



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. 15/2017* **

<i>Communication submitted by:</i>	D.K.N. (represented by counsel, Mr. Albert Parés Casanova)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	13 March 2017
<i>Date of adoption of Views:</i>	1 February 2019
<i>Subject matter:</i>	Age assessment procedure in respect of an alleged unaccompanied child
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of the right of submission; incompatibility <i>ratione personae</i> ; non-substantiation of claims
<i>Article of the Convention:</i>	12
<i>Article of the Optional Protocol:</i>	7 (c), (e) and (f)

1.1 The author of the communication is D.K.N., a citizen of Ghana, who states that he was born on 6 August 1999. He claims to be the victim of a violation of article 12 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 In accordance with article 6 of the Optional Protocol, on 28 March 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party not to return the author to his country of origin and to transfer him to a child protection centre while his case was under consideration by the Committee.

1.3 On 19 October 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request that the admissibility of the communication be considered separately from its merits.

* Approved by the Committee at its eightieth session (14 January–1 February 2019).

** The following members of the Committee participated in the examination of the communication: Amal Salman Aldoseri, Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Bernard Gastaud, Olga A. Khazova, Hatem Kotrane, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Kirsten Sandberg, Ann Marie Skelton, Velina Todorova and Renate Winter.



Factual background

2.1 The author arrived in Spain in an irregular manner on 9 December 2016. On 10 December 2016, he presented himself, of his own accord, at the Juvenile Services section of the Provincial Prosecutor's Office of Barcelona. He stated that he was a minor and showed a Ghanaian birth certificate¹ indicating that his date of birth was 6 August 1999. The author submits, however, that the Spanish authorities deemed this document to be invalid and treated him as an undocumented person.

2.2 On 10 December 2016, the Barcelona Provincial Prosecutor's Office ordered that the author undergo medical testing to assess his age and that he be placed in a child protection centre pending the conduct of such tests. The order specified that the author should appear for examination by a forensic doctor and should be accompanied by a teacher from the protection centre.

2.3 The author was transferred to the Gaudí child protection centre on 12 December 2016. On the same day, the juvenile division of the Office of the Prosecutor of the High Court of Justice of Catalonia ordered a preliminary inquiry, summoning the author to appear and specifying that he should be accompanied by a teacher from the protection centre. The summons issued on the same date by the Barcelona Provincial Prosecutor's Office again stipulated that the author must appear on 20 December 2016 and be accompanied by a teacher from the centre.

2.4 On 20 December 2016, the author underwent medical testing to assess his age. The tests consisted of an X-ray of the left hand for comparison with the Greulich and Pyle atlas, a physical examination by a forensic doctor, an external examination of dental development, assessment of pubertal development using the Tanner scale, and an orthopantomogram or carpal bone age assessment using the Demirjian scale. The test results showed that the author's bone age was 19 years. The forensic findings indicated that "the most likely minimum age was 18 years". Also on 20 December 2016, the author was brought to the police for the processing of his expulsion case. The author was released on the same day.²

2.5 On the basis of the medical test results, the Barcelona Provincial Prosecutor's Office issued an order on 21 December 2016 stating that the author had been found to be over 18 years of age.³

2.6 A removal order was issued against the author on 12 January 2017.

2.7 The author notes that age assessment orders issued by the prosecuting authority cannot be challenged in court, as confirmed by the Spanish Constitutional Court in its decision No. 172/2013, and that he has therefore exhausted all available domestic remedies.

2.8 He states that he is currently housed in a private migrant accommodation centre.

Complaint

3.1 The author maintains that during the age assessment procedure that he underwent, his right to be heard, as enshrined in article 12 of the Convention, was not respected. Yet Organic Act No. 1/1996 of 15 January 1996 on the legal protection of minors requires that minors receive, in language they can understand, the information they need in order to exercise their right to be heard.

3.2 The author submits that he was not notified of the decision to close his child protection case, in violation of his right to due process and to be heard. He was notified only of the order of 21 December 2016 whereby the Barcelona Provincial Prosecutor's Office found him to have reached the age of majority.

¹ A certified copy, dated 20 October 2016, of the author's birth certificate is in the case file.

² The author states that, under Organic Act No. 4/2000 of 11 January 2000 on the rights, freedoms and social integration of foreign nationals in Spain, the examining magistrate in expulsion proceedings may take precautionary measures, including the detention of the person concerned. In the present case, however, no precautionary measures were taken against the author.

³ The order indicated that the birth certificate provided by the author could not be considered valid because its authenticity was in doubt and because Spain had no agreement with the country of origin.

3.3 He claims that although an ex officio lawyer was appointed for him, this appointment did not take place until after the Prosecutor's Office had found that he had reached the age of majority, not before that finding.

3.4 The author proposes, as possible forms of reparation: (a) recognition of his right to be assisted by a lawyer or representative of his choice before his case is referred to the Administration; (b) notification of any decision affecting him; and (c) recognition that age assessment orders issued by the prosecuting authority should be subject to appeal before the courts.

State party's observations on admissibility

4.1 In observations dated 29 May 2017, the State party argues, on the basis of article 7 (c) of the Optional Protocol, that the communication is inadmissible because it constitutes an abuse of the right of submission and is incompatible *ratione personae* with the provisions of the Convention. The State party notes that the author has not provided any original of an official document or any objective medical evidence offering reliable proof of his age. On the contrary, he gave permission for the Spanish authorities to carry out five medical tests to assess his age.

4.2 The State party notes that, as in other cases brought before the Committee, the author is a person who is allegedly close to the age of majority and appears to have reached the age of majority; he has not presented any original identity document with biometric data or medical test results that contradict the results of the tests carried out, even though he is represented by lawyers and non-governmental organizations with the resources to do so; and he does not state which medical tests would be appropriate. Lastly, the State party cites the case of *M.E.B. v. Spain*,⁴ submitted to the Committee, in which the author claimed to be a minor despite the existence of X-ray evidence concluding that he was 18 years old. Following investigations by the Spanish police in the author's country of origin, it was found that he had tried to use a false identity and that he was actually 20 years old. The State party warns of "trafficking mafias that profit from illegal immigration, encouraging people to leave their countries in pursuit of an uncertain and illusive prosperous future in Europe", and frequently advising these desperate people not to carry or to hide their identity documents and claim, if possible, to be minors.

4.3 The State party also contends that the communication is inadmissible on the grounds that the author failed to exhaust domestic remedies, given that: (a) the age assessment can be reviewed upon presentation of new objective evidence (identity documents with biometric data or objective medical evidence), in which case the Public Prosecution Service may decide to have new investigations undertaken to assess the individual's age; (b) an application for a judicial age assessment can be submitted; and (c) the removal order can also be challenged through administrative or judicial channels.

4.4 The State party provides information on the application of a specific protocol for dealing with presumed unaccompanied minors,⁵ under which an immigrant in an irregular situation who claims to be an unaccompanied minor and clearly appears to be a minor is immediately entrusted to the child protection authorities and entered in the register of unaccompanied minors. If the individual's physical appearance raises doubts about his or her age, medical tests are carried out immediately, with his or her informed prior consent, to assess age in accordance with the criteria accepted by the medical forensics community. The results of these tests – which are interpreted in the way that most favours the immigrant – are taken into account when considering whether specific child protection measures are to be taken.

⁴ CRC/C/75/D/9/2017, decision to discontinue consideration of the communication.

⁵ Agreement between the Ministry of Justice, the Ministry of the Interior, the Ministry of Employment and Social Security, the Ministry of Health, Social Services and Equality, the Attorney General's Office and the Ministry of Foreign Affairs and Cooperation on the adoption of the framework protocol on specific interventions in relation to unaccompanied foreign minors, published in Official Gazette No. 251 on 16 October 2014.

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

5.1 In comments dated 12 September 2017, the author states that on 12 December 2016, he was appointed an ex officio lawyer to deal with the removal procedure against him. However, considering that the author had been in police custody since 10 December 2016, the appointment of the lawyer was unduly delayed. Furthermore, his right to be heard as a minor prior to the Administration's decision on his age was not respected, in violation of article 12 of the Convention.

5.2 The author notes that the Catalanian police handed him over to the Spanish police for the purpose of initiating the expulsion process, in violation of the principle of presumption of minor age established in domestic legislation.

5.3 The author reiterates that age assessment orders issued by the prosecuting authority cannot be challenged in court.

State party's observations on admissibility and the merits

6.1 In observations dated 22 February 2018, the State party reiterates its arguments that the communication is inadmissible because the author failed to provide reliable evidence of minor age and failed to exhaust available domestic remedies. It notes that, while the provisional age assessment by the Public Prosecution Service is not subject to judicial review, the Public Prosecution Service itself can agree to the conduct of further investigative measures if new objective evidence is presented. Moreover, non-contentious proceedings for age assessment can be brought before a civil court, in accordance with Act No. 15/2015 of 2 July 2015 on non-contentious jurisdiction. In this regard, according to the Constitutional Court, age assessments carried out by the Public Prosecution Service are highly provisional, so that an application can be made to the courts for a definitive age assessment.

6.2 The State party points out that the European Court of Human Rights has confirmed, in its judgment in *Ahmade v. Greece*, that medical tests for age assessment are compatible with human rights.⁶ In that judgment, the Court interpreted the author's refusal to undergo a dental X-ray as a sign that he was afraid the test would reveal that he was not the age he claimed to be.

6.3 The State party maintains that the author's complaint is generic and seemingly based on the argument that any finding based on medical evidence that shows that the age of majority has been attained constitutes a violation of the Convention. The State party contends that the Committee's general comment No. 6 on treatment of unaccompanied and separated children outside their country of origin establishes the presumption of minor age in case of uncertainty, but not when the individual appears to be an adult, as in the present case. It adds that this does not prevent the national authorities from legally considering an undocumented individual who clearly appears to be of legal age as an adult, without having to conduct any tests at all. However, in the present case the authorities gave the author the opportunity to undergo objective medical tests to assess his age. The State party adds that the author does not identify which tests should be used to disprove the findings of the medical tests carried out.

6.4 The State party submits that there has been no violation of the best interests of the child. As soon as the author presented himself to the Spanish authorities and stated that he had entered Spain unlawfully, he was offered a lawyer and an interpreter free of charge, he was informed of his rights, and his case was reported to the Public Prosecution Service, the institution responsible for safeguarding the best interests of the child in accordance with domestic law.

6.5 The State party submits that there has likewise been no violation of the author's right to identity or right to development.

⁶ Application No. 50520/09, paras. 77 and 78.

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

7.1 In comments dated 28 March 2018, the author clarifies that the present communication is essentially based on the violation of his right to be heard before his case was referred to the Public Prosecution Service, as the authorities did not facilitate the child's contact with a lawyer or representative of his choice to ensure that he would be heard. In the present proceedings, the author's right under article 12 of the Convention has not been respected, as he did not have the assistance of a lawyer at the time when the Provincial Prosecutor's Office dealt with his case. The lawyer was not appointed until two days after the author's case had been referred to the Public Prosecution Service. In addition, the lawyer was appointed to defend his rights as an adult in the removal procedure, not to represent him as a minor.

7.2 The author disputes the State party's contention that the medical tests carried out were objective, noting that this claim is contrary to scientific doctrine.

7.3 Lastly, the author submits a copy of his passport, issued on 20 June 2017 by the Embassy of Ghana in Madrid, certifying that his date of birth is 6 August 1999.

7.4 The author requests that the right of every child to be heard be recognized through the assignment of a specially trained lawyer before any administrative decision concerning the child is taken, and that entities be allowed to represent children before the Administration.

Third-party submissions⁷

8.1 On 3 May 2018, the Ombudsman of France made a third-party submission on the issue of age assessment. The Ombudsman submits that age assessment processes must be accompanied by the necessary safeguards to ensure respect for the best interests of the child. According to a 2017 Council of Europe report, the procedural safeguards afforded under international and European standards are not upheld consistently across member States.⁸

8.2 Age assessments should be carried out only when there are serious doubts about a person's age, given that age should be verified on the basis of documents or statements provided by the person concerned. In these procedures, States should consider not only the physical appearance of the individual, but also his or her psychological maturity, thereby adopting a multidisciplinary approach. If doubt persists after the completion of the procedure, the individual concerned should be given the benefit of the doubt.

8.3 There are no common rules or agreements on age assessment in European States. Several States use a combination of medical and non-medical tests. The medical tests used include X-rays of the left wrist (23 States), dental X-rays (17 States), X-rays of the collarbone (15 States), dental examinations (14 States) and estimates based on physical appearance (12 States). While bone age assessment is common, it is not reliable and it undermines children's dignity and physical integrity. There are no medical indications for this type of assessment, as confirmed by the London-based Royal College of Radiologists. In a resolution adopted on 12 September 2013, the European Parliament deplores the unsuitable and intrusive nature of the medical techniques used for age assessment based on bone maturity, which may cause trauma, have large margins of error and are sometimes performed without the child's consent.⁹

8.4 The Greulich and Pyle method is unsuitable and is not applicable to the migrant population, which consists mostly of adolescents from Saharan Africa, Asia or Eastern Europe who are fleeing their countries of origin, often in precarious socioeconomic conditions. Several studies show that there are differences in skeletal development based on

⁷ This submission relates to communications Nos. 11/2017, 14/2017, 15/2017, 16/2017, 20/2017, 22/2017, 24/2017, 25/2017, 26/2017, 28/2017, 29/2017, 37/2017, 38/2017, 40/2018, 41/2018, 42/2018 and 44/2018, registered with the Committee.

⁸ Daja Wenke, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, Council of Europe, 2017.

⁹ European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the European Union.

ethnic origin and socioeconomic status, and, therefore, that this method is not suitable for age assessment in the case of the non-European population.¹⁰ The method involves significant margins of error, particularly among people between the ages of 15 and 18 years.¹¹ According to the Commissioner for Human Rights of the Council of Europe, associations of paediatricians across Europe state clearly that dental and skeletal maturity cannot be used in assessing the exact age of a child; all that can be achieved is an estimate with a wide margin of error of two to three years. Moreover, the interpretation of data may vary from one country to another or even from one specialist to another.¹² The Committee has also called on States not to use bone age assessment methods.¹³

8.5 The Ombudsman recommends, accordingly: (a) that a multidisciplinary approach be taken to age assessment and that medical testing be used as a last resort when there are serious doubts about the person's age; (b) that the child be informed and given the opportunity to provide prior consent; (c) that the person be presumed to be a child during the age assessment process and that protective measures be taken, such as the appointment of a legal representative to assist throughout the proceedings; (d) that the testing be carried out with strict respect for the rights of the child, including the right to dignity and physical integrity; (e) that the child's right to be heard be respected; (f) that, if the findings of the procedure are inconclusive, the person be given the benefit of the doubt; (g) that an application for protection not be denied solely on the basis of a refusal to undergo medical tests; and (h) that an effective remedy be provided through which decisions based on an age assessment procedure may be challenged.

8.6 The Ombudsman recalls that the detention of migrant children, even for short periods or for purposes of age assessment, is prohibited by international law and that States should instead use alternative measures. States should prohibit the practice of depriving children of liberty or detaining them in facilities for adults.¹⁴ Child protection services should be informed immediately to enable them to ascertain the child's protection needs.¹⁵

Further submissions from the parties

9.1 In observations dated 3 August 2018, the State party notes that the passport attached by the author was never shown to the Spanish authorities, despite having been issued on 20 June 2017, and that it was not introduced into the proceedings until 28 March 2018, which demonstrates procedural bad faith on the author's part. It is clear from rule 15 (1) (a) of the Committee's rules of procedure¹⁶ that the parties are under an obligation to ensure that any

¹⁰ Fiona M. Bright and others, "The applicability of Greulich and Pyle atlas to assess skeletal age for four ethnic groups", *Journal of Forensic and Legal Medicine*, vol. 22 (2014), pp. 26–29.

¹¹ The Ombudsman cites, inter alia, Terry Smith and Laura Brownlee, *Age assessment practices: a literature review and annotated bibliography*, United Nations Children's Fund (UNICEF), 2011; National Academy of Medicine of France, *Sur la fiabilité des examens médicaux visant à déterminer l'âge à des fins judiciaires et la possibilité d'amélioration en la matière pour les mineurs étrangers isolés* (report of the National Academy of Medicine of France on the reliability of medical tests for age assessment for judicial purposes and possible improvements for unaccompanied children), 2007; and S. Depallens and others, "Détermination de l'âge des jeunes migrants: Position de la Société Suisse de Pédiatrie" (Assessing the age of young migrants: Position of the Swiss Society of Paediatrics), 2017.

¹² Commissioner for Human Rights of the Council of Europe, *Methods for assessing the age of migrant children must be improved*, 2011.

¹³ General comment No. 6 and joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration.

¹⁴ European Court of Human Rights, *Tarakhel v. Switzerland* (application No. 29217/12).

¹⁵ European Court of Human Rights, *Abdullahi Elmi and Aweys Abubakar v. Malta* (applications Nos. 25794/13 and 28151/13).

¹⁶ Rule 15 (1) of the Committee's rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure provides that "The Secretary-General may request where necessary clarification from the author(s) and/or alleged victim(s) of a communication, including:

information or documentation that is of relevance for proving the author's identity and age is immediately brought to the Committee's attention. However, the author held back the alleged evidence until after the State party had already submitted its observations. Consequently, the passport could not be taken into consideration by the State party. Given that domestic remedies must be exhausted before a communication may be submitted to the Committee, the original passport should have been presented to the competent Spanish authorities¹⁷ as soon as the author obtained it.

9.2 The State party points out that the claims for reparation made by the author in his initial communication do not match those made in his comments of 28 March 2018.

9.3 The State party reiterates that five objective medical tests show that the author has reached the age of majority, and adds that he has not provided a passport or identity document that disproves the results of these tests. The State party points out that, even if the date of birth indicated in the photocopy of the author's passport that was provided on 28 March 2018 is accepted as accurate, it still shows that the author is not of minor age, which means that he cannot submit the present communication and it is therefore moot.

9.4 The State party reiterates its observations with regard to the merits of the communication.

10.1 In comments dated 21 September 2018, the author points out that he presented his passport to the Spanish authorities on 9 November 2017, in the context of an application for temporary residence.¹⁸

10.2 The author reiterates that the present communication is based on the violation of his right to be heard before his case was referred to the Prosecutor's Office, in violation of article 12 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

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

11.2 The Committee takes note of the State party's argument that the communication is inadmissible under article 7 (c) of the Optional Protocol because the author has not provided any original of an official document or any medical evidence certifying that he is of minor age, whereas the results of five objective medical tests show that he has reached the age of majority. The Committee notes, however, that there is no evidence in the record to show that the author, a youth who claimed to be a minor at the time of the events in question, was an adult at the time of his arrival in Spain.¹⁹ The Committee also notes that the author was in possession of a certified copy of his birth certificate upon arrival in Spain and that it was never examined by the State party. Accordingly, the Committee is of the view that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication.²⁰

11.3 The Committee also notes the State party's argument that the author has not exhausted available domestic remedies because he did not apply to the Public Prosecution

(a) The name, address, date of birth of the author(s) and/or alleged victim(s) and verification of the author's(s')/alleged victim's(s') identity(ies)".

¹⁷ The State party mentions, as competent authorities, the Public Prosecution Service, the Autonomous Community of Madrid and the Ministry of the Interior.

¹⁸ The author provides a copy of a decision of 25 January 2018 issued by the delegation of the Spanish Government in Catalonia, which states that the author's application for temporary residence cannot be considered because it was not "submitted in person to the Aliens Office in Barcelona, which is the body with competence to process it". That decision does not indicate whether the author provided his passport.

¹⁹ In this regard, see *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 11.2.

²⁰ *Ibid.*

Service for a review of the age assessment order; did not request a judicial assessment of his age; and did not challenge the removal order before the administrative courts. The State party has also argued that the author did not present, to the competent Spanish authorities, the passport issued by the Embassy of Ghana in Madrid on 20 June 2017 and thus has not exhausted available domestic remedies. The author states that he presented his passport in the context of his application for temporary residence by reason of exceptional circumstances. However, the Committee notes that the decision of 25 January 2018 of the government delegation in Catalonia found the author's application for temporary residence inadmissible on the grounds that it had not been submitted to the competent authority. Furthermore, it is not clear from that decision whether the passport issued in the author's name was presented as part of the application for temporary residence. The passport also does not seem to have been presented to the Public Prosecution Service to seek review of the order finding that he had reached the age of majority. Lastly, the author did not inform the Committee of the passport's issuance until 28 March 2018, nine months after the fact, and did not explain the delay in submitting a document of such importance for substantiating his claim that he was a minor at the time of his arrival in Spain.

11.4 Without prejudice to the foregoing, the Committee notes that the author's complaint focuses exclusively on the violation of his right to be heard during the age assessment procedure to which he was subjected and that, in this regard, the State party has not indicated what domestic remedies would have been effective and available to enable the author to give effect to this right. Accordingly, the Committee finds that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication.

11.5 The Committee takes note of the author's allegations that a lawyer was not appointed for him before his case was referred to the Public Prosecution Service for his age to be determined and a decision taken in that regard. The Committee nonetheless observes that the author's claim that an ex officio lawyer was appointed for him on 12 December 2016 contradicts the facts established by objective evidence, in that the assessment of his age and the decision taken in that regard occurred after a lawyer was assigned to him. According to the official documentation provided by the State party, the age assessment tests were carried out on 20 December 2016 in accordance with the order issued by the Barcelona Provincial Prosecutor's Office and the Prosecutor of the High Court of Justice of Catalonia, and the author was declared to have reached the age of majority by an order issued by the Barcelona Provincial Prosecutor's Office on 21 December 2016. The Committee further observes that, according to the official documentation provided by the State party, at the time the author underwent the forensic medical examination he was accompanied by a teacher from the child protection centre where he was housed, and that the results of the examination were communicated to him by the Juvenile Prosecutor in the presence of an interpreter.

11.6 In the light of the foregoing, the Committee finds that the author has not sufficiently substantiated his claim of a violation of his right to be heard and, consequently, declares this claim to be inadmissible under article 7 (f) of the Optional Protocol.

12. The Committee on the Rights of the Child decides:

- (a) That the communication is inadmissible under article 7 (f) of the Optional Protocol;
- (b) That this decision shall be transmitted to the author of the communication and, for information, to the State party.