



Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 14/2017*, **

<i>Communication submitted by:</i>	A.D. (represented by counsel, Albert Parés Casanova)
<i>Alleged victim:</i>	A.D.
<i>State party:</i>	Spain
<i>Date of communication:</i>	17 March 2017
<i>Date of adoption of decision:</i>	1 February 2019
<i>Subject matter:</i>	Determination of the age of an alleged unaccompanied minor
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of the right of submission
<i>Articles of the Convention:</i>	3, 8, 12, 18 (2), 20 (1), 27 and 29
<i>Articles of the Optional Protocol:</i>	7 (c), (e) and (f)

1.1 The author of the communication is A.D., a citizen of the Republic of Guinea who claims to have been born on 2 February 2003. He claims to be a victim of a violation of article 3, read alone and in conjunction with articles 8, 18 (2) and 20 (1), 27 and 29 of the Convention.¹ The Optional Protocol to the Convention on the Rights of the Child on a communications procedure 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 that the State party refrain from returning the author to his country of origin and that it transfer him to a child protection centre while his case was pending consideration by the Committee.

* Adopted 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: Suzanne Aho Assouma, Amal Salman Aldoseri, 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.

¹ Although not expressly invoked in the initial communication, the author also alleges a violation of article 12 of the Convention (see paras. 3.4 and 5.4 below).



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 to consider the admissibility and merits of the communication separately.²

The facts as submitted by the author

2.1 On 1 March 2017, the Spanish National Police intercepted the small boat in which the author was travelling as he attempted to enter Spain illegally. On the day of his arrival, the author, who was undocumented, stated that he was a minor.

2.2 On 2 March 2017, the juvenile prosecution section of the Provincial High Court of Almería ordered that medical tests be carried out to assess the author's age. The tests, which consisted of an X-ray of the author's left hand, were carried out the same day. The results of the X-ray indicated that the author's bone age was "over 18 years, according to the Greulich and Pyle atlas". There is no standard deviation for this age range.³

2.3 On the basis of the X-ray results, later the same day the juvenile prosecution section decreed that the author was of full legal age.

2.4 Also on the same day, Almería Court of Investigation No. 5 ordered that the author be placed in a holding centre for foreign nationals for a period of no more than 60 days pending his deportation. The author was taken to the holding centre for foreign nationals in Barcelona the same day. On admission to the holding centre, he again stated that he was a minor, as a result of which police officers at the centre sent a fax informing the juvenile section of the Barcelona Provincial Public Prosecution Service of his situation. The author maintains that he never received a response.

2.5 The author asserts that he does not have any identity documents because his mother died during the boat journey and his father was murdered in his country of origin.

2.6 The author maintains that the age assessment rulings issued by the Public Prosecution Service cannot be appealed in court, as confirmed by the Spanish Constitutional Court in decision No. 172/2013, and that he has therefore exhausted all available domestic remedies.

The complaint

3.1 The author maintains that, during the age assessment he underwent, no consideration was given to the best interests of the child, in violation of article 3 of the Convention. As the Committee has noted, the State party does not have a standardized national protocol for protecting unaccompanied minors. Age assessment methods, for instance, vary from one autonomous community to another.⁴

3.2 The author notes that the only age assessment methods currently used in Spain are medical estimates and estimates based on a person's physical characteristics. Other methods, such as psychosocial and developmental estimates and estimates based on available documentation, knowledge and local information, are not used. He adds that the main method used in Spain is the radiological test based on the Greulich and Pyle atlas, a 1950s study of a sample of 6,879 healthy children of upper-middle-class background from the United States of America. The test provides an estimate of the age range within which a person falls. The author maintains that this study, like other studies carried out subsequently, is merely indicative and was not designed to serve as a means of assessing a person's chronological age. The author highlights the need to distinguish between chronological age and bone age, which is a statistical concept developed through clinical experimentation that is useful for strictly medical purposes, such as estimating the rate of a person's bone

² See paras. 4.1–4.7 below.

³ The author provides a copy of the results of the medical tests provided by the diagnostic imaging unit of the Torrecárdenas Hospital Complex.

⁴ The author cites the Committee's concluding observations on the combined third and fourth periodic reports of Spain (CRC/C/ESP/CO/3-4), paras. 27 and 59. The author also cites the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 31.

maturation or predicting how tall a person will grow. Chronological age, on the other hand, is the length of time a person has lived. Bone age and chronological age are not necessarily the same, as a child's growth and development can be affected not only by genetic, pathological, nutritional, hygiene and health factors reflecting his or her social status, but also by racial factors. According to a number of studies, a person's socioeconomic status is a key determinant of his or her bone development.

3.3 The author maintains that the best interests of the child should be the primary consideration throughout the age assessment process and that only necessary medical tests, compatible with medical ethics, should be carried out. The resulting medical reports should always indicate the margin of error. In addition, X-rays should be taken and read by medical personnel specialized in reading X-rays, and the overall assessment of the results should be carried out not, as often occurs, by the radiology departments, but by medical personnel specialized in legal and forensic medicine.⁵ Lastly, age assessments should draw on a variety of supplementary tests and analyses. Also, pursuant to article 35 of Organic Act No. 4/2000,⁶ tests to assess a child's age should not be carried out when he or she is in possession of identity papers.⁷

3.4 The author claims to be a victim of a violation of article 3 of the Convention, read in conjunction with articles 18 (2) and 20 (1), because he was not assigned a guardian or representative as soon as possible, a practice that is a key procedural guarantee of respect for the best interests of the unaccompanied child.⁸ The author submits that, having been declared an adult on the basis of unreliable evidence, he has been left defenceless, without the protection he is owed by the State party. He is thus left in a situation of extreme vulnerability.

3.5 The author maintains that the State party has violated his right to preserve his identity, as enshrined in article 8 of the Convention. He notes that age is a fundamental aspect of identity and that the State party has an obligation not to undermine his identity, as well as to preserve and recover the elements thereof, particularly being in mind that the author has no relatives in the country of reception.

3.6 The author claims that the State party failed in its obligation to protect him by considering him as an adult without any conclusive evidence, in violation of article 20 of the Convention.

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

3.8 The author proposes the following possible solutions: (a) that the State party acknowledge that it is impossible to establish his age on the basis of the medical tests

⁵ The author cites a 2011 report of the Síndic de Greuges (the Ombudsman of Catalonia) on the process of assessing the age of unaccompanied foreign minors.

⁶ Article 35 (3) of Organic Act No. 4/2000 of 11 January, on the Rights and Freedoms of Foreign Nationals in Spain and their Social Integration, states that: "In the event that the State law enforcement or security agencies locate an undocumented foreign national whose status as a minor cannot be established with certainty, the relevant child protection services shall immediately provide the necessary care, as established in the legislation on the legal protection of minors, and the case shall be brought to the immediate attention of the Public Prosecution Service, which, in collaboration with the relevant health institutions, shall conduct the necessary tests on a priority basis to determine the person's age".

⁷ The author also cites a report by the United Nations Children's Fund (UNICEF), the General Council of Spanish Lawyers and Banesto, entitled "Ni ilegales ni invisibles: realidad jurídica y social de los menores extranjeros en España" (Neither illegal nor invisible: The judicial and social reality of foreign minors in Spain), 2009; and the report by La Merced Migraciones-Mercedarios, the Office of the United Nations High Commissioner for Refugees, Save the Children, Santander Programme on Minors at the Pontifical University of Comillas, Baketik and the Asociación Comisión Católica Española de Migración, entitled "Aproximación a la protección internacional de los menores no acompañados en España" (Approaches to the international protection of unaccompanied minors in Spain), Madrid, La Merced Migraciones, 2009.

⁸ The author cites general comment No. 6, para. 21.

carried out; (b) that the possibility of appealing the Public Prosecution Service's age assessment decrees before the courts be recognized; (c) that the right of the child to be heard through a person or institution specializing in the rights of the child be recognized; and (d) that all the rights to which the child is entitled as a minor be recognized to him, including the right to protection by the competent authorities, the right to legal representation and the right to education, and that he be granted a residence and work permit to allow for his full personal development and his integration into society.

State party's observations on admissibility

4.1 In its observations of 26 May 2017, the State party submits in relation to the facts that the author illegally entered Spanish territory on 27 February 2017, on which date the vessel on which he was travelling was rescued by the Spanish security forces.⁹ On his arrival, the author, who was not in possession of any identity documents, voluntarily gave his name and the name of his parents, and stated that he was born on 1 December 1998.¹⁰ It was only after his entry to Spain that the author claimed to be a minor, which is why, although he did not appear to be a minor, he was subjected to age assessment tests consisting of an X-ray of the left hand, in accordance with the Greulich and Pyle atlas, and a diagnosis of age by a doctor. On the basis of these tests, the Public Prosecution Service provisionally declared him to be an adult. On 2 March 2017, the author was admitted to the holding centre for foreign nationals in Barcelona. On 17 March 2017, he submitted various documents to the police and the Barcelona Provincial Public Prosecution Service requesting that additional tests be carried out in order to prove that he was a minor. Barcelona Court of Investigation No. 30 initiated preliminary proceedings and ordered new age assessment tests to be carried out. These were conducted on 24 March 2017 and consisted of a physical examination by a forensic doctor, a dental examination, a Tanner puberty scale test, a Greulich and Pyle bone age test and orthopantomographic analysis. Since in all these tests the author was shown to be over 18 years old, the investigating judge decided to close the preliminary proceedings on 29 March 2017. The State party notes that the author told the forensic doctor he was born on 2 February 2003 and was therefore 14 years old.¹¹

4.2 The State party submits that the communication is inadmissible as manifestly ill-founded, in accordance with article 7 (f) of the Optional Protocol, as the author has not provided a single piece of medical evidence attesting to his age.

4.3 The State party further submits that the communication is inadmissible as an abuse of the right of submission and as incompatible *ratione personae* with the Convention, in accordance with article 7 (c) of the Optional Protocol. The author has not provided any authoritative original official document nor any objective medical evidence showing that he is a minor. He has also failed to provide any photographs. In contrast, the Public Prosecution Service has carried out as many as six objective medical tests that show him to be of full legal age. As in other cases brought before the Committee, the author is a person who is presumed to be close to the age of majority, who appears to be over the age of 18 years old and who has undergone, with his consent, objective medical tests in Spain that certify that he has reached the age of majority. He has provided no original identity documents with biometric data nor any medical test results that contradict those carried out, despite being represented by lawyers with the resources to do so, nor does he specify which medical tests he would consider to be appropriate. Lastly, the State party cites the case of *M.E.B. v. Spain*,¹² submitted to the Committee, in which the author claimed to be a minor

⁹ The State party provides a copy of the minutes of the preliminary proceedings conducted before Almería Court of Investigation No. 5 on 2 March 2017, which mentions the date of rescue to which the State party refers.

¹⁰ The State party submits a copy of the fax sent by the National Police Force in Almería to Almería Court of Investigation No. 5 in which it informs the Court of the rescue of a small boat carrying 32 sub-Saharan migrants and requests that they be placed in holding centres for foreign nationals. Attached to this fax is a list of the names, dates of birth and parents of the migrants, including the author, whose date of birth is recorded as 1 December 1998.

¹¹ The State party provides a copy of the medical report of 28 March 2017, which contains this statement.

¹² *M.E.B. v. Spain* (CRC/C/75/D/9/2017).

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 uncertain and illusive prosperity in Europe". These mafias frequently recommend that these desperate people either should not carry or should hide their identity documents, and should claim, if possible, that they are minors.

4.4 The State party also contends that the communication is inadmissible under article 7 (e) of the Optional Protocol on the grounds that the author failed to exhaust domestic remedies, given that: (a) age assessments can be reviewed by submitting 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 determine the individual's age; (b) an application for a judicial assessment of age can be submitted; and (c) deportation orders can also be appealed through administrative and judicial channels.

4.5 The State party reports that, when the 60-day maximum permitted period of detention in a holding centre for foreign nationals expired without the expulsion order having been executed, the author was released, and that he is currently residing in a reception centre run by the Cepaim Foundation in Teruel.

4.6 The State party maintains that the author's situation has been re-examined in accordance with article 6 of the Optional Protocol, and that it has been concluded that: (a) there are various pieces of objective evidence – the X-ray of the left hand and the physical examination¹³ – carried out by specialized doctors under the supervision of the prosecution service and the courts, which confirm that the complainant has reached the age of majority; (b) no documentary evidence has been provided to attest to a different age; and (c) there is no evidence that the author's return to his country of origin, where he has personal and family ties, would put him at risk of irreparable harm, nor would his return represent an exceptional circumstance.

4.7 The State party provides information about a special protocol for dealing with presumed unaccompanied minors,¹⁴ pursuant to 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, although the individual claims to be a minor, his or her physical appearance raises doubts about his or her age, medical age assessment tests are carried out immediately, with his or her informed prior consent, in accordance with criteria accepted by the medical forensics community. The results of these tests – which are interpreted in the way most favourable to the immigrant – are taken into account when considering whether specific child protection measures are to be taken.

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

5.1 In his comments of 11 July 2017, the author confirms that, on his arrival in Spain, he voluntarily gave his name, the names of his parents and his date of birth. He maintains that he arrived in a boat in terrible physical and mental condition. He adds that the State party makes no mention of any register or document in which the date of birth allegedly given by the author is recorded. He also adds that minors arriving by boat in Spain are unaware of the applicable regulations and the rights of minors in that country. On the contrary, there is a belief that, if they claim to be minors, they will be returned more quickly, for which reason they sometimes claim to be adults without being so. He adds that the State party gave more credence to his first age claim than to the second, without explaining why.

¹³ No copy of the results of the physical examination is provided.

¹⁴ 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 the *Boletín Oficial del Estado* of 16 October 2014.

5.2 The author states that the State party continues to use the author's appearance as the criterion for determining his age, thereby showing a lack of professionalism and rigour in defending the rights of foreign minors and a failure to accord him the benefit of the doubt as to his minor age status, despite the fact that domestic legislation establishes such a principle.¹⁵ The author points out that the child protection services have a duty to look after children until they are confirmed to be of full legal age, i.e. until it is irrefutably established, by means of a binding administrative decision, that they have reached the age of majority.

5.3 The author emphasizes the unreliability of the medical tests carried out, highlighting that they cannot be considered objective and cannot constitute the sole basis for determining a person's age. The author submits that his right to be accorded the benefit of the doubt as to his minor age status, as set out in the Committee's general comment No. 6, was not respected.¹⁶ Unaccompanied foreign children should be entrusted to the child protection services even before their age is determined.

5.4 The author states that although a lawyer was appointed to provide him – as an adult – with assistance in connection with the deportation proceedings, he was at no time appointed a representative of his own choosing to defend his interests as a minor, in violation of article 12 of the Convention.¹⁷

5.5 The author asserts that he did not challenge the age assessment decree issued by the Public Prosecution Service because there is no possible means of appeal against such decrees. While other administrative acts indirectly related to age assessment may be appealed, the Public Prosecution Service's age assessment decision cannot be appealed.

5.6 The author states that, in the light of the many communications submitted to the Committee by various Spanish organizations, it is possible to speak of systematic violations, within the meaning of article 13 of the Optional Protocol, in the State party.

5.7 The author notes that the framework protocol on special interventions in relation to unaccompanied foreign minors has been challenged before the Supreme Court, as many of its articles are considered to be unconstitutional. In particular, under the protocol, children in possession of a passport can have their passport deemed invalid if they appear to be an adult. The author indicates that, in contrast, the Supreme Court has found that "an immigrant whose passport or equivalent identity document confirms that he or she is a minor cannot be considered an undocumented foreign national and subjected to further age assessment tests for this reason".

State party's observations on admissibility and the merits

6.1 In its observations of 19 February 2018, the State party notes that the author has provided no evidence to demonstrate that his mental faculties were affected at the time of his arrival in Spain. The date of birth he declared upon entry to Spain is recorded in the documentation provided, including the application for admission to a holding centre for foreign nationals made by the National Police¹⁸ and the form recording his admission to the holding centre in Barcelona.¹⁹

6.2 The State party reiterates its arguments on admissibility and maintains that a minimum criterion for the admission of a communication under the Optional Protocol should be the provision of at least some evidence that the author is a child.

¹⁵ The author cites article 35 (3) of Organic Act No. 4/2000, which provides that: "undocumented foreign nationals whose minority cannot be established with certainty shall be given the immediate attention required by the competent child protection service, in accordance with legislative provisions on the legal protection of minors".

¹⁶ The author cites paragraph 31 (i) of general comment No. 6 and paragraph 51 of the European Parliament resolution of 5 February 2009 on the implementation in the European Union of Directive 2003/9/EC.

¹⁷ The author also cites general comment No. 6, para. 25.

¹⁸ As footnote 10 above.

¹⁹ This form, which is dated 2 March 2017 and was issued by police working at the holding centre in Barcelona and signed by the author, gives his date of birth as 1 December 1998, besides containing other personal data and a photograph of him.

6.3 The State party notes that, while the provisional age assessment made by the Public Prosecution Service cannot be judicially reviewed, the Public Prosecution Service can agree to conduct new investigations if new objective evidence is presented. In addition, a request to review any decision of the autonomous community in which the author is not considered to be a minor can be submitted to the civil court in the place of detention. Deportation orders and, where applicable, refusals of asylum requests can also be appealed before the administrative courts. Lastly, non-contentious proceedings can be brought for age assessment before a civil court, in accordance with Act No. 15/2015 of 2 July on non-contentious jurisdiction. According to the Constitutional Court, age assessments carried out by the Public Prosecution Service are purely provisional by nature and the courts can therefore be petitioned to make a definitive age assessment.

6.4 The State party submits that the author's complaint is generic and apparently based on the premise that any use of medical age assessment tests that results in a person being declared an adult implies a violation of the Convention. The State party also maintains that general comment No. 6 accords the individual the benefit of the doubt as to his or her minor age status in cases of uncertainty, but not when it is clear that the person is of full legal age. Article 35 of Act No. 4/2000 provides that "undocumented foreign nationals whose minority cannot be established with certainty" shall be given immediate assistance in accordance with legislation on the legal protection of minors. In other words, an individual should be assumed to be a minor, even if undocumented, if he or she appears to be a minor. However, if the undocumented person appears to be clearly an adult, the authorities can legally consider him or her as such without needing to carry out tests. Nonetheless, in the present case the authorities gave the author the opportunity, subject to his prior informed consent, to undergo objective medical tests to determine his age. The State party adds that the author criticizes the tests to which he was subjected without indicating which alternative tests should have been carried out.

6.5 The State party maintains that, in the absence of reliable evidence that he is a minor, and solely on the basis of his statement, it would have been inappropriate to place the author in a centre with minors, as this could have posed a serious risk for the minors concerned.

6.6 In relation to the author's complaint of an alleged violation of his best interests, the State party notes that the author has omitted to mention that he was rescued by Spanish authorities while aboard a fragile vessel; that he was looked after by the health services upon his arrival on Spanish soil and was provided with a lawyer and interpreter free of charge; that as soon as he claimed to be a minor, this was reported to the Public Prosecution Service, as the institution responsible for ensuring the best interests of the child; and that the author is currently at liberty and is receiving social assistance. Consequently, the State party argues that one can hardly speak of a lack of legal assistance or protection, even if the author were a minor, which is not the case.

6.7 Regarding the author's allegations concerning his right to preserve his identity, the State party notes that it is the author's representative who has violated this right, since, to date, the representative has failed to provide any official identity document confirming his name. Nonetheless, the Spanish authorities registered the author with the name he gave at the time of his rescue at sea and his illegal entry on Spanish soil.

6.8 Lastly, the State party maintains that the author was cared for by the State until the maximum permitted period of detention in a holding centre had expired, at which point he was released and was subsequently accorded comprehensive assistance and health coverage. His right to development has not therefore been violated.

6.9 As to the reparation measures requested, the State party notes that it is paradoxical for the author to apply for a work permit if he is 14 years old; at this age no Spanish child is permitted to work as this would constitute a violation of his or her right to education. This reveals that the author's representative knows implicitly that he is an adult who intends to stay in Spain to engage in paid work.

Third-party submission²⁰

7.1 On 3 May 2018, the Ombudsman of France presented a third-party submission on the issue of age assessment. The Ombudsman maintains 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.²¹

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

7.3 There are no common rules or agreements on age assessment in European States. Several States combine medical and non-medical tests. Medical tests performed include X-rays of the left wrist (23 States), dental X-rays (17 States), collarbone X-rays (15 States), dental examinations (14 States) and estimates based on physical appearance (12 States). Although bone age assessment is common, it is unreliable and impacts on children's dignity and physical integrity. Bone age assessment does not provide a medical diagnosis of any kind, as confirmed by the Royal College of Radiologists in London. In a resolution issued on 12 September 2013 on the situation of unaccompanied minors in the European Union, the European Parliament also condemned the inappropriate and intrusive nature of the medical techniques used for age assessment based on bone age, which can cause trauma, have wide margins of error and are sometimes carried out without the child's consent.

7.4 The Greulich and Pyle method is inappropriate and not applicable to the migrant population, which consists mostly of adolescents from Saharan Africa, Asia and Eastern Europe who are fleeing their countries of origin, often in precarious socioeconomic conditions. A number of studies have shown that bone development differs according to a person's ethnic origin and socioeconomic status, making this method unsuitable for assessing the age of the non-European population.²² This method also has significant margins of error, especially among persons aged between 15 and 18 years old.²³ According to the Commissioner for Human Rights of the Council of Europe, European paediatric associations have categorically stated that bone and dental maturation cannot be used to determine the exact age of a child, but can provide only estimates with a wide margin of error of between two and three years. The interpretation of the information may also vary from one country to another, and from one specialist to another.²⁴ The Committee has also urged States not to use bone age assessment techniques.²⁵

²⁰ This submission affects 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 submitted to the Committee.

²¹ D. Wenke, "Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration", Council of Europe, 2017, p. 6.

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

²³ The Ombudsman cites, inter alia, T. Smith and L. Brownlees, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011; National Academy of Medicine of France, "Rapport sur la fiabilité des examens médicaux visant à déterminer l'âge à des fins judiciaires et la possibilité d'amélioration en la matière pour les mineurs étrangers isolés" (Report on the reliability of medical tests to determine age for judicial purposes and possible improvements in this area for unaccompanied foreign minors), *Bulletin de l'Académie nationale de médecine*, vol. 191, No. 1 (January 2007), pp. 139–142; and S. Depallens et al., "Détermination de l'âge des jeunes migrants. Position de la Société Suisse de Pédiatrie" (Determining the age of young migrants. Position of the Swiss Paediatric Society), *Paediatrica*, vol. 28, No. 2 (2017), p. 3.

²⁴ Council of Europe Commissioner for Human Rights, Human Rights Comments, "Methods for assessing the age of migrant children must be improved", 2011.

²⁵ General comment No. 6 and 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

7.5 The Ombudsman therefore recommends: (a) that age assessment should be based on a multidisciplinary approach and that medical tests should be used only as a last resort when there are serious grounds for doubting age; (b) the child should be informed and given the opportunity to give his or her prior consent; (c) that the individual should be presumed to be a child during the age assessment process and protective measures should be adopted, such as appointing a legal representative to assist the person throughout; (d) that the test should be administered in strict respect for the rights of the child, including his or her dignity and physical integrity; (e) that the child's right to be heard should be respected; (f) that, if doubt persists at the end of the procedure, the individual should be given the benefit of the doubt; (g) an application for protection should not be denied solely because the person refuses to undergo medical tests; and (h) that there should be an effective remedy for challenging a decision based on an age assessment procedure.

7.6 The Ombudsman recalls that the detention of migrant children, even for short periods or for age assessment purposes, is prohibited by international law and that States should use alternative measures. States should prohibit the deprivation of liberty of children and their detention in adult facilities.²⁶ Child protection services should be informed immediately so that they can assess the child's protection needs.²⁷

Parties' comments on the third-party submission

8. In his comments of 1 August 2018, the author maintains that the submission confirms that the technique used to assess his age was inappropriate, given the wide margin of error existing, particularly in his age group. Spanish institutes of forensic medicine have also confirmed this view and have issued recommendations on forensic methods for estimating the age of unaccompanied foreign minors.²⁸

9.1 In its observations of 3 August 2018, the State party notes that none of the cases against Spain submitted to the Committee concern detained persons. The authors of these communications have been offered the option of staying in open centres while their administrative and judicial cases are considered. It adds that none of these cases concerns asylum seekers, but rather economic migrants.

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

Rights of the Child on the general principles regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.

²⁶ European Court of Human Rights, Grand Chamber, *Tarakhel v. Switzerland*, application No. 29217/2012.

²⁷ European Court of Human Rights, *Abdullahi Elmi and Aweys Abubakar v. Malta*, application Nos. 25794/2013 and 28151/2013.

²⁸ The author attaches a copy of a consensus document setting out the best practices of Spanish forensic medicine institutes. The aim of this document, which was issued in 2010, was to "standardize and harmonize the minimum criteria required for expert reports, as well as the interpretation of the margins of error deriving from the normal distribution and variability in an individual's development towards maturity. It is suggested that age assessments be performed at forensic medicine institutes by experienced practitioners under supervision, after obtaining the informed consent of the presumed minor." (*Revista Española de Medicina Legal*, vol. 37, No. 1 (January–March 2011), p. 22).

cases, the authors were recognized as children by the Spanish authorities and, on that basis, the Committee closed the case. In another case, the authorities of the author's country of origin confirmed that the author was an adult. That communication was also closed. This proves the veracity of the medical tests carried out.

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

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

Issues and proceedings before the Committee

Consideration of admissibility

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 that the purpose of the present communication is to establish whether the age assessment procedures that the author had to undergo incorporated the safeguards necessary to protect his rights under the Convention.

10.3 However, before taking a position on the merits, the Committee must consider whether the file contains any evidence as to why the author, as an undocumented youth who claims to have been a minor at the time of the events, cannot be presumed as such.²⁹ In this regard, the Committee takes note of the State party's argument that, as recorded in two official documents (see para. 6.1 above), at the time of his arrival in Spain the author voluntarily gave his name and the names of his parents and stated that his date of birth was 1 December 1998. Based on these statements, the author would have reached the age of majority before arriving in Spain. In his comments of 11 July 2017 (see para. 5.1 above), the author appears to acknowledge that, at the time of his arrival, he stated he was born on 1 December 1998, claiming that he was in a very poor mental state as a result of his journey. However, the Committee notes that the author has not provided any convincing explanation as to why the harsh conditions of his journey by boat would have led him to give an allegedly incorrect date of birth upon arrival. The Committee also notes that the rest of the information provided by the author at the time, including the name of his parents, was correct, and that he has failed to provide any evidence of having been, at the time of his arrival, in a mental state so poor that it made him forget his date of birth and give a date five years earlier.

10.4 The Committee considers that States parties should give the benefit of the doubt to young people who claim to be minors, despite lacking identity documents, and that it should presume them to be minors and treat them as such until it can be established with certainty, by reliable evidence, that they are of full legal age. However, the Committee notes that, in the present case, there are serious inconsistencies and discrepancies in the claims the author has made about his age both before the Spanish authorities and before the Committee, and that the author has provided no reasonable explanation to justify these discrepancies. In particular, the Committee notes that in the initial communication the author omitted to disclose that he had told the Spanish National Police he was an adult at the time of his arrival. The author also failed to explain why he confirmed that his date of birth was 1 December 1998, as recorded in the form documenting his admission to the holding centre for foreign nationals in Barcelona, which he signed on 2 March 2017 (see para. 6.1 above), despite having indicated in the initial communication that he stated he was a minor at the time of his admission to the centre.

²⁹ In this regard, see *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 11.2.

10.5 In the light of the foregoing, the Committee concludes that the inconsistencies in the author's age claims, which have not been duly explained, are sufficient to deny him the benefit of the doubt as to his minor status in the present case.

10.6 Consequently, the Committee finds that the communication is incompatible with the provisions of the Convention, which protects the rights of children, and is inadmissible under article 7 (c) of the Optional Protocol.

11. The Committee decides that:

(a) That the communication is inadmissible under article 7 (c) of the Optional Protocol; and

(b) That this decision shall be transmitted to the author of the communication and, for information, to the State party.
