



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 communications No. 37/2017 and No. 38/2017^{*, **}

<i>Communications submitted by:</i>	L.D. (first author) and B.G. (second author) (represented by counsel, José Luis Rodríguez Candela, Asociación Málaga Acoge)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	20 December 2017
<i>Date of adoption of Views:</i>	28 September 2020
<i>Subject matter:</i>	Age assessment procedure in respect of an unaccompanied minor
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; incompatibility <i>ratione personae</i> ; non-substantiation of claims
<i>Articles of the Convention:</i>	2, 3, 8, 12, 18 (2), 20 (1), 27 and 29
<i>Articles of the Optional Protocol:</i>	6 and 7 (c), (e) and (f)

* Adopted by the Committee at its eighty-fifth session (14 September–1 October 2020).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Renate Winter.



1.1 The authors of the communications are L.D. (first author) and B.G. (second author), nationals of Algeria born on 18 August 2001 and 14 September 2000, respectively. They both claim that the State party has violated their rights under articles 2, 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 Pursuant to article 6 of the Optional Protocol, on 21 December 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt interim measures consisting of a stay in the execution of the expulsion order against the authors, pending the consideration of their cases by the Committee, and their transfer to a child protection centre.

1.3 Pursuant to article 6 of the Optional Protocol, on 6 March 2018, the Working Group on Communications, acting on behalf of the Committee, decided to lift the interim measures in the case of the first author, L.D., at the request of the State party. In addition, through the Working Group, the Committee rejected the request for it to discontinue consideration of the first communication.

1.4 Pursuant to article 6 of the Optional Protocol, on 16 May 2019, the Working Group on Communications, acting on behalf of the Committee, decided to lift the interim measures in the case of the second author, B.G., at the request of the State party.

The facts as submitted by the authors

2.1 The first author, L.D., arrived on the coast of Almería, Spain, on 17 November 2017, in a small boat. Subsequently, at the police station in Almería, he indicated that he was a minor. On the same day, he was transferred to the Torrecárdenas hospital in Almería in order to undergo medical tests, specifically an X-ray of his left hand, for the purposes of determining his age. The results, when compared against the Greulich and Pyle atlas, indicated that the author was over 19 years old. In its decision of 19 November 2017, Vera First Instance and Examining Court No. 2 ordered that L.D. should be placed in the Málaga II prison, which is used as a holding centre for foreign nationals.¹ The subsequent appeal filed by the court-appointed lawyer went unanswered. On 22 November 2017, a letter was sent to the Málaga Prosecutor's Office to inform it that L.D., a minor, was being held at the Málaga II prison, to ensure that the appropriate protocol would be followed. On 22 November, a complaint was filed with the Ombudsman concerning the pending return to Algeria of an individual claiming to be a minor. On 11 December, the author's lawyer took a copy of the author's birth certificate to the Málaga Prosecutor's Office for minors.² On 14 December, another complaint, containing information on the case of B.G., was submitted to the Ombudsman's Office, together with a copy of L.D.'s birth certificate. On 16 December, a complaint was lodged with the due process judge at the holding centre for foreign nationals in Archidona, so that the situation of the minors could be reviewed. Nevertheless, on 17 December 2017, an order for their removal was issued. On 22 December 2017, the lawyer reported that L.D. had been returned to Algeria.

2.2 The second author, B.G., arrived on the coast of Lorca, Spain, on 17 November 2017, in a small boat. Subsequently, at the police station, he indicated that he was a minor. Nevertheless, he was then held in a cell together with others who had recently arrived in Spain. A court in Archidona subsequently ordered that he should be placed in detention at the Málaga II prison in Archidona, although no age assessment procedure had been carried out.³ On 20 November 2017, the Government Delegation of Murcia issued a removal order. On 14 December 2017, the author's lawyer sent a letter to the Ombudsman informing him that Algerian nationals who were presumed to be minors – including the author – were being held at the Málaga II prison in Archidona, and requesting him to take action to ensure that their ages were assessed correctly, in accordance with the unaccompanied foreign minors

¹ This facility has been used temporarily as a holding centre for foreign nationals since November 2016.

² The author has provided proof of the delivery of his birth certificate to the prosecutor's office for minors.

³ There is no evidence that the author was properly informed about the procedure or the possible consequences of such medical tests in a language that he could understand.

protocol. On 15 December 2017, the author's lawyer filed a request for protective measures before the Archidona First Instance and Examining Court, in which he stated that minors were being held at the Málaga II prison; he enclosed a copy of the author's birth certificate, which indicated that he was 17 years old. On 18 December, the author underwent medical tests at the Antequera hospital to assess his age, specifically, an X-ray of his left wrist, which, when compared against the Greulich and Pyle atlas, indicated that he was 19 years old. On the same day, the Archidona First Instance and Examining Court, by order No. 214/2017, rejected the request for protective measures, including the suspension of the author's deportation and his transfer to a centre for minors, stating that "a record or certificate of birth and a mere medical insurance card featuring a photograph and handwritten information whose reliability is questionable, at best, is not a passport or a valid document attesting to a person's identity" and referring to the medical report that concluded that the author was an adult, based on bone age. On 5 January 2018, the author was issued a consular safe conduct by the Algerian Consulate in Alicante, indicating his birth date as 14 September 1999.

2.3 On 8 January 2018, the Lorca First Instance and Examining Court No. 5 ordered that B.G. be removed from detention and placed in a centre for minors in Murcia. Subsequently, the lawyer reported that B.G. was staying with extended family and was not being held in a centre for minors.

The complaint

3.1 The authors maintain that the State party failed to uphold the principle that an individual should be presumed to be a minor in the event of doubt or uncertainty, against their best interests and in violation of article 3 of the Convention.⁴ This violation is all the more flagrant, as there was a real risk of the authors' suffering irreparable harm as a consequence of having been placed in a detention centre for adults and ordered to return to their country of origin. The authors cite concluding observations issued in respect of the State party in which the Committee expresses concern at its failure to consider the best interests of the child and at disparities in the methods used to assess the age of unaccompanied children.⁵ The authors also refer to various studies to support their claim that the medical assessment method used in the State party, particularly the one used in their case, have a wide margin of error, as the studies that underpin them are based on other populations with very different racial and socioeconomic characteristics.

3.2 The authors claim to be the victims of a violation of article 3 of the Convention, read in conjunction with article 18 (2), owing to the State party's failure to appoint a guardian to protect their interests, which serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied minor.⁶ They also allege a violation of article 3 (2), read in conjunction with article 20 (1), on the grounds that the State party failed to provide them with protection, even though they were defenceless and highly vulnerable unaccompanied child migrants. The authors maintain that the best interests of the child should prevail over public order concerns regarding foreign nationals and should prevail in all decisions taken by the authorities; furthermore, when dealing with persons who claim to be minors and who are in the process of obtaining documents to prove their age, the State party should set in motion its administrative apparatus and appoint a guardian as a matter of course.⁷

3.3 In addition, the authors submit that the State party has violated their right to an identity, as enshrined in article 8 of the Convention. They point out that age is a fundamental aspect of a person's identity, and that the State party has a duty not to interfere in this regard. Moreover, the State party's obligation includes the duty to preserve and recover any data on the identity of the authors that exist or may exist. Yet, the State party attributed to them ages

⁴ The authors cite general comment No. 6, para. 31.

⁵ CRC/C/ESP/CO/3-4, para. 59.

⁶ The authors cite general comment No. 6.

⁷ The authors cite a report by La Merced-Migraciones-Mercenarios, the Office of the United Nations High Commissioner for Refugees, Save the Children, the Santander Programme on Minors and the Law at the Pontifical University of Comillas, Baketik and Asociación Comisión Católica Española de Migración, entitled "Aproximación a la protección internacional de los menores extranjeros en España", Madrid (2009).

that were different from their real ages and dates of birth that did not match their declared dates of birth or the ones appearing in the identity documents that were later submitted.

3.4 The authors further claim a violation of their right to be heard under article 12 of the Convention, in connection with the age determination procedure and on the grounds that they were not assigned a legal representative, which in turn had a direct impact on their right to an identity.⁸

3.5 The authors also claim to have suffered a violation of their rights under articles 27 and 29 of the Convention, as their proper all-round development has been impeded. The authors believe that their not having guardians to guide them has prevented them from developing in a manner consistent with their ages.⁹

3.6 The authors further allege that article 20 of the Convention was violated because they were left in a situation of defencelessness and social exclusion as a consequence of the State party's decisions and actions. They claim that they were denied protection by the State party when it considered them to be adults without any conclusive evidence, and they cite the Committee's general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, according to which this right must be interpreted in the light of the child's circumstances, age and ethnic, cultural and linguistic background.

3.7 The authors maintain that they suffered discrimination on account of their status as unaccompanied foreign minors, in violation of article 2 of the Convention. They claim that they would not have been denied protection if they had been accompanied by their families or if they had not been nationals of an African country. Indeed, in the case of nationals of other countries and of Algerian nationals who are adults or accompanied minors, neither the person's age nor the documents issued by the relevant national authorities are ever called into question.

3.8 The first author proposes the following possible solutions: (a) that the State party recognize him as a minor on the basis of the official documents submitted and stay his removal to his country of origin; and (b) that all his rights as a minor be recognized, including the rights to receive State protection, to have a legal representative, to receive an education and to be granted a residence and work permit to allow him to develop to his full potential and be integrated into society. Both authors propose that (a) the State party acknowledge that it is impossible to establish their ages on the basis of the medical tests carried out; and (b) their right to be heard through a person or institution specializing in children's rights be recognized.

State party's observations on admissibility

Account of the facts

4.1 In its observations of 29 January 2018 and 6 August 2019 on the admissibility of communications No. 37/2017 and No. 38/2017, respectively, the State party points out that the authors' accounts of the facts are partial and inaccurate. The only photos of the authors that are accepted are those that were officially taken at the time they were rescued and brought before a judge: in those photos, a person with a moustache and beard can clearly be seen, with characteristics that are consistent with those of an adult.

4.2 With regard to the first author, the State party states that a bone age of 19 years was estimated on the basis of the medical report drawn up by the Torrecárdenas hospital in Almería. It also states that L.D. was recognized as Algerian and that his identity was confirmed by the Algerian Consulate in Alicante, which indicated that his birth date was 18 August 1998.¹⁰ He was deported on 19 December 2019.

4.3 With regard to the second author, since B.G. claimed to be of age when he entered Spain, indicating 21 December 1994 as his date of birth, and since his entry was illegal and he did not apply for asylum, the deportation proceedings were initiated and, on 21 November

⁸ The authors cite general comment No. 12 (2009) on the right of the child to be heard, para. 26.

⁹ The authors cite general comment No. 6, para. 44.

¹⁰ The State party has provided a copy of the safe conduct issued by the Algerian Consulate in Alicante.

2017, he was admitted to the holding centre for foreign nationals in Archidona, with a visa for his return to Algeria. B.G. later claimed to be a minor but failed to provide any official documents. For this reason, following the involvement of the Public Prosecution Service, lateral X-rays were taken of his right hand and jaw, and the X-rays of his left and right hands were compared against the Greulich and Pyle atlas. The medical conclusion was that the subject was an adult of at least 18 years of age.

4.4 Since B.G. was not carrying any official identity documents, the return had to be agreed to by the Consul of his country of origin, following verification that he was a national of that country. After interviewing the author and checking the biometric and administrative data in the official Algerian archives, the Consul stated that his date of birth was 14 September 1999, making it clear that, on the day he had entered Spain, he had already been of age.¹¹

4.5 The State party reports that, further to the present communication, the author B.G. was not able to be returned to his country of origin, as just two days after entering the children's home, he decided to run away.

Grounds for inadmissibility

4.6 The State party argues that both communications are inadmissible *ratione personae*, because the authors are adults. The State party maintains that they are adults on the grounds that (a) they appear physically to be adults, as shown by the photographs taken at the time of their placement in detention; and (b) after they stated that they were minors, objective medical tests were carried out, the results of which showed that they were at least 18 years old, bearing in mind that there is no standard deviation for this age group. The authors did not prove by any means that they were minors; moreover, there were official documents from their country of origin (safe conducts) proving that they were adults. The State party adds that the identity documents provided by the authors are "mere photocopies that do not include biometric data and that cannot be authenticated as personal identity documents (identity card or passport)". In the case of B.G., the State party further argues that the author indicated that he was an adult when he entered Spain, and that four separate medical tests concluded that he was an adult.

4.7 According to the State party, the Committee's admission of a communication in the absence of reliable evidence that the author is a minor would only benefit the mafias that engage in the trafficking of migrants. The sole purpose behind the submission of communication No. 38/2017 was to prevent the deportation of the second author, B.G., who fled from the child protection centre where he was placed as a protective measure on the Committee's recommendation; this was a clear abuse of the right of submission.

4.8 The State party also maintains that the communication is inadmissible under article 7 (e) of the Optional Protocol because the authors have failed to exhaust all available domestic remedies. The authors could have (a) requested the Public Prosecution Service to conduct additional medical tests; (b) petitioned the civil court with jurisdiction over the place in which they were detained for a review of any autonomous community decision finding that they were adults, in accordance with the procedure set out in article 780 of the Civil Procedure Act; (c) challenged the removal order before the administrative courts; and (d) initiated, in accordance with Act No. 15/2015, non-contentious proceedings for age assessment before the civil courts.

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

5.1 In their comments on admissibility of 5 April 2018 and 19 September 2019, the authors respond to the State party's account of the facts. They claim that the medical reports stating that they had bone ages of 18 and 19 years, respectively, did not specify whether or not there was a standard deviation for that age group, even though these methods have margins of error that mean they cannot be used to draw definite conclusions. If those margins

¹¹ The State party cites *Y.M. v. Spain* (CRC/C/78/D/8/2016), in which the Committee states that a consular certificate is considered an official document that is presumed to be valid. The State party also cites *D.D. v. Spain* (CRC/C/80/D/4/2016).

of error had been applied, the results would not have contradicted the authors' claims regarding their ages, which they subsequently proved.

5.2 In B.G.'s case, while the State party claims that the author is an adult on the basis of his physical appearance, there is no evidence that additional psychological tests were carried out to corroborate this claim. Furthermore, with regard to the safe conduct issued by the Algerian Consulate in Alicante, given that there were two contradictory age determination documents relating to the same minor, the authorities, upon receiving the birth certificate, should have contacted the Consulate to verify whether or not it maintained the information contained in the safe conduct.¹² According to the author, a birth certificate is considered more reliable than a safe conduct¹³ and there is no other conclusive evidence for the State party to show that B.G. was an adult when he entered Spanish territory.¹⁴ While the State party reiterates that B.G. initially claimed to have been born on 24 December 1994, there is no recorded official statement to support this claim. In addition, the author claims that the authorities rejected his statements, disregarding the fact that he was a minor. Even the birth certificate the author submitted was assumed to be false and he was never given the benefit of the doubt through the application of the best interests of the child. As to the validity of the medical tests for age determination, the authorities waited one month before subjecting B.G. to the medical tests. The tests, which consisted exclusively of X-rays, once carried out were not sufficient to rule out the possibility that the author might be a minor. The author considers that he was unjustifiably deprived of his liberty for one month before undergoing tests.

5.3 In the case of L.D., it is clear that, when the court in Vera approved the detention on 19 November 2017 and the Government Subdelegation of Almería issued the removal order on 18 November 2017, the age of the author had not yet been determined, since, based on general comment No. 6, in the event of uncertainty, the individual is to be given the benefit of the doubt and treated as a child. Furthermore, the author claims that there is no evidence that he was notified of the safe conduct issued by the Algerian Consulate, so that he could then check the information on record. If he had received such notification, he would have had the opportunity to appeal or to request the Consulate directly to have the information corrected.

5.4 With regard to the claim that the communication is inadmissible because the available domestic remedies have not been exhausted, the authors explain that the remedies available under domestic law are ineffective, either because they do not provide effective redress for the violations in question or because it takes too long to obtain such redress. Administrative litigation is a subsidiary remedy and must be preceded by an administrative appeal; such appeals are not dealt with in a timely manner and do not suspend the effects of a removal order. In cases of imminent return, only a remedy with suspensive effect can be considered effective, in line with the Views expressed by the Committee against Torture¹⁵ and the European Court of Human Rights.¹⁶ Moreover, in the case of L.D., the author notes that it would be impossible, in practice, for the decree declaring him to be an adult to be reviewed by the Public Prosecution Service, given that, when he provided his birth certificate, the

¹² The author cites article 5 (1) of Council Regulation (EU) No. 1417/2013, of 17 December 2013, laying down the form of the laissez-passer issued by the European Union: "Persons to whom a laissez-passer is issued shall have the right to verify the personal data contained in it ... and, where appropriate, to ask for its rectification or erasure."

¹³ The author cites article 5 (4) of Council Regulation (EU) No. 1417/2013: "the biometric features in the laissez-passer shall only be used for verifying the authenticity of the document [and] the identity of the holder by means of directly available comparable features".

¹⁴ The author quotes from joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 4: "Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children ... must be considered".

¹⁵ The authors cite *Arkauz Arana v. France* (CAT/C/23/D/63/1997) and *Tebourski v. France* (CAT/C/38/D/300/2006).

¹⁶ The authors cite, inter alia, *Čonka v. Belgium* (application No. 51564/99), *Hirsi Jamaa and Others v. Italy* (application No. 27765/09) and *De Souza Ribeiro v. France* (application No. 22689/07).

Public Prosecution Service refused to review the decree on the grounds that the birth certificate contradicted the results of the medical tests carried out.

5.5 The State party itself acknowledges that the public prosecutor's action in terms of issuing such decrees is extremely provisional. However, in the case of L.D., since his age was assessed only hours before he was deported, the prosecutor's action became final and there was no opportunity for the alleged minor to take any action in response; indeed, since the latter was not notified of the prosecutor's decree declaring him to be an adult, it would have been difficult for him to challenge it.¹⁷

State party's observations on the merits

6.1 In its observations of 6 July 2018 and 1 August 2019, the State party states that, in their initial submissions, the authors do not substantiate the violation of the articles cited, and it notes that the mere listing of the articles of the Convention is insufficient, as the complaints are generic. The State party maintains that the principle of the best interests of the child, enshrined in article 3 of the Convention, has not been violated, because the authors are adults. The State party asserts that individuals should be presumed to be minors only "in the event of remaining uncertainty" as to their age, not when it is obvious that they are adults.¹⁸ The State party concludes that, "in the present case, where a person with no documentation whatsoever appears to be an adult, the authorities can legally consider him or her an adult without conducting any tests". However, when the authors claimed to be minors, the State party decided to carry out medical tests, with their informed consent, since general comment No. 6 does not preclude, let alone prohibit, the use of objective medical tests to determine the age of persons who appear to be adults, have no documents and claim to be minors. The State party argues that considering an adult to be a minor in the absence of reliable evidence and based solely on the word of the person concerned would seriously endanger minors placed in reception centres (who could suffer abuse or ill-treatment at their hands), which would, in turn, certainly constitute a violation of the principle of the best interests of the child.

6.2 The State party further submits that there has been no violation of the principle of the best interests of the child in relation to articles 18 (2) and 20 (1) of the Convention, stating that (a) the authorities rescued the authors, who were in danger on the open sea, aboard a very flimsy boat that was unsuited to the voyage; (b) the authors were tended to by health workers as soon as they set foot on Spanish soil; (c) they were provided with documents and the services of a lawyer and an interpreter at the expense of the State party; (d) the competent judicial authority was immediately notified of their situation to ensure that their rights were respected during the procedures relating to their irregular status; and (e) as soon as the authors claimed to be minors, the Public Prosecution Service, which is the institution responsible for protecting the best interests of the child,¹⁹ was informed and provisionally determined that they were adults. The State party argues that the authors cannot be said to have been deprived of legal assistance or left unprotected, even supposing that they had been minors.

6.3 According to the State party, even if the authors had been minors, there was no violation of their right to an identity, enshrined in article 8 of the Convention, as "their stated identity was recorded as soon as they were rescued at sea and entered Spanish territory illegally".

6.4 With regard to the author L.D., the State party considers that he always had the opportunity to be heard, including initially while being held in custody at the police station and during the age determination procedure, when he was assisted by counsel. In addition, he was notified personally of the removal order with the help of an interpreter and he was informed that he could seek a judicial remedy.

¹⁷ The author cites Act No.15/2015 of 2 July.

¹⁸ The State party cites general comment No. 6.

¹⁹ The State party cites domestic legislation that explains the impartial and independent role of the Public Prosecution Service (including article 124.1 of the Constitution, article 435 of the Organic Act on the Judiciary, article 1 of Act No. 50/1981 and articles 3.7 and 7 of the Organic Statute of the Public Prosecution Service).

6.5 In relation to the author B.G., the State party submits that his rights under articles 27 and 29 of the Convention have not been violated, as the author has been given comprehensive support. In the absence of identity papers and in response to the Committee's recommendation of protective measures, he was placed in a centre for minors and benefited from coordinated assistance and health care.

6.6 With regard to the reparation measures requested by the authors, the State party submits that, faced with the impossibility of determining their ages, the authors neither request nor propose a means by which their ages could be determined with certainty. As for allowing appeals to be brought against the decrees issued by public prosecutors, the State party reiterates that the decrees in question are extremely provisional decisions, without the force of *res judicata*; they may be reviewed by the prosecutor himself or herself if new information is submitted, and may be replaced by final decisions taken by judges through any of the judicial channels. With regard to the remaining requests, the State party points out that the authors have already received State protection and assistance from judges and the Public Prosecution Service. Lastly, residence and work permits can be granted only where the general legal requirements are met; in the present case, the authors entered the country illegally and did not apply for international protection.

Authors' comments on the State party's observations on the merits

7.1 In their comments of 3 October and 6 May 2019, respectively, the authors maintain that, with regard to article 3 of the Convention, the State party acted against their best interests by failing to respect their right to be presumed to be minors – at no time did it consider the possibility that they were minors, and the protocol for dealing with unaccompanied foreign minors was not followed.²⁰ The State party maintains that there was no uncertainty about the authors' age, even though birth certificates had been provided that had not been declared false by the Public Prosecution Service or the courts; in fact, no expert evidence was taken in this regard, nor were the birth certificates referred to the Algerian Consulate to ascertain. The authors' ages were determined based on X-ray analysis, which is insufficient. The authors did not have a legal representative or guardian during the age determination process, nor is there any record of the informed consent referred to by the State party. The authors were placed in a prison for adults and they were not given the benefit of the doubt.

7.2 With regard to the violation of article 8 of the Convention, the authors maintain that the State party altered important elements of their identity by attributing to them ages and dates of birth that differed from those reflected in their official documents, which were never formally contested. The arbitrary modification of their dates of birth, as occurred with the safe conducts issued by the Algerian Consulate, deprives them of their full and correct identity.

7.3 The authors claim that they cannot be said to have been properly heard insofar as, although they claimed to be minors, they were not assigned a legal representative. Article 12 of the Convention was therefore violated.

7.4 The author B.G. notes that the State party considers that the protective measures recommended by the Committee, such as placement in a centre for minors, were sufficient to ensure that articles 27 and 29 were not violated. However, the State party fails to mention that the author spent more than 50 days in the holding centre for foreign nationals in Archidona before being transferred to a centre for minors.

7.5 The author L.D. claims that he was treated as an adult from the outset, as he was deprived of his liberty and placed in a prison that served as a holding centre for foreign nationals, together with adults, despite the fact that the State party had a birth certificate indicating that he was a minor. In addition, he was returned to Algeria with adults, without any assurance that he would be protected on arrival, either by his family or by the social and child protection services of the country of destination, in violation of article 20 of the Convention.

²⁰ The authors cite general comment No. 6, para. 31 (i), and joint general comment No. 4/No. 23 (2017).

Third-party submission²¹

8. On 3 May 2018, the Defender of Rights of France made a third-party submission on the issue of age determination and detention in centres for adults awaiting deportation.²² This submission was transmitted to the parties, which were invited to submit comments. The parties did so with reference to the case of *J.A.B. v. Spain*²³ and stated that their comments were applicable to all the cases concerned by the third-party submission. The Committee refers to paragraphs 8 to 10 of that communication for the sake of brevity.

Issues and proceedings before the Committee*Discontinuance of communication No. 37/2017*

9. The Committee on the Rights of the Child, having taken note of the information provided by the State party, according to which the author L.D. was returned to his country of origin on 19 December 2019, and after having received information from the author's counsel, confirming that he had lost contact with the author, decides to discontinue its consideration of communication No. 37/2017, in accordance with rule 26 of its rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

Consideration of admissibility of communication No. 38/2017

10.1 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.

10.2 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* because (a) the author physically appears to be an adult; (b) the objective medical tests carried out showed that they were at least 18 years old; and (c) the birth certificate cannot be used as proof of age because it does not contain biometric data. The Committee notes, however, that the author stated that he was a minor upon arriving in Spain and that he submitted a copy of his birth certificate from Algeria, which confirmed that he was a minor, to the Court of Investigation. The Committee takes note of the State party's argument that, since the birth certificate lacked biometric data, it could not be checked against the data provided by the author. The Committee recalls that the burden of proof does not rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. The Committee takes note of the author's argument that, if the State party had doubts as to the validity of his birth certificate, it should have contacted the consular authorities of Algeria to verify the author's identity, which it did not do.²⁴ In the light of the foregoing, the Committee considers that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

10.3 The Committee also notes the State party's argument that the author has not exhausted the available domestic remedies because he could have (a) requested the Public Prosecution Service to conduct additional medical tests; (b) requested the civil judge to review the decisions denying him a guardian, in accordance with the procedure set out in article 780 of the Civil Proceedings Act; (c) challenged the removal orders before the administrative courts; and (d) initiated, in accordance with Act No. 15/2015, non-contentious proceedings for age assessment before the civil courts. The Committee notes, in turn, the author's argument that the domestic remedies mentioned by the State party are either unavailable or ineffective. The

²¹ This submission concerns communications No. 11/2017, Nos. 14/2017–16/2017, No. 20/2017, No. 22/2017, Nos. 24/2017–26/2017, Nos. 28/2017–29/2017, Nos. 37/2017–38/2017, Nos. 40/2018–42/2018 and No. 44/2018, which have been registered with the Committee.

²² A summary of the submission by the Defender of Rights can be found in *N.B.F. v. Spain* (CRC/C/79/D/11/2017), paras. 8.1–8.6.

²³ CRC/C/81/D/22/2017, paras. 9–10.

²⁴ See, inter alia, *M.A.B. v. Spain* (CRC/C/83/D/24/2017), para. 9.2, and *H.B. v. Spain* (CRC/C/83/D/25/2017), para. 9.2.

Committee considers that, in the context of the author's imminent expulsion from Spain, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order cannot be considered effective.²⁵ The Committee notes that the State party has not specified whether the remedies mentioned would have suspended the author's deportation. In the light of the foregoing, the Committee considers that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

10.4 The Committee considers that the author's claims under articles 2, 18 (2), 27 and 29 of the Convention have not been sufficiently substantiated for the purposes of admissibility and therefore finds them inadmissible under article 7 (f) of the Optional Protocol.

10.5 However, the Committee is of the view that the author has sufficiently substantiated his claim under articles 3, 8, 12 and 20 of the Convention, namely that he was not assigned a representative during the age determination process, that his right to be presumed to be a minor and his right to an identity were not respected during that process, and that he did not receive the protection to which he was entitled as a minor. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits of communication No. 38/2017

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

10.7 One of the issues before the Committee is whether, in the circumstances of the present case, the procedure for assessing the age of the author, who stated that he was a minor and later presented a copy of his birth certificate to support his claims, violated his rights under the Convention. In particular, the author has claimed that, because of the type of medical test used to assess his age and the failure to assign him a guardian or representative, the best interests of the child were not taken into consideration during the age assessment procedure.

10.8 The Committee recalls that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights contained in the Convention flows from that determination. It is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, the person should be presumed to be a minor and treated as such. Accordingly, the Committee considers that the best interests of the child should be a primary consideration throughout the age determination process.²⁶

10.9 The Committee also recalls that documents that are available should be considered genuine unless there is proof to the contrary. In the absence of identity documents or other appropriate evidence, and only in such cases: "to make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children ... in a language the child understands."²⁷ The benefit of the doubt should be given to the individual being assessed.²⁸ In the present case, the Committee notes that the official document submitted by the author, namely his birth certificate, was not challenged by the State party, and that therefore the author should have been presumed to be a minor as long as the document indicating his age had not been invalidated.²⁹

²⁵ *N.B.F. v. Spain*, para. 11.3.

²⁶ *Ibid.*, para. 12.3.

²⁷ Joint general comment No. 4/No. 23 (2017), para. 4.

²⁸ *N.B.F. v. Spain*, para. 12.4.

²⁹ Spanish Supreme Court, Civil Division, procedural violation appeal No. 2629/2019, judgment No. 307/2020, 16 June 2020, p. 15. The Supreme Court states: "the doubts raised by the Prosecutor's Office concerning the reliability of the age reflected in an official document that has not been declared invalid or discredited by the authorities that issued it and that, in addition, shows no signs of having been tampered with, cannot take precedence over what is stated in the document provided by

10.10 The Committee notes that (a) for the determination of their ages, the author, who arrived in Spain without documents, underwent bone age tests consisting of wrist X-rays and a dental X-ray, but that no additional tests, such as psychological examinations, were administered, and that there is no record of his having been interviewed as part of the process; (b) as a result of these tests, the hospitals in question determined the author's bone age to be 19 years on the basis of the Greulich and Pyle atlas, without taking into account the fact that this method, which does not establish standard deviation margins for that age range, cannot be used to extrapolate reliable data on individuals with the author's characteristics; (c) the competent court ordered that the author be placed in a centre for adults; (d) the author was not assisted by a representative during the age determination procedure; and (e) the author was transferred to a centre for minors in application of the protective measures recommended by the Committee.

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

10.12 The Committee takes note of the State party's conclusion that the author clearly appeared to be an adult. However, the Committee recalls its general comment No. 6, which states that age assessment should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner and, in the event of remaining uncertainty, the individual should be accorded the benefit of the doubt such that if there is a possibility that the individual is a child, he or she should be treated as such.³⁰

10.13 The Committee also takes note of the author's claims that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age determination process, which led to the issuance of a decree declaring him to be an adult. The Committee recalls that States parties should appoint a qualified legal representative and, if need be, an interpreter, for all young persons claiming to be minors, as soon as possible on arrival and free of charge.³¹ The Committee is of the view that to provide a representative for such persons during the age determination process is an essential guarantee of respect for their best interests and their right to be heard, given that the role played by the prosecutor's office specializing in child protection is insufficient in this regard.³² Failure to do so amounts to a violation of articles 3 and 12 of the Convention, as the age assessment procedure is the starting point for its application. The absence of timely representation can result in a substantial injustice.

10.14 The Committee also notes the State party's assertion that an unaccompanied minor will be considered as being documented if he or she is in possession of a passport or travel document attesting to his or her identity and which is considered valid under the international conventions signed by the State party, i.e. which can prove the identity of the person presenting it by means of photographs or identification records. However, the Committee notes that, as determined by the State party's own Supreme Court,³³ doubts about the reliability of an official birth certificate issued by a sovereign country cannot take precedence if there has not been a formal legal challenge to the document's validity.³⁴

10.15 In the light of the foregoing, the Committee considers that the age determination procedure undergone by the author, who claimed to be a minor, was not accompanied by the

the minor as proof of his or her status as such for the purpose of obtaining the protection to which minors are entitled".

³⁰ General comment No. 6, para. 31 (i).

³¹ *A.D. v. Spain* (CRC/C/83/D/21/2017), para. 10.14.

³² *Ibid.*; *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8.; and *J.A.B. v. Spain*, para. 13.7.

³³ Spanish Supreme Court, Civil Division, procedural violation appeal No. 2629/2019, judgment No. 307/2020, 16 June 2020.

³⁴ *M.B.S. v. Spain* (CRC/C/85/D/26/2017), para. 9.14.

safeguards needed to protect his rights under the Convention. In the present case, this is due to the failure to properly take into account the original official birth certificate issued by his country of origin and the failure to appoint a guardian to assist him during the age determination procedure. Therefore, the Committee considers that the best interests of the child were not a primary consideration in the age assessment procedure undergone by the author, contrary to articles 3 and 12 of the Convention.

10.16 The Committee also takes note of the author's claims that the State party violated his rights under article 8 of the Convention insofar as it altered elements of his identity by attributing to him an age that was not consistent with the information in the official document issued by his country of origin. The Committee considers that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements of it. In the present case, the Committee notes that the State party failed to respect the author's identity by rejecting his birth certificate, which confirmed that he was a minor, as evidence, without even assessing its validity or verifying the information that it contained with the authorities of his country of origin, even though the author was not an asylum seeker and there was no reason to believe that contacting those authorities would put him at any risk. The Committee also notes that there was a discrepancy between two official documents issued by the Algerian authorities. However, since the validity of the birth certificate submitted by the author, attesting to his status as a minor, was neither challenged in court nor proved to be false, its validity must be presumed. Consequently, the Committee finds that the State party violated article 8 of the Convention.

10.17 The Committee also notes the author's allegations, which have not been contested by the State party, that the State party failed to provide him with protection even though he was a defenceless and extremely vulnerable unaccompanied child migrant. The author was treated as an adult, deprived of his liberty and placed in a prison that served as a holding centre for foreign nationals, together with adults, despite the fact that the State party had a birth certificate indicating that he was a minor. The author spent more than a month in a detention centre before being transferred to a centre for minors. The Committee is therefore of the view that this inaction constitutes a violation of article 20 (1) of the Convention.

11. The Committee on the Rights of the Child, acting under article 10 (5) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, is of the view that the facts before it disclose a violation of articles 3, 8, 12, and 20 (1) of the Convention.

12. The State party should therefore provide the author with effective reparation for the violations suffered. The State party is also under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

(a) Ensure that all procedures for assessing the age of young people claiming to be children are carried out in a manner consistent with the Convention and, in particular, that, in the course of such procedures, (i) the documents submitted by these young people are taken into consideration and, where the documents have been issued or verified by the issuing States or by the embassies thereof, they are accepted as genuine; and that (ii) the young people concerned are assigned a qualified legal representative or other representatives without delay and free of charge, that any private lawyers chosen to represent them are recognized and that all legal and other representatives are allowed to assist them during the age assessment procedure;

(b) Ensure that unaccompanied young people claiming to be under 18 years of age are assigned a competent guardian as soon as possible, even if the age assessment procedure is still pending;

(c) Develop an effective and accessible redress mechanism that allows young unaccompanied migrants claiming to be under 18 years of age to apply for a review of any decrees declaring them to be adults issued by the authorities in cases where the age assessment procedure was conducted in the absence of the safeguards necessary to protect the best interests of the child and the right of the child to be heard;

(d) Provide training to immigration officers, police officers, members of the Public Prosecution Service, judges and other relevant professionals on the rights of migrant children and, in particular, on the Committee's general comment No. 6, joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No.22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration and the aforementioned joint general comment No. 4/No. 23 (2017).

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