	A.E.A. (the author's son)
State party:	Spain
Date of communication:	8 March 2020
Date of adoption of Views:	31 May 2021
Subject matter:	Right to education of a Moroccan child born and raised in Spain
Procedural issues:	Failure to exhaust domestic remedies; incompatibility *ratione personae*; failure to substantiate the complaint
Substantive issues:	Discrimination; best interests of the child; education
Articles of the Convention:	2, 3, 28 and 29
Articles of the Optional Protocol:	6 and 7 (c), (e) and (f)

* Adopted by the Committee at its eighty-seventh session (17 May–4 June 2021).

** The following members of the Committee participated in the consideration of the communication: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Zara Ratou, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Benoit Van Keirsbilck.

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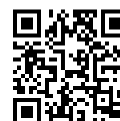

1.1 The author of the communication is H.M., a national of Morocco born on 9 August 1981. She has submitted the present communication on behalf of her son, A.E.A., a national of Morocco born in Melilla, Spain, on 21 November 2012. She claims that her son's rights under articles 2, 3, 14, 28 and 29 of the Convention have been violated. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 On 10 March 2020, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested that, as an interim measure, the State party immediately enrol A.E.A. in school in order to allow him to attend classes while his case was under consideration by the Committee. The Committee repeated its request for interim measures on 22 April, 12 June and 23 September 2020.

The facts as submitted by the author

2.1 On 8 May 2019, the author applied for A.E.A. to be enrolled in school, using the regular procedure established under the domestic laws of the State party.[1] She attached to the application the certificate of his birth in Melilla, his health card and his Moroccan passport. On 28 October 2019, after the school year had begun without her having received a response from the authorities, she requested that the courts order her son's enrolment,[2] but she received no response to her request.

2.2 On 24 January 2020, given the authorities' continued silence, the author petitioned the administrative courts for an emergency provisional remedy or, alternatively, a regular provisional remedy ordering her son's enrolment in order to prevent the irreparable harm of the loss of a school year. In order to prove that A.E.A did actually reside in Melilla, the author attached a record of his vaccinations in Melilla, a gas supply contract in his father's name and a copy of a police report for theft filed by his father, which showed the same address that appeared on all the other documents. Administrative Court No. 2 denied the request for an emergency provisional remedy on 30 January 2020 and the request for a regular provisional remedy on 10 February 2020. On 11 February 2020, the author again sought a provisional remedy on the basis of a request for interim measures made by the Committee in an individual communication similar to the present one.[3] This request for a provisional remedy was denied on 28 February 2020, as the Committee's request applied to a communication unrelated to the author's case.

2.3 On 13 February 2020, after the court had denied the request for a provisional remedy for the first time, the author filed an appeal with the Litigation Division of the High Court of Justice based in Málaga. According to the author, this appeal is an ineffective remedy in the face of irreparable harm because it does not have suspensive effect.

2.4 The author adds that, since a sister of A.E.A., I.E.A., has been enrolled in the State education system since the 2018/19 school year, the refusal to enrol A.E.A. is incomprehensible.

2.5 The author states that, in order for a foreign national's name to be recorded in the Melilla municipal register, unlike in the rest of Spain he or she must be in possession of a residence permit or visa, meaning that the municipal registration process is tied to the lawfulness of the foreign national's administrative status. The author argues that this requirement, which is contained in article 16 (2) of Act No. 7/1985 of 2 April establishing the basic provisions of local government, is contrary to domestic law, which provides that the right to education is universal, and thus enjoyed by foreign children on an equal basis with Spanish children regardless of their administrative status.[4] On 7 November 2008, the Government Advisory Office of the City of Melilla refused municipal registration to A.E.A.'s father on the grounds that he did not have a residence permit.

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[1] Order No. ECD/724/2015 of 22 April on student admissions in public and charter schools at the upper preschool, primary and lower and upper secondary levels in the cities of Ceuta and Melilla.

[2] Pursuant to article 29 (2) of Act No. 29/1998 of 13 July on Administrative Courts.

[3] Communication No. 111/2020, which was then pending before the Committee. See also the Committee's decision in *A.B. v. Spain* (CRC/C/85/D/111/2020), para. 4.

[4] Pursuant to article 9 of Organic Act No. 4/2000, of 11 January, on the rights and freedoms of foreign nationals in Spain and their social integration.

2.6 The author adds that her son A.E.A. and her daughters have for years been attending an unregulated education centre called the Residence for Muslim Moroccan Students in Melilla, which is neither accredited nor recognized as a school. This means that her children will not be able to earn the diplomas needed in order to thrive and integrate in their country of residence and live and work there with dignity, and this places them in a situation of social exclusion.

2.7 According to the author, the difficulties involved in enrolling minors of Moroccan origin born and residing in Melilla have been reported publicly and are well known. These difficulties have also been decried on a regular basis by civil society and even by the Ombudsman.[5] Ultimately, these children are being denied access to school because they are being discriminated against on the grounds of their nationality and origin, in violation of the principle of the best interests of the child.

The complaint

3.1 The author states that, since A.E.A. was born in Melilla and ample proof of his residence in the city has been provided, the only explanation for the refusal to enrol him in school is that he is being discriminated against on the grounds of his Moroccan origin and his lack of a residence permit, in violation of article 2 of the Convention.[6]

3.2 The author argues that, because primary education is not only a right but also an obligation, denying A.E.A such education is contrary to his best interests, in violation of article 3 of the Convention.[7] The author adds that at no point has any effort to determine her son's best interests been made.

3.3 The author claims that not being enrolled in school is hindering her son's proper development and preventing him from enjoying a decent quality of life and developing all his capacities, in violation of articles 28 and 29 of the Convention.

3.4 The author stresses that, as its name indicates, the educational centre attended by A.E.A. is not secular, which means that he is being forced to be educated in the Muslim religion, in violation of his and his parents' right to religious freedom, protected under article 14 of the Convention.

3.5 In the light of the foregoing, the author requests that A.E.A. be immediately enrolled in school.

Additional information provided by the author[8]

4. On 16 April 2020, the author reported that the authorities had not moved forward with her son's enrolment. She stated that she had again petitioned for a provisional remedy at the domestic level in the light of the Committee's request for interim measures but had so far received no response.

State party's observations on the request for interim measures

5.1 On 11 May 2020, the State party submitted its observations on the request for interim measures.[9] It argues that the State party's obligations with respect to the request made by the Committee are limited, under article 6 (1) of the Optional Protocol, to its urgent consideration

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[5] The author cites *El País*, "Más de 200 niños sin documentos viven pendientes de su escolarización en Melilla", 1 August 2019, available at https://elpais.com/sociedad/2019/07/31/actualidad/1564596428_176991.html.

[6] The author cites general comment No. 1 (2001), which states: "Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities." (para. 10)

[7] The author cites general comment No. 14 (2013), para. 79.

[8] The written submission from the author's counsel also dealt with communications No. 111/2020 and No. 113/2020 (*B.B. v. Spain*, CRC/C/86/D/113/2020), also before the Committee.

[9] These observations also addressed communications No. 111/2020, No. 113/2020, No. 114/2020 and No. 116/2020, also before the Committee.

of the interim measures requested. The State party argues that it has scrupulously complied with this obligation.

5.2 The State party argues that the Committee's request failed to demonstrate either that there were exceptional circumstances or that the author's son might suffer irreparable damage if the measures requested were not taken. The State party warns that the child would be harmed if, after his immediate, provisional enrolment, it was decided at the end of the proceedings that the measure should be lifted, as this would mean that he had to leave an educational environment into which he may have settled. The State party argues that such harm could be greater than the harm that might result from the enrolment, if it were to happen, being delayed for a certain period of time.

5.3 The State party notes that it has forwarded the contents of the author's communication to the Ministry of Education and Vocational Training for urgent review of her son's situation, along with the administrative files relating to his enrolment application, for an assessment of whether the interim measure requested by the Committee should be adopted. The State party asserts that, in communication No. 111/2020, the child in question had been registered in the municipal register and, after various branches of the police had conducted visits confirming that she genuinely resided in Melilla, she was enrolled in and attends school on a permanent basis.

Additional information submitted by the author[10]

6.1 On 5 June 2020, the author reported that the published lists of children accepted for the 2020/21 school year showed that her son had been excluded for the year because his paperwork was allegedly incomplete. The authorities had not, however, told the author which documents were missing. The author points out that police personnel had gone to the home of the author of communication No. 111/2020, which was currently before the Committee, to confirm that the author and her daughter resided in Melilla, resulting in the daughter's enrolment in school, but that such a step had not been taken for her son.

6.2 On 25 June 2020, the author again submitted supplementary information, indicating that, once the enrolment process for the 2020/21 school year had ended, the decision to exclude A.E.A. had become final. The author added that she had been informed, during a telephone meeting with staff of the school enrolment board, that they had been instructed not to enrol children whose names were not in the municipal register and/or did not have a certificate from the social welfare services, and that the Committee's requests for interim measures had no binding effect.

6.3 On 16 September 2020, the author again submitted additional information, indicating that the border with Morocco had been closed. This means that her presence in Melilla alone demonstrates that she and her son reside there, since even if they did live in Morocco, as the State party seems to claim, they would not be able to cross the border to return to their alleged place of residence. The author adds that the Moroccan Islamic centre is closed, leaving A.E.A. without even that possibility. The situation is therefore extremely serious and, consequently, enrolment on a provisional basis can in no way be considered worse than the existing situation.

State party's observations on admissibility and the merits

Observations on the account of the facts and the context

7.1 On 21 December 2020, the State party submitted its observations on the admissibility and merits of the communication. In its observations, it gave the following account of the facts: the author applied to enrol her son in school on 9 May 2019, claiming that she lived at 11 Siyon Street and providing certain documents to support this claim. The application was rejected on the grounds that the documentation submitted did not prove that the child actually resided in Melilla. The author again applied to enrol A.E.A., for the 2020/21 school year, and

[10] The first two written submissions were from the author's counsel and also dealt with communication No. 113/2020, also before the Committee. The third addressed communications Nos. 113/2020–118/2020 and was submitted by the various representatives of the authors of these communications.

again gave 11 Siyon Street as the family's address. The application was again rejected, on the same grounds. The documents submitted, according to the State party, included the child's birth certificate, his Moroccan passport, documentation relating to a request made to the city health authorities by various members of his family to receive health-care services because of "special circumstances" and a gas supply contract for 9 Siyon Street, signed in 2004 (without providing evidence that the contract is still in force). Between the months of September and November 2020, the local education authorities asked the Provincial Immigration and Border Force to check the actual residences of various children who had asked to be enrolled in schools in Melilla. The National Police established that the author's family, including A.E.A., do actually reside at 11 Siyon Street.

7.2 The State party claims that the legal proceedings relating to the enrolment application for the 2019/20 school year were initiated in order to determine whether there had been administrative silence, without going into the question of whether A.E.A. was entitled to be enrolled in school. Melilla Administrative Court No. 2 found that the authorities had indeed made an express pronouncement when they published a list of accepted students that did not include A.E.A. The appeal against this decision was accepted for consideration on 19 November 2020 but, on 16 December, the State Legal Service filed a brief opposing the appeal. With respect to the legal proceedings relating to the enrolment application for the 2020/21 school year, the State party notes that, on 9 December 2020, the same court referred the complaint to the State Legal Service, which was required to respond within 20 working days. The State party notes that these proceedings address the question of whether the inclusion of A.E.A. on the list of students who needed to provide additional documentation was consistent with the law. In these proceedings, the court rejected the request for a provisional remedy on 2 December 2020, after finding that there was insufficient evidence in the author's submissions to make a prima facie case or to demonstrate the potential harm that the child might suffer if the complaint was ultimately dismissed.

7.3 The State party explains that its laws recognize the absolute and unconditional right of foreign children living on its soil to access education under the same conditions as Spanish citizens, regardless of their parents' administrative status.[11] It adds that the authorities attach great importance to promoting access to education for foreign children, as education is essential for their integration into Spanish society.[12] It further states that, in Melilla, approximately 13 per cent of students in non-university education are foreign nationals and, specifically, 20 per cent of students in preschool, primary and compulsory secondary education. Of the total number of foreign students in Melilla, 90 per cent are of Moroccan origin.

7.4 The State party explains that municipal registration is required in order to prove actual residence in the municipality where enrolment is requested and proximity to a particular school. It adds that municipal registration involves having one's name recorded in a public register called the Municipal Register of Inhabitants. The data contained in this register constitute proof of residence and habitual domicile. As a general rule, the names of foreign nationals in an irregular situation can be recorded in the register upon presentation of a passport from their country of origin. However, there is an exception in municipalities such as Melilla that have a special visa exemption regime for local border traffic.

7.5 The State party explains that, with a population of around 85,000, Melilla has the highest population density in Spain and one of the highest in Europe, at more than 7,000 inhabitants per km^2. The Moroccan province of Nador, which surrounds Melilla, has a population of over 500,000 and its largest city, the city of Nador, is located 16 km from Melilla. The State party explains that, under the special regime established between Spain and Morocco, any person residing in Nador may cross the border to spend the day in Melilla

[11] The State party cites article 9 of Organic Act No. 4/2000; and article 1 of Organic Act No. 8/1985 of 3 July, on the right to education.

[12] The State party notes as an example that foreign nationals who have children of compulsory school age (from 6 to 16 years of age) in their care and have to undertake certain government formalities are required by law to provide proof of the children's enrolment in school.

and cross it again to return to Nador the same day.[13] In practice, the border is crossed by around 40,000 people on foot and 10,000 vehicles every day.

7.6 According to the State party, inhabitants of nearby border towns such as Beni Enzar and the city of Nador cross the border daily and try to access various services offered by the city of Melilla, including educational, health and social welfare services, despite the fact that they live in Morocco. It is even common for Moroccan and Spanish citizens who work in Melilla to choose to live in Morocco because of the difference in housing prices. In many cases, when they cross the border, they are accompanied by their children, who attend school in Melilla. The State party adds that, to facilitate the border crossing for children who enter and leave Melilla every day in order to go to school in the city, there is a special border crossing where they do not have to wait in any form of queue, unlike at the regular crossings.

7.7 The State party asserts that several hundred Moroccan children residing in border areas adjacent to Melilla are enrolled in schools in Melilla. This fact was very clearly demonstrated after the closure of the border agreed because of the coronavirus disease pandemic, in that, between September and October 2020, 439 Moroccan students did not attend classes and attributed their absence to the fact that they could not cross the border to reach Melilla, thereby demonstrating that they reside in Morocco. The State party adds that unlawful practices have been detected, both in isolation and as part of organized networks, whereby fraudulent means (including the forging of documentation) are used to obtain documents establishing a fictitious residence in Melilla.

7.8 The State party explains that, because of the special regime in force in Melilla, foreign nationals must have the appropriate visa in order to be registered as residents in the Melilla municipal register. Municipal registration is a prerequisite for accessing public education.[14] However, because municipal registration is difficult for persons residing unlawfully in Melilla, the education authorities have agreed to accept other, alternative proofs of residence. Acting on a proposal from the Admissions Oversight Commission, the Ministry of Education and Vocational Training agreed to allow the possibility of submitting a health card in the child's name, together with an electricity supply contract in the name of one of the parents, concluded at least six months earlier, as proof of residence.

7.9 The State party claims that Melilla is in an especially critical situation because its schools are full, there is no space in the city to enlarge them, and the number of students that they can accommodate cannot be increased. Melilla has the largest class sizes in Spain, with 28 students per class at the preschool level and 29 students per class at the primary and lower secondary levels, in most cases exceeding the levels set under the applicable regulations. The State party asserts that the number of applications for the enrolment of children from the province of Nador is very high and continues to increase. According to the State party, it is therefore necessary to exercise particular caution and rigour when assessing applications submitted by children from the province of Nador and to verify, in each case, that their actual residence in Melilla has been proven. If it has not, they must be enrolled in Morocco.

Observations on admissibility

7.10 The State party argues that the communication is inadmissible under article 7 (e) of the Optional Protocol for failure to exhaust domestic remedies. It asserts that proceedings regarding enrolment for the 2019/20 school year were under way before the administrative courts at the time the communication was submitted to the Committee, and that these proceedings are now at the appellate stage. Moreover, the question to be determined by these proceedings is not whether the author meets the requirements for enrolment, but rather whether, by apparently remaining silent, the authorities agreed to enrol A.E.A. The

[13] This regime is established under article 41 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), which maintains the regime that has been in place between the State party and Morocco since 1985 regarding the territories of Melilla and Ceuta.

[14] Decision of 14 February 2019 of the Office of the Secretary of State for Education on the process for admitting students to public and charter schools at the upper preschool, primary and lower and upper secondary levels in the cities of Ceuta and Melilla for the 2019/20 school year.

proceedings relating to the rejection of the enrolment application for the 2020/21 school year are also at the appellate stage.

7.11 The State party argues that direct access to the Committee cannot be allowed before domestic legal proceedings have come to an end, as domestic courts must be given the opportunity to reach a decision, within a reasonable period of time, on the merits of the cases brought before them. It adds that the fact that no decision on the merits has yet been reached with respect to whether A.E.A. meets the requirements for enrolment, specifically the requirement that he actually resides in Melilla, can be attributed to the author’s domestic counsel; if, instead of improperly raising the procedural claim regarding the alleged administrative silence, he had appealed the decision to refuse enrolment, the court would have been able to rule on the merits of the claim and determine whether or not the refusal had been consistent with the law. This is borne out by the fact that a decision on the merits has already been reached at first instance in the second suit, relating to the 2020/21 school year. The State party argues that there is no justification in the case at hand for the author not having awaited the completion of the legal proceedings before turning to the Committee and to be seeking a ruling from the Committee per saltum, without taking into account the views of the domestic courts.

Observations on the merits

7.12 The State party contests the assertion that the reason that A.E.A., like other children in a similar situation who have brought complaints before the Committee, is unable to enrol in school is because he is in Melilla in an irregular situation and does not have a residence permit or visa. The State party recalls that all children in Spain have an absolute right to education, on equal terms, regardless of their nationality or administrative status.

7.13 The State party argues that, while it is true that the particular situation in Melilla makes municipal registration especially difficult for foreign nationals in an irregular situation who live there, this difficulty does not prevent children with an irregular residential status from enrolling in school, since the Ministry of Education and Vocational Training has agreed to accept other additional means as proof of actual residence in the city. According to the State party, A.E.A. was refused enrolment because his actual residence had not been proven using the means permitted under the applicable regulations. It adds that none of the documents submitted either with the enrolment application or thereafter constitute reliable proof of the child’s actual, ongoing residence in Melilla.

7.14 According to the State party, a certificate of birth in Melilla is not proof of actual residence, as pregnant women living in Nador often go to Melilla Hospital to give birth because the conditions there are better than in the Moroccan health system and they receive the same care as Spanish nationals, free of charge. The following also do not constitute proof of actual residence: the gas supply contract in the name of the child’s father, which relates to a house adjacent to the one in which the child allegedly lives and was signed more than 15 years ago; the 2008 administrative decision refusing to record the father’s name in the Melilla municipal register, with nothing to indicate that the father has made any further attempts to be registered; and the documentation relating to a request made by various members of the child’s family to receive health-care services for “special reasons”. The State party adds that the fact that the documentation submitted was inadequate is not a bar to the future submission of new documents – for example, the documents produced by the National Police after verifying the child’s residence – that could provide proof of actual residence and which the education authorities would then duly assess.

7.15 On the basis of the foregoing, the State party concludes that there has been no violation of articles 2, 3, 28 or 29 of the Convention. It adds that there is nothing under these articles or any other domestic or international law that requires the State party to enrol in its schools children who cannot provide proof of actual residence in its territory. The State party asserts that there was no discrimination against A.E.A. because of his status as a foreign national, as the decision not to enrol him had nothing to do with his not having a municipal registration certificate or a residence permit; rather, the decision was based on the fact that his actual residence in the State party had not been proven, either at the time his enrolment application was submitted or thereafter.

7.16 The State party requests that the communication be declared inadmissible or, in the alternative, that it be dismissed on the grounds that no violation of the Convention has been found.

Author's comments on admissibility and the merits

Comments on the account of the facts and the context

8.1 On 27 January 2021, the author submitted her comments on admissibility and the merits. With respect to the proceedings relating to the 2019/20 school year, the author states that the director of the school did not expressly issue an official decision or notify the author of the decision to refuse to enrol her son, as required under the relevant regulations,[15] nor were any lists published, as the law requires; the deadlines for publishing the provisional and final lists of accepted and excluded children were 21 and 28 May 2019, respectively, and 5 and 14 June 2019, respectively, in the case of the Admissions Oversight Commission.[16] The author claims that no such lists were published, either of the children accepted or of those excluded; that the date on the Commission's list (21 June) was later than the deadline set; and that the list only identified "students for whom supporting documents are required", without specifying the documents needed for each child. These were the circumstances that prompted the author to initiate the first lawsuit. The author adds that the State party neglected to mention that it had been pointed out that a sister of A.E.A. was already enrolled in school.

8.2 The author adds that she was summoned to appear before the High Court of Justice of Andalucía, Ceuta and Melilla on 5 January 2021, which means that 2020 had elapsed in its entirety before the appellate proceedings began. Throughout this period, A.E.A. was not in school. Furthermore, although the author had been summoned to appear before the same court on 3 March 2020 in connection with her appeal against the decision dismissing her request for a provisional remedy, no decision has yet been reached on that appeal.

8.3 The author argues that, in any event, given that her son's enrolment is obligatory, even if certain documents may be missing, the situation should be remedied ex officio and the State party should adopt a much more proactive approach. She adds that a general list of "students for whom supporting documents are required" that does not specify which documents are missing is insufficient to satisfy this obligation.

8.4 The author states that the schools did publish lists for the 2020/21 school year and that she provided additional documentation proving her son's actual residence in Melilla. In addition, since the initiation of the second lawsuit regarding her son's enrolment, in May 2020, the borders have been closed and she and her family have since been unable to leave Melilla. The author notes that, on 2 December 2020, her request for a provisional remedy was dismissed in the proceedings regarding this suit as well, and her appeal against this decision was accepted for consideration on 4 January 2021. The author highlights that the reasoning of Melilla Administrative Court No. 2 in denying her request for a provisional remedy was as follows:

> Granting the request for a provisional remedy could, however, indeed result in harm: on the one hand, harm to the other students of the school chosen by the plaintiff and, on the other, harm to the child claimant, if the complaint is later dismissed. We do not know how many students there are in the classes and whether the claimant speaks Spanish and has a level of education comparable to the students of the school that he wishes to attend. The foregoing would be detrimental to the quality of education of the other students.

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[15] The author cites article 17 (10) of Order No. ECD/724/2015 of 22 April on student admissions in public and charter schools at the upper preschool, primary and lower and upper secondary levels in the cities of Ceuta and Melilla.

[16] The author refers to annex VI to the decision of 14 February 2019 of the Office of the Secretary of State for Education and Vocational Training on the process for admitting students to public and charter schools at the upper preschool, primary and lower and upper secondary levels in the cities of Ceuta and Melilla for the 2019/20 school year.

> Therefore, in weighing up the competing interests, the public interest must prevail over the parents' mere expectation that their child should have access to the Spanish education system.[17]
>
> Finally, with regard to the submission from the Committee on the Rights of the Child, the Committee has no power to bind the Spanish State (without going into the matter in depth) and the courses of action available to it are limited to proposing a meeting that may lead to a "friendly settlement" (article 9 of the Optional Protocol).[18]

The author states that such arguments take no account of educational diversity, show no respect for children who may have problems with the Spanish language – which is not the case for A.E.A. – and overlook the fact that he will be behind in school because he will have entered the education system late. She adds that they also show disdain for the Committee's request for interim measures and disregard the many decisions in which the Committee has found the failure to comply with a request for interim measures to be in itself a violation of the Optional Protocol.

8.5 The author emphasizes that, even though a report from the Provincial Immigration and Border Force, which the State party itself acknowledges, has confirmed that A.E.A. and his family do actually reside in Melilla, A.E.A. has still not been enrolled in school. This is reflected in a statement made by the Provincial Director of the Ministry of Education and Vocational Training in Melilla, who, after receiving the report, asked the Government Representative in Melilla for her:

> assistance in confirming whether these children and their families are lawful residents of the city and in proceeding accordingly, as the Provincial Education Directorate is not competent to make a legal determination regarding allegedly irregular stays in Melilla. This request for assistance is prompted by the lack of documentation ... demonstrating any type of authorization to reside in Spain, which, consequently, precludes enrolment in any of the city's schools.[19]

This shows that, in practice, the highest government office on matters of education in Melilla clearly imposes a requirement of lawful residence.

8.6 The author asserts that the State party's observations regarding the context in Melilla are irrelevant to her son's case for three reasons. First, the authorities themselves, through the police, have acknowledged that A.E.A. and his entire family reside in Melilla. Second, a series of documents have been submitted to the Committee and to the local authorities to attest to her son's actual residence in Melilla. Finally, the border could no longer be crossed after 13 March 2020 and will very likely remain closed throughout the 2020/21 school year. Given this situation, the right to education of all children in Melilla should have been ensured; however, it has not been, and dozens of children have remained excluded from the school system throughout these months. The author adds that it is noteworthy that the State party recognizes that 439 students have stopped attending classes; this means that 439 school places have been available since the closure of the border, but these places have not been filled by the 200 or so students who, with the border closed, have asked to be enrolled because they find themselves in Melilla.

8.7 The author adds that, under the regulations for the 2020/21 school year, actual residence could be proven "by means of a certificate issued by the social welfare services".[20] The administrative file indicates that such a certificate has been requested for A.E.A., but no reply has been received from the social welfare services. The author argues that members of the public cannot be required to produce documents when they have no control over their issue. She reiterates that, in any event, it is clear that the State party is unwilling to enrol A.E.A., since it continues to refuse to enrol him even though there is a police certificate

[17] Melilla Administrative Court No. 2, decision No. 351/2020, of 2 December 2020, collateral proceeding regarding provisional remedy 13/2020, regular proceeding 13/2020, third paragraph.
[18] Ibid., fourth paragraph.
[19] Note in the administrative file, dated 10 November 2020.
[20] Decision of 26 February of the Office of the Secretary of State for Education on the process for admitting students to public and charter schools at the upper preschool, primary and lower and upper secondary levels in the cities of Ceuta and Melilla for the 2020/21 school year, point 15.

attesting to the fact that he does actually reside in the city. The author adds that, although she is aware of the difficulties facing the education authorities in Melilla, these difficulties should not detract from the need to guarantee the exercise of the fundamental right to education of children, who are one of the most vulnerable population groups. A.E.A. is not a child who crosses the border every day, as has been demonstrated. Acting with prudence and rigour to counter fraud should never be used as a reason to punish children, like A.E.A., who actually live in Melilla.

Comments on admissibility

8.8 The author argues that article 7 (e) of the Optional Protocol does not require domestic remedies to be exhausted if they are ineffective or unreasonably prolonged. The appeal regarding the provisional remedy requested for the 2019/20 school year has been pending before the High Court since March 2020, while the decision on the merits of 7 July 2020 has only just been referred to this same court. The author states that these remedies are clearly ineffective given the intended aim, which was to have A.E.A. enrolled before the end of the school year. The same can be said of the proceedings regarding her son's enrolment for the 2020/21 school year, which are still at the stage in which the complaint is answered. The provisional remedy requested in connection with these proceedings was denied on 2 December 2020, and this decision is now under appeal. The author claims that, given these time frames, her son will miss the 2020/21 school year.

8.9 The author adds that she did not submit the present communication to the Committee until after the Melilla court had denied her request for a provisional remedy. Once that request had been denied, the remedies available were ineffective and prolonged, as the passage of time has shown. The author is therefore of the view that she did not have to exhaust other domestic remedies.

Comments on the merits

8.10 The author argues that it has been demonstrated that the highest government office in matters of education in the city of Melilla ties school enrolment to lawful residence, as, after it had been verified that A.E.A. and his family actually resided in the city, the office inquired into whether they were lawfully resident for purposes of enrolment (see para. 8.5 above). The author reiterates that equality between residents in regular and irregular situations for purposes of school enrolment is officially recognized under domestic law. However, this recognition is, in reality, illusory, since an irregular administrative status acts as an insurmountable obstacle to school enrolment in Melilla.

8.11 The author adds that it can also be seen from communications No. 111/2020 and No. 113/2020, also before the Committee, that actual residence is insufficient for enrolling a child in school in Melilla. The first communication involved a child who was enrolled only after the Committee intervened, even though her name appeared in the municipal register. The four children involved in the second communication had a report of long-term stay demonstrating that their family had actually resided in Melilla for over 30 years, but they were not enrolled in school until their names were recorded in the municipal register.

8.12 The author argues that all the documents that she has submitted to the administrative and judicial authorities have provided clear evidence of her actual residence, which has been corroborated by the police report. She notes that the State party asserts that the police report, dated 4 November 2020, will be duly assessed (see para. 7.14 above). However, three months have passed since this report was issued and A.E.A. has still not been enrolled in school and proof of his lawful residence continues to be requested.

8.13 According to the author, the foregoing shows that children of Moroccan origin, including A.E.A., are being discriminated against on the basis of their administrative status and that of their parents. The authorities continue to deny A.E.A. admission into the education system even though his actual residence has been proven and there is no justification for failing to enrol him or delaying his enrolment since he is of compulsory school age. The foregoing is in violation of article 3 of the Convention, read in conjunction with articles 28 and 29, and of article 2.

8.14 The author adds that the failure to comply with the Committee's request for interim measures is a violation of article 6 of the Optional Protocol. She notes that the Committee has already addressed the compulsory nature of interim measures on several occasions.[21]

8.15 The author requests: (a) that the communication be declared admissible; (b) that violations of the articles of the Convention mentioned above be found, and A.E.A. be immediately enrolled in school; (c) that the State party be urged to take the necessary steps to comply with the Convention in terms of enrolling children who actually reside in Melilla by relaxing the criteria for proving their residence and requiring the police to verify the residence of all applicants for enrolment; (d) that the State party be urged to comply with the interim measures requested by the Committee; and (e) that adequate reparation be granted in the form of compensation and rehabilitation for the harm suffered by her son as a result of having been deprived of his right to an education for at least two school years, with compensation being provided at the rate of €3,000 for each school year that he has missed and will miss as long as he has not been enrolled.

Further information submitted by the author

9. On 7 April 2021, the author informed the Committee that the Ministry of Education and Vocational Training, in exercise of its certiorari powers over local authorities,[22] had decided to admit her son to school on 16 March 2021. However, having missed a full school year and two trimesters of the next year, and given the conflict surrounding the school enrolment of children in Melilla, the author is requesting the Committee to issue a prompt decision on the alleged violations.

Further information submitted by State party

10. On 31 May 2021, the State party informed the Committee that, on 13 April 2021, A.E.A. had been enrolled in the Mediterranean Primary School (Colegio de Educación Infantil Mediterráneo). The State party requests that consideration of the communication, which has become moot as a result of A.E.A. being admitted to school, be discontinued, in accordance with rule 26 of the Committee's rules of procedure.

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, whether the communication is admissible under the Optional Protocol.

11.2 The Committee notes the State party's argument that the communication is inadmissible for failure to exhaust domestic remedies given that: (a) proceedings regarding enrolment for the 2019/20 school year were under way before the administrative courts and these proceedings are now at the appellate stage; (b) the question to be determined by these proceedings is not whether A.E.A. meets the requirements for enrolment but whether, by allegedly remaining silent, the authorities agreed to enrol him; and (c) the proceedings relating to the rejection of the enrolment application for the 2020/21 school year are also at the appellate stage. The Committee also notes the State party's argument that the author improperly raised the procedural claim regarding the alleged administrative silence instead of appealing the decision to refuse her son's enrolment. According to the State party, had the author done the latter, a decision on the merits could already have been reached, as in the proceedings relating to the 2020/21 school year. At the same time, the Committee notes the author's argument that the remedies available were ineffective for the purposes of her son's enrolment and had been unreasonably prolonged. In particular, the Committee notes the author's argument that she turned to the Committee only after her first request for a provisional remedy had been denied and the passage of time has shown that all the remedies

[21] The author cites *M.T. v. Spain* (CRC/C/82/D/17/2017); *M.B.S. v. Spain* (CRC/C/85/D/26/2017); and *M.A.B. v. Spain* (CRC/C/83/D/24/2017).

[22] Pursuant to article 10 of Act 40/2015, of 1 October, on the Public Sector Legal Regime.

she has sought have been ineffective. The Committee notes that the author filed for the provisional remedies necessary to have A.E.A. enrolled and that these were denied. The Committee notes that almost two years have elapsed since the author submitted the first enrolment application for her son without a final decision on her legal claims being reached until the Ministry of Education and Vocational Training intervened. It also notes the denial of the author's domestic requests for provisional remedies and the failure to comply with the Committee's request for interim measures, dated 10 March 2020, which sought the immediate enrolment of A.E.A. In the Committee's view, the prolonged exclusion of a child from primary education constitutes irreparable harm within the meaning of article 6 of the Optional Protocol. Taking into account the foregoing, the fact that, almost two years after the application to enrol A.E.A. was submitted, the courts have still not reached a final decision on the application, and the denial of all of the author's requests for provisional remedies, the Committee is of the view that the domestic legal proceedings were unreasonably prolonged and that, as a result, the author was not required to exhaust them in accordance with article 7 (e) of the Optional Protocol.

11.3 The Committee notes the author's claim that, because her son is being excluded from the Spanish education system, he must go to a religious centre and be educated in the Muslim religion, in violation of his right to freedom of religion under article 14 of the Convention. However, the Committee notes that the author has never raised this claim in the domestic proceedings and has therefore not exhausted domestic remedies for the purposes of article 7 (e) of the Optional Protocol.

11.4 With respect to the author's claims under article 29 of the Convention, relating to the characteristics required of an education, the Committee is of the view that they have not been sufficiently substantiated for the purposes of admissibility and therefore finds them inadmissible under article 7 (f) of the Optional Protocol.

11.5 However, the Committee is of the view that the author has sufficiently substantiated her claims, under articles 2, 3 and 28 of the Convention, that the right of access to education of A.E.A has been violated; that A.E.A was discriminated against on the grounds of his national origin and administrative status; and that his best interests were not duly considered when he was denied access to compulsory education. The Committee notes that, although A.E.A. was enrolled in school on 16 March 2021, almost two years after his application was submitted on 19 May 2019 and a year after the Committee requested that he be immediately enrolled as an interim measure, because of the delay he has missed almost two full academic years of primary education. The Committee considers that A.E.A.'s late enrolment has not provided comprehensive reparation for the potential violations of his rights under the Covenant that require consideration on the merits by the Committee. The Committee therefore finds 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 Committee recalls that, under article 2 of the Convention, States parties must respect and ensure the right of all children under their jurisdiction to access education, without distinction of any kind. In addition, because enjoyment of the rights contained in the Convention follows from access to education, it is imperative that the best interests of the child be a primary consideration in any procedure aimed at a child's enrolment in school.[23]

12.3 The Committee must make the following three determinations: (a) whether the State party has violated the right of A.E.A. to access education under article 28 of the Convention; (b) whether the refusal to enrol A.E.A. constituted discriminatory treatment under article 2 of the Convention, read in conjunction with article 28; and (c) whether the procedure for the

[23] See general comment No. 14, paras. 30 and 79.

child's provisional enrolment took due account of his best interests under article 3 of the Convention, also read in conjunction with article 28.

12.4 On the first point, the Committee recalls that the right to education "epitomizes the indivisibility and interdependence of all human rights"[24] and that its importance is such that the Convention provides not only for the right of every child to have access to an education (art. 28) but also for an "individual and subjective right to a specific quality of education".[25] The Committee is also of the view that the right to education should be guaranteed to all children of compulsory school age, regardless of their nationality or administrative status. The Committee notes that, in the case at hand, both the State party and the author agree that it has been recognized that all children have an absolute right to education in Spain, on an equal basis and regardless of their nationality or administrative status. The Committee notes the State party's argument that the refusal to enrol A.E.A. was related not to his national origin or administrative status, but to the fact that his actual residence in Melilla had not been proven. However, the Committee notes the author's argument that, despite the official recognition under domestic law, the facts reveal that, in practice, A.E.A., like all children with an irregular administrative status residing in Melilla, faces obstacles that prevent his enrolment.

12.5 The Committee notes that, as acknowledged by the State party, the Provincial Immigration and Border Force of the Spanish National Police confirmed that A.E.A and his family were genuinely residing at the address provided by the author in her judicial and administrative complaints after visiting their home in November 2020. The Committee also notes the author's claim, which is uncontested by the State party, that a sister of A.E.A. has been enrolled in school since the 2018/19 school year. Finally, the Committee notes that, even though the National Police had attested to the family's actual residence, the competent education authority continued to require confirmation that they are "lawful residents" (see para. 8.5 above), which prevented A.E.A. from being enrolled in school until the Ministry of Education and Vocational Training exercised its certiorari powers to order his enrolment. The foregoing reveals that, although all children's right to education, regardless of their administrative status, is recognized under domestic law, the competent local education authorities are, in practice, using lawful residence as a prerequisite for A.E.A. to gain access to the education system.

12.6 The Committee recalls that article 2 of the Convention explicitly requires States parties to respect and ensure the rights set forth in the Convention, which implies the following:

> The obligation to respect [the right to education] requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal.[26]

12.7 The Committee notes the State party's argument that none of the documents submitted by the author constitute reliable proof of her actual residence. The Committee recalls that, as a general rule, it comes under the jurisdiction of national bodies to examine the facts and evidence and to interpret domestic law, unless such examination or interpretation is clearly

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[24] Committee on Economic, Social and Cultural Rights, general comment No. 11 (1994), para. 2.

[25] General comment No. 1, para. 9.

[26] Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999), para. 47. See also general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child (2017), which states: "The Committees strongly urge States to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented children, from registering at schools and educational institutions", para. 60.

arbitrary or amounts to a denial of justice.[27] However, in the case at hand, the Committee is of the view that the documents furnished by the author in applying for her son's enrolment constitute, as a minimum, sufficient evidence of his residence to give rise to an obligation on the part of the State party to proactively conduct the necessary checks to confirm his actual residence. In the case at hand, the Committee notes that the National Police confirmed the actual residence of A.E.A. after a visit to his home in November 2020, that is, almost 18 months after the author submitted the application for his enrolment. The Committee is of the view that, in addition to being required to immediately enrol A.E.A. upon confirmation of his actual residence in Melilla, the State party should have taken all the necessary steps to confirm his actual residence in an expeditious manner. In the case at hand, the Committee cannot consider 18 months to be a reasonable time period for the fulfilment of this obligation. In the absence of any further explanation from the State party as to why A.E.A. was not immediately enrolled following the official verification of his actual residence in Melilla, the Committee is of the view that his right of access to education under article 28 of the Convention has been violated.

12.8 On the second point to be determined – namely, whether the refusal to enrol A.E.A. constituted discriminatory treatment under article 2 of the Convention – the Committee recalls that the discrimination prohibited by article 2 may be "overt or hidden".[28] This means that discrimination can be de jure or de facto and direct or indirect.[29] In the case at hand, the facts have shown direct, de facto differentiation based on the irregular administrative status of A.E.A and, consequently, his national origin. Once again, the Committee notes that, although the State party itself recognizes that those living on its soil have an unrestricted right to education, the author has shown that, despite the National Police's official confirmation of her son's actual residence in Melilla, the local authorities still refused to enrol him. In the absence of any justification by the State party for such a distinction based on the administrative status of A.E.A., the Committee is of the view that the failure to enrol A.E.A. for almost two years constituted a violation of his right not to be discriminated against under article 2 of the Convention, read in conjunction with article 28.

12.9 With respect to the violation of article 3, the Committee notes that the State party has not provided information to explain how the best interests of A.E.A. were treated as a primary consideration in the judicial and administrative proceedings in which he was involved in order to secure his provisional enrolment in school.[30] The Committee notes that Melilla Administrative Court No. 2 refused to enrol A.E.A. on a provisional basis, ruling that "the public interest must prevail over the parents' mere expectation that their child should have access to the Spanish education system"(see para. 8.4 above). The Committee recalls that States have an obligation to respect and guarantee the right to education for all children under their jurisdiction, without discrimination of any form. The realization of this right cannot be subject to discretion, beyond verification of actual residence. In the context of the request for admission to school on a provisional basis, while A.E.A.'s actual residence was being established, the Court adopted an approach whereby it gave itself discretion beyond the verification of actual residence and weighed the different competing interests against each other. The Court gave preference to the general and unsubstantiated harm to all children attending the school in which A.E.A. would be enrolled if admitted, considering them greater

[27] See, inter alia, the Committee's decisions of inadmissibility in *A.A.A. v. Spain* (CRC/C/73/D/2/2015), para. 4.2, and in *Navarro Presentación et al. v. Spain* (CRC/C/81/D/19/2017), para. 6.4.

[28] General comment No. 1, para. 10.

[29] The Committee has on several occasions highlighted the need to combat de jure or de facto and direct and indirect discrimination, including in relation to access to education. See CRC/C/AUT/CO/3-4, para. 25; CRC/C/VNM/CO/3-4, para. 29; and CRC/C/THA/CO/3-4, para. 33. See also the various international instruments that recognize as discrimination any distinction based on purpose (intention) or effect (result): Convention against Discrimination in Education (United Nations Educational, Scientific and Cultural Organization), art. 1; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Convention on the Rights of Persons with Disabilities, art. 2; Human Rights Committee, general comment No. 18 (1989), para. 7; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7 (including mention of direct and indirect discrimination).

[30] See general comment No. 14, paras. 30 and 79.

than the benefits that A.E.A. would gain if he were admitted to the educational system on a provisional basis. Moreover, the Court made generalized assertions to the effect that it would be worse for A.E.A. to be granted provisional access to education that might later be revoked. The lack of an individualized assessment of the best interests of A.E.A. is evidenced by the fact that the Court claimed not to know whether he spoke Spanish or had an academic level comparable to that of the students at the school he was seeking to attend, and not to have taken account of the fact that his sister had already been admitted to school. In the light of the foregoing, the Committee is of the view that the best interests of A.E.A. were not a primary consideration in the proceedings related to his enrolment, in violation of article 3 (1) of the Convention, read in conjunction with article 28.

12.10 Lastly, the Committee notes the State party's failure to comply with the Committee's request, issued on 10 March 2020 and repeated on 22 April, 12 June and 23 September 2020, for interim measures consisting of the immediate enrolment of A.E.A. The Committee also notes the State party's argument that, under the Optional Protocol, its obligations are limited to the urgent consideration of the interim measures that it has been requested to adopt. The Committee further notes the argument of Melilla Administrative Court No. 2 that the interim measures requested by the Committee have no binding force whatsoever in relation to the State party and that the courses of action available to the Committee are limited to proposing a meeting that may lead to a "friendly settlement" (article 9 of the Optional Protocol) (see para. 8.4 above). Firstly, the Committee notes that article 9 of the Optional Protocol simply accords the Committee and the parties the option of reaching a solution outside the framework of the legal examination of the admissibility and the merits of an individual communication. Secondly, the Committee recalls that it has repeatedly found in its jurisprudence that, by ratifying the Optional Protocol, States parties assume an international obligation to take the interim measures requested under article 6 of the Optional Protocol, as such measures, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.[31] Consequently, the Committee considers that the failure to adopt the interim measures requested was itself a violation of article 6 of the Optional Protocol.

13. The State party should therefore provide A.E.A. with effective reparation for the violations suffered, which includes adequate compensation as well as taking proactive steps to help him to catch up at school and reach the same level as his peers as soon as possible. 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, when local administrative and judicial authorities receive documentation indicating that a child requesting to be enrolled in school in Melilla actually resides in the city, they take effective and expeditious steps to confirm the child's residence;

(b) Ensure that, if the actual residence of a child requesting to be enrolled is confirmed, the local administrative and judicial authorities enrol him or her immediately.

(c) Ensure that, when there is a dispute over a child's right to education, there is an effective and accessible remedy that may be provided promptly and expeditiously, and that both the children and their parents or guardians have full knowledge of this remedy and the related procedures;

(d) Provide specialized training for judges and administrative staff on the implementation of the Convention, and, in particular, on the best interests of the child.

14. 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 requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party is also requested to publish the present Views and to disseminate them widely.

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[31] See, inter alia, *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.11.