



# Convention on the Rights of the Child

Distr.: General  
5 November 2019  
English  
Original: Spanish

## Committee on the Rights of the Child

### Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 27/2017\*, \*\*

<i>Communication submitted by:</i>	R.K. (represented by the non-governmental organization Fundación Raíces)
<i>Alleged victim:</i>	R.K.
<i>State party:</i>	Spain
<i>Date of communication:</i>	20 July 2017
<i>Date of adoption of Views:</i>	18 September 2019
<i>Subject matter:</i>	Age assessment procedure in respect of an alleged unaccompanied asylum-seeking minor
<i>Procedural issues:</i>	Inadmissibility <i>ratione personae</i> ; non-exhaustion of domestic remedies
<i>Articles of the Convention:</i>	3, 8, 12, 18 (2), 20, 22, 27 and 29
<i>Articles of the Optional Protocol:</i>	7 (c), (e) and (f)

1.1 The author of the communication is R.K., a national of Guinea, born on 1 February 2000. The author claims to be the victim of violations of articles 3, 8, 12, 18 (2), 20, 22, 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 July 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to refrain from returning the author to his country of origin and to transfer him to a child protection centre while his case was under consideration by the Committee.

#### The facts as submitted by the author

2.1 On 3 June 2017, the author travelled in a small boat from Nador, Morocco, to Almería, Spain; his boat was rescued by the Red Cross before reaching the Spanish coast. He had fled Guinea where he had lived with his family. His parents were Christians and

\* Adopted by the Committee at its eighty-second session (9–27 September 2019).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffe, Olga A. Khazova, Cephaz Lumina, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedemera Reyna, José Ángel Rodríguez Reyes, Aissatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.



lived in the Astadi neighbourhood, which is predominately Muslim. They were murdered during clashes between Christians and Muslims when the author was 14 or 15 years old. The author managed to flee his home but was caught, tied up and had his arms and chest cut with a razor blade. He managed to escape again and took refuge in a Christian neighbourhood where he had his wounds treated. When he returned to Astadi, he found that his house had been razed to the ground and burned. The author decided to travel alone from Conakry, passing through Mali, Algeria and Morocco as part of a year-long journey. At the border between Mali and Algeria, he was stopped by members of the Tuareg community who kept him tied up for three days. He finally reached Nador, where he remained for six months.

2.2 When he arrived in Spain, the author was transferred to Almería police station and taken straight to a cell, where he spent three days alongside adults. During this time, he was brought food but was unable to shower. On the third day, he was called for fingerprinting. Even though the author maintained that he was 17 years of age throughout the process, his date of birth was recorded as 1 January 1996, making him 21 years of age.

2.3 On 5 June 2017, a deportation order was issued against the author pursuant to agreement No. 1461/17. On 6 June 2017, Almería Court of Investigation No. 1 issued judgment No. 1152/2017 ordering his detention in the holding centre for foreign nationals located in Aluche, Madrid. The author explains that he informed the Court that he was a minor, that he was not assisted by an interpreter and that he does not know whether a lawyer was assigned to him, since he was unable to speak to him or her. He also explains that he stated once again that he was a minor when he arrived at the holding centre.

2.4 On 17 July, the organization SOS Racismo, which assists persons detained in the holding centre in question, wrote to inform the Ombudsman and the supervisory judge responsible for the centre that five minors were being held there, including the author, and that they risked being deported on 24 July 2017. The author explains that he learned through informal channels that there was a deportation flight to Guinea scheduled for 24 July 2017. However, since deportation notifications are issued only 12 hours in advance, he had still not been formally notified of his fate.

2.5 On 18 July 2017, the author attended an interview to apply for asylum. He explains that he was not allowed to formalize his application for international protection in his capacity as a minor, as he did not have a guardian.

2.6 On 19 July 2017, the author received a notification from Madrid Court of Investigation No. 19 ordering him to undergo age assessment tests.

2.7 On 20 July 2017, the author wrote to the Embassy of Guinea in Spain, Almería Court of Investigation No. 1, the Directorate-General for Family and Children's Affairs of the Community of Madrid, the Ombudsman, the supervisory court responsible for the holding centre for foreign nationals and the Madrid Provincial Prosecutor's Office. The letter urged the various institutions to take protective measures in respect of the author, explaining that he had the appearance of a minor. Several hours later, after having received a copy of an extract of his birth certificate and the accompanying legal certificate, he sent a copy of the documentation to the aforementioned institutions, the Almería Provincial Prosecutor's Office and the Almería provincial police.

2.8 On 28 July 2017, after having received his original documentation by post, the author wrote to the supervisory court responsible for the holding centre for foreign nationals, Almería Court of Investigation No. 1, the Almería Provincial Prosecutor's Office and the Madrid Provincial Prosecutor's Office to inform them that he had the documentation in his possession. The very same day, the author was released, after having spent 52 days in the holding centre. He was transferred to accommodation for adults without having been assigned a guardian or having received the treatment and protection to which he was entitled as a minor.

### **Complaint**

3.1 The author claims that, even though he was an asylum-seeking foreign unaccompanied minor, the State party failed to take into account the principle of the best

interests of the child enshrined in article 3 of the Convention. He submits that the State party violated this principle by failing to respect his right to be presumed to be a minor in the event of any doubt or uncertainty, especially when there is a real risk that he could suffer irreparable harm.<sup>1</sup> He indicates that he is in possession of documentation confirming his status as a minor: a copy of an extract of his birth certificate and the accompanying legal certificate. The author claims that he is suffering harm as a result of living in a centre for adults, as it is a place that is totally inadequate for minors. Moreover, there is a risk that the deportation order issued against him might be executed, which would amount to expelling an asylum-seeking minor from Spanish territory.

3.2 The author points out that, although Spanish law includes the principle of the best interests of the child, there is still no uniform protocol for assessing age because of the differences in how the autonomous communities determine what the principle in question entails.<sup>2</sup>

3.3 The author also claims to be the victim of a violation of article 3, read in conjunction with articles 18 (2) and 20 (1) of the Convention, as the State party failed to assign him a guardian or representative, a practice that is a key procedural guarantee of respect for the best interests of an unaccompanied child.<sup>3</sup> He submits that the State party, in declaring him to be an adult solely on the basis of his appearance, without having contacted the embassy of his country of origin to confirm whether he was indeed a minor, deprived him of all his rights under the Convention.

3.4 The author maintains that the State party has violated his right to an identity 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 interfere in this regard and to preserve and recover the data constituting it.

3.5 The author also claims to be the victim of a violation of article 12 of the Convention, as the State party did not provide him with an opportunity to be heard.

3.6 The author also claims to be the victim of a violation of article 20 of the Convention, since the State party failed to grant him the protection that he was owed as a child deprived of his family environment. He adds that the State party immediately considered him to be an adult, without taking into account his original documentation indicating that he was in fact a minor, thereby depriving him of the protection that he was owed.

3.7 The author also claims to be the victim of a violation of article 22 of the Convention as, when he attempted to apply for asylum, he was prevented from formalizing his application as he was a minor. The author refers to Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, which provides that, when a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.<sup>4</sup> The author considers that the purpose of the three-day deadline for registering applications is to provide security and a guarantee to asylum seekers, bearing in mind the consequences associated with being in an irregular situation.

3.8 Lastly, the author claims that he is the victim of a violation of his rights under articles 27 and 29 of the Convention, as the State party's failure to take his best interests into account impeded his proper all-round development. The failure to assign a guardian to guide the author likewise prevented him from developing in an age-appropriate manner.

3.9 The author proposes the following potential solutions: (a) that the State party recognize him as a minor and stay his deportation to his country of origin; (b) that he be allowed to formalize his asylum application in his capacity as a minor; (c) that he be declared to be in a situation of distress and that the Community of Madrid assume his

<sup>1</sup> The author cites the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 31 (i).

<sup>2</sup> The author cites CRC/C/ESP/CO/3-4, para. 27.

<sup>3</sup> The author cites general comment No. 6 (2005), para. 21.

<sup>4</sup> Article 6.

guardianship; and (d) that all the rights to which he is entitled as a minor be recognized, including the right to be heard, to receive protection from the State, to have a legal representative, to receive an education and to be granted a residence and work permit to allow him to fully develop as a person and be integrated into society.

#### **State party's observations on admissibility**

4.1 In its observations of 24 November 2017, the State party submits that the whereabouts of the author are unknown and that it therefore makes no sense to apply the interim measures requested.

4.2 The State party claims that the communication is inadmissible *ratione personae* under article 7 (c) and (f) of the Optional Protocol, as the author is an adult. This is evident because: (a) the author failed to present official identity documents with verifiable biometric data; (b) the birth certificate that he presented does not constitute sufficient evidence of the author's identity, as it is only a photocopy and lacks biometric data; and (c) his appearance is that of an adult, based on the photographs taken of him at the time of his illegal entry into Spain. The State party adds that, as there is no reliable evidence that the author is indeed a minor, declaring this communication admissible "would only serve to encourage migrant smuggling rings, whom the author paid and whose services he used".

4.3 Moreover, the State party submits that Madrid Court of Investigation No. 19 sent a notification on 19 July 2017 ordering Gregorio Marañón Hospital in Madrid to perform medical tests consisting of an X-ray of his wrist and a dental X-ray in order to ascertain whether the author was indeed a minor. In the medical reports dated 20 and 24 July 2017, his bone age was estimated to be 19 years, according to the Greulich and Pyle atlas, and his minimum age to be 18 years, according to the dental X-ray. The results of the forensic medical tests established the most likely minimum age of the author to be 18 years.

4.4 The State party further submits that, under article 7 (e) of the Optional Protocol, the communication is inadmissible on the ground of failure to exhaust all domestic remedies, given that: (a) the author could have requested to undergo medical tests to confirm that he was a minor; (b) the author can apply for a review of any decision issued by the Autonomous Community in which he is not considered a minor in order to avail himself of the protection to which minors are entitled, in accordance with the procedure set out in article 780 of the Civil Proceedings Act; (c) the author can appeal his deportation order and any rejection of his asylum application before the administrative courts; and (d) the author can initiate non-contentious proceedings for age assessment before the civil courts, in accordance with Act No. 15/2015.

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

#### **State party's observations on the merits**

5.1 In its observations of 19 January 2018, the State party reiterates its account of the facts and its arguments regarding the admissibility of the communication.

5.2 Regarding the author's claim of non-consideration of his best interests, the State party submits that "the interests of a minor could hardly have been disregarded" when objective medical tests show the author to be an adult. It adds that the claim is generic in nature and does not specify the exact nature of the infringement of the principle of the best interests of the child that the author is attempting to attribute to the State party. Furthermore, the claim is seemingly based on the argument that the Convention is violated every time that medical age assessment tests find a person to be an adult. The Committee's general comment No. 6 (2005) establishes the right to be presumed to be a child in the event of uncertainty, but not when it is obvious that the person in question is an adult, in which case the national authorities may legally consider him or her to be an adult without having to conduct any tests. However, in this case, the authorities gave the author the opportunity to

undergo objective medical testing to assess his age, for which he gave his prior informed consent.

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

5.4 Regarding the author's claim of non-consideration of his best interests in relation to articles 18 (2) and 20 (1) of the Convention, the State party notes that the author was treated by health-care personnel when he arrived on Spanish soil and was provided with a lawyer and an interpreter free of charge; that his status was reported without delay to the competent judicial authority to ensure that his rights were respected; and that, as soon as he claimed to be a minor, this was reported to the Public Prosecution Service, the institution responsible for ensuring respect for the best interests of the child. Consequently, one can hardly speak of a lack of legal assistance or protection, even if the author were a minor, which is not the case.

5.5 Regarding the claims concerning the author's right to an identity, the State party considers that the author has not explained under what circumstances he might have been deprived of the right to preserve his identity. It adds that the Spanish authorities registered him under the name that he gave when he entered Spanish territory illegally and that the documentation in his possession is what is currently allowing him to exercise his rights.

5.6 Regarding the author's claim concerning an alleged violation of his right to be heard, the State party submits that the author has always had the opportunity to exercise the right in question. The author was heard when he claimed to be a minor and, with his prior informed consent, was given the opportunity to undergo medical age assessment tests. He was also offered legal assistance and was represented and defended at all times by a lawyer. The State party submits that, on 6 June 2017, the author was provided with a copy of the standard document informing detainees of their rights under the Aliens Act, which he signed in the presence of an interpreter and a lawyer. The author was heard and assisted by a lawyer at all times during the judicial proceedings concerning him, both before Almeria Court of Investigation No. 5 and Madrid Court of Investigation No. 19.

5.7 Regarding the author's claims that he has been deprived of his right to receive special protection and assistance from the State party under article 20 of the Convention, the State party submits that, "in this case, as there is evidence that he is in fact an adult, the right in question simply does not apply".

5.8 The State party also denies that the author's right to asylum has been violated since, on 28 July 2017, the Subdirector General for Asylum Affairs of the Ministry of the Interior registered the author's asylum application.

5.9 The State party further claims that there has been no violation of articles 27 and 29 of the Convention, since the right to development applies only to minors. It adds that the author was properly cared for by the State party from the time he arrived in Spain.

5.10 Regarding the potential solutions proposed by the author in his initial communication, the State party submits that the author is neither requesting nor proposing "any means by which his age may be assessed with certainty". Nor is he proposing that the information concerning him be verified with the authorities of his supposed country of origin. Requesting Spain to recognize that it is impossible to establish his age is therefore not a solution, since it is unacceptable that a person who appears to be an adult should be treated as a minor on the basis of his word alone. Regarding the author's request that the age assessment decrees issued by the Public Prosecution Service be appealed before the courts, the State party claims that such decrees are highly provisional, that they can be reviewed by the prosecutor who issued them if new evidence is submitted and that they can be replaced with final decisions issued by other judicial bodies. With regard to the author's remaining requests, the State party points out that the author has already received State protection and assistance from judges and the Public Prosecution Service. Lastly, in Spain, residence and work permits can be acquired only if the relevant general legal requirements are met.

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

6.1 In his comments of 13 July 2018, the author insists that the State party's statement that his whereabouts are unknown is false, as he was living in a centre for adults as part of a programme funded by the Ministry of Employment and Social Security, which monitors the situation of the persons living there. The author explains that, for eight months, he has been living in a centre for adults located in Burgos, which is managed by Red Acoge.

6.2 The author notes that, on 25 July 2017, he was able to formalize his asylum application. In February 2018, the Asylum and Refuge Office renewed his asylum seeker card. The author points out that the form used to formalize his asylum application included the date of birth from his original documentation, namely 1 February 2000, which confirms that he was a minor. However, the date that appears on his asylum seeker card is 1 February 1998, indicating that he was not registered as a minor. In view of this discrepancy, the author notes that he has requested the Asylum and Refuge Office to change the date on his identity card but that he has not yet received a response.

6.3 Regarding the State party's argument that the communication should be declared inadmissible *ratione materiae*, the author claims that, contrary to the State party's assertion, it is incorrect to say that he is an adult. He submits that his birth certificate shows that he is a minor. He adds that, according to the latest scientific research, the margin of error of the X-ray tests performed to assess his age, particularly the results of the X-ray of his left wrist based on the Greulich and Pyle method, is such that they do not allow reliable conclusions to be drawn.

6.4 Regarding the exhaustion of domestic remedies, the author notes that article 7 (f) of the Optional Protocol provides that the exhaustion of domestic remedies is not necessary where they are unlikely to bring effective relief. The author submits that the deportation order cannot be appealed directly before the courts and that an appeal must first be filed with the administrative authorities, which will issue a decision within three months; this appeal does not, however, suspend the execution of a deportation order.

6.5 The author points out that the Public Prosecution Service has not reviewed the age assessment decree, even though the author provided documentation issued by the Embassy of Guinea that confirms his status as a minor, on the ground that this documentation contradicts the results of the medical tests carried out. The author concludes that, contrary to the State party's claim, age assessment decrees are not highly provisional decisions that can be reviewed if new documents are submitted.

6.6 Regarding the violation of the principle of the best interests of the child enshrined in article 3 of the Convention, the author reiterates that the State party has not respected his right to be presumed to be a minor, especially when there is an imminent risk that he could suffer irreparable harm, which would be the case if he were to be expelled from the country. The author refers to joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, which underlines that documents submitted as part of an age assessment procedure should be considered genuine unless there is proof to the contrary, that statements by children must be considered and that, in the event of uncertainty regarding an individual's age, the individual being assessed should be given the benefit of the doubt. The author claims that he should have been transferred immediately to a centre for minors or, in case of doubt, the Spanish authorities should have contacted the consular authorities of Guinea to confirm his identity.

6.7 He adds that the medical test that he underwent cannot be considered objective and does not allow his exact age to be determined. The author refers to the judgment of 9 October 2017 of the National High Court of Spain, according to which medical age assessment tests do not determine a person's age exactly but rather provide an estimate of his or her age with a margin of error of plus or minus two years. The author claims that, in this case, this margin of error was not taken into consideration.

6.8 Regarding his claim of non-consideration of his best interests in relation to articles 18 (2) and 20 (1) of the Convention, the author submits that, contrary to the State party's assertion, it is incorrect to say that the role played by the Public Prosecution Service in the age assessment procedure served as an adequate substitute for his being assigned a guardian or legal representative by the authorities as soon as they learned that he might be a minor. He adds that article 20 of the Convention obliges States parties to provide children deprived of their family environment with assistance and alternative care. The author reiterates that he has received neither.

6.9 Regarding the violation of his right to an identity, the author claims that, under article 8 of the Convention, the State party has a negative obligation to preserve the identity of a child and a positive obligation to re-establish the identity of a child where he or she has been deprived of any element of it. The author understands that a person's age is an element of his or her identity and therefore must be protected under article 8. He explains that the State party violated his right to an identity when it attributed to him a date of birth that did not match the date of birth in his identity documents issued by the authorities of his country of origin and when it included that date of birth on his asylum seeker card.

6.10 The author reiterates that his right to be heard under article 12 of the Convention was denied. He claims that this right was violated from the moment he arrived in Spain as, even though he stated that he was a minor, he was assigned the wrong age at the registration stage. Similarly, at Almería police station, the author remained in a cell even though he had indicated that he was a minor. He reiterates that he did not have access to either a lawyer or an interpreter.

6.11 The author submits that the conditions in the holding centre for foreign nationals were not conducive to the proper exercise of his right to be heard, as it was a hostile environment that was unsuitable for minors. Moreover, he was not provided with a lawyer during the age assessment tests. The author refers to the Committee's general comment No. 12 (2009) on the right of the child to be heard, according to which States parties must allow the child to decide how to be heard, whether directly or through a representative, and, above all, ensure that the child is able to express his or her views freely and is adequately informed, on the understanding that being allowed to express his or her views freely also means that the child must not be manipulated or subjected to undue influence or pressure. In paragraph 34 of the general comment in question, the Committee points out that a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate.

6.12 The author takes note of the State party's argument that, as he is an asylum seeker, there has been no violation of article 22 of the Convention. The author reiterates that, on 18 July 2017, he attempted to apply for asylum in the holding centre for foreign nationals but, after having claimed that he was a minor, he was not allowed to formalize the application. The author was only able to formalize his asylum application on 25 July 2017, after having submitted his complaint to the Committee and the latter having requested the State party to apply interim measures. The author concludes that, when he sent his complaint to the Committee, he had been denied access to the asylum procedure, which had left him totally defenceless and extremely vulnerable in the face of his possible deportation on 24 July 2017. The author submits that he was only allowed to apply for asylum as an adult, as his asylum seeker card shows. He argues that, as a minor, he was entitled to apply for asylum with the safeguards and guarantees provided for by the Office of the United Nations High Commissioner for Refugees (UNHCR) and in the Committee's general comment No. 6 (2005).<sup>5</sup>

6.13 Regarding the violation of article 27 of the Convention, the author submits that the State party did not provide him with the necessary conditions to ensure his physical, mental, spiritual and social development. In particular, he was not assigned a guardian, he was not placed in a child protection centre and he was not provided with the psychological assistance that he needed after his long journey from his country of origin to the coast of

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<sup>5</sup> Paras. 68–75.

Almería. The author adds that the State party has not provided any evidence that he actually received health care.

6.14 Lastly, the author submits that the State party has failed to apply the interim measures requested by the Committee since, upon his release from the holding centre for foreign nationals, he was never transferred to a child protection centre or assigned a guardian. The State party's failure to apply the interim measures requested constitutes a violation of article 6 of the Optional Protocol.

### **Third-party submission<sup>6</sup>**

7. On 12 November 2018, the French Ombudsman presented a third-party submission on the issue of age assessment and the author's detention in a centre for adults pending his expulsion.<sup>7</sup>

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 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.

8.2 The Committee takes note of the State party's argument that the communication is inadmissible *ratione personae* under article 7 (c) and (f) of the Optional Protocol, on the ground that it constitutes an abuse of the right of submission because the author is an adult and he has not provided any "basic" or "reliable" evidence to the contrary. The Committee notes, however, that the author claims to have stated that he was a minor when he arrived in Spain, that he has provided a detailed and consistent account of the events, and that he submitted a copy of his birth certificate from Guinea attesting to his status as a minor to the Public Prosecution Service and Court of Investigation but did not receive a response. The Committee also notes that the Embassy of Guinea later issued documentation confirming that the author was a minor. The Committee takes note of the State party's argument that, since the birth certificate lacks biometric data, it cannot be checked against the details 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. In the present case, the Committee takes note of the author's argument that, if the State party had doubts as to the validity of his birth certificate, it should have contacted the consular authorities of Guinea to verify his identity, which it did not do. In the light of the foregoing, the Committee considers that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

8.3 The Committee also takes note of the State party's argument that the author did not exhaust the domestic remedies available because: (a) he could have requested the Public Prosecution Service to carry out medical tests to prove that he was a minor; (b) he could have applied for a review of any decision issued by the Autonomous Community in which he was not considered a minor under article 780 of the Civil Procedure Act; (c) he could have appealed his deportation order before the administrative courts; and (d) he could have initiated non-contentious proceedings for age assessment before the civil courts, in accordance with Act No. 15/2015. The Committee also notes that, according to the State party, age assessment decrees issued by the Public Prosecution Service can be reviewed only if new evidence is produced. However, the Committee takes note of the author's assertion that the Public Prosecution Service rejected his request for a review of the age assessment decree, even though he had provided documentation issued by the Embassy of

<sup>6</sup> This submission concerns communications Nos. 17/2017, 21/2017 and 27/2017, which have been registered by the Committee.

<sup>7</sup> A summary of the French Ombudsman's submission can be found in *N.B.F. v. Spain* (CRC/C/79/D/11/2017), paras. 8.1–8.6.



Guinea that confirmed his status as a minor, on the ground that the documentation in question contradicted the results of the medical tests carried out. The Committee considers that, in the context of the author's imminent expulsion from Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order cannot be considered effective.<sup>8</sup> The Committee notes that the State party has not specified whether the remedies mentioned would suspend the author's deportation. Accordingly, the Committee finds that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

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

8.5 The Committee is nonetheless of the view that the author has sufficiently substantiated his claims under articles 3, 8, 12, 20 and 22 of the Convention relating to the State party's failure to take into consideration the best interests of the child and to appoint a guardian or representative during the age assessment and asylum application procedure. The Committee therefore considers that this part of the communication is admissible and proceeds to consider it on the merits.

#### *Consideration of the merits*

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

9.2 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 presented a copy of his birth certificate and documentation issued by the Embassy of Guinea in support of his claim, 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 provide him with a guardian or representative during the age assessment and asylum application procedure, the best interests of the child were not taken into consideration.

9.3 The Committee recalls that the assessment 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 set out in the Convention flows from that determination. It is therefore imperative that there be due process to assess 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 must be given the benefit of the doubt and treated as a child. Accordingly, the Committee recalls that the best interests of the child should be a primary consideration throughout the age assessment process.<sup>9</sup>

9.4 The Committee also recalls that, in the absence of identity documents or other appropriate evidence, 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 and in a language that the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children must be considered. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental

<sup>8</sup> Ibid., para. 11.3.

<sup>9</sup> Ibid., para.12.3.

exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes.<sup>10</sup>

9.5 In the present case, the Committee notes that: (a) for the assessment of his age, the author, who arrived in Spanish territory undocumented, underwent medical tests consisting of an X-ray of his wrist and a dental X-ray, with no additional tests, psychological tests in particular, being administered, and there is no record of the author having been interviewed as part of the process; (b) on the strength of the tests carried out, the hospital in question determined the author's bone age to be 19 years, according to the Greulich and Pyle atlas, and at least 18 years according to the dental X-ray, without indicating a possible margin of error; (c) on the basis of this result, the Public Prosecution Service issued a decree stating that the author was an adult; and (d) the Public Prosecution Service did not take into consideration the documentation issued by the Embassy of Guinea confirming his status as a minor as the basis for a potential review of the age assessment decree.

9.6 The Committee notes, however, that there is ample information in the file to suggest 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.

9.7 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 (2005), which states that an age assessment should not only take into account the physical appearance of the individual, but also his or her psychological maturity, that the assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner and that, in the event of remaining uncertainty, 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.<sup>11</sup>

9.8 The Committee also takes note of the author's claim that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age assessment procedure, which led to a decree stating that he was an adult being issued. 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. The Committee is of the view that to provide a representative for such persons during the age assessment process is an essential guarantee of respect for their best interests and their right to be heard.<sup>12</sup> Failure to do so amounts to a violation of articles 3 and 12 of the Convention, as the age assessment process is the starting point for its application. The failure to provide timely representation can result in a substantial injustice.

9.9 In the light of the foregoing, the Committee considers that the age assessment procedure undergone by the author, who claimed to be a child and who later provided evidence to support this claim, lacked the safeguards necessary to protect his rights under the Convention. In the circumstances of the present case, this is a result of the test used to assess the author's age, the failure to appoint a representative to assist him during this process and the almost automatic dismissal of the probative value of the birth certificate provided by the author, without the State party having even formally assessed the information that it contained and, in the event of uncertainty, having confirmed that information with the consular authorities of Guinea. The Committee is therefore of the view that the best interests of the child were not a primary consideration in the age assessment procedure undergone by the author, which constitutes a violation of articles 3 and 12 of the Convention.

<sup>10</sup> Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child, para. 4.

<sup>11</sup> Para. 31 (i).

<sup>12</sup> *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8. and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 13.7.

9.10 The Committee also takes note of the author's claim that the State party violated his rights insofar as it altered elements of his identity by attributing to him an age and a date of birth that did not match the information on his birth certificate, even after he had presented documentation issued by the Embassy of Guinea confirming his status as a minor to the Spanish authorities. The Committee considers that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements of it. In the present case, the Committee notes that, although the author provided the Spanish authorities with a copy of his birth certificate, the State party failed to respect the author's identity by denying that the birth certificate had any probative value, without a competent authority having conducted a prior formal assessment of the information contained therein and without, alternatively, the State party having checked that information with the authorities of the author's country of origin. Consequently, the Committee finds that the State party violated article 8 of the Convention.

9.11 The Committee must also determine whether the fact that the author was unable to apply for asylum in his capacity as a minor violated his rights under the Convention. The Committee takes note of the author's claims that: (a) although he attempted to formalize his asylum application in his capacity as a minor, he was denied that possibility, and (b) the fact that he was unable to formalize his asylum application exposed him to a risk of expulsion. The Committee also notes that the author finally obtained an asylum seeker card, having been considered to be an adult, even though he had a birth certificate confirming his status as a minor in his possession.

9.12 In this connection, the Committee recalls its general comment No. 6 (2005), according to which States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations. In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.<sup>13</sup> The Committee considers the failure to assign the author a guardian so that he could apply for asylum in his capacity as a minor, even though he possessed documentation confirming that to be the case, led to him being deprived of the special protection that is to be afforded to unaccompanied asylum-seeking minors and exposed him to a risk of irreparable harm in the event of his deportation to his country of origin, which constitutes a violation of articles 20 (1) and 22 of the Convention.

9.13 Lastly, the Committee takes note of the author's claims concerning the State party's failure to apply the interim measure consisting of his transfer to a child protection centre. The Committee recalls that, by ratifying the Optional Protocol, States parties take on an international obligation to comply with interim measures requested under article 6 of the Optional Protocol, the purpose of those measures being to prevent irreparable harm while a communication is under consideration and to ensure the effectiveness of the individual communications procedure.<sup>14</sup> In the present case, the Committee takes note of the State party's argument that the author's transfer to a child protection centre could have posed a serious risk to the children in those centres. However, the Committee notes that this argument is based on the premise that the author is an adult. The Committee considers that the greater risk would be to send someone who may be a child to a centre reserved for individuals recognized as adults. Consequently, the Committee considers that the failure to apply the requested interim measure in itself constitutes a violation of article 6 of the Optional Protocol.

9.14 The Committee on the Rights of the Child, acting under article 10 (5) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, finds that the facts before it disclose violations of articles 3, 8, 12, 20 (1) and 22 of the Convention, and article 6 of the Optional Protocol.

<sup>13</sup> Paras. 33 and 36.

<sup>14</sup> *N.B.F. v. Spain*, para. 12.11.

10. The State party should therefore provide the author with effective reparation for the violations in question, including by providing him with the opportunity to regularize his administrative status in its territory, taking due account of the fact that he was an unaccompanied minor when he first applied for asylum, and correcting the date of birth on his asylum seeker card. Furthermore, the State party is under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

(a) Ensure that all processes 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 asylum-seeking young people claiming to be under 18 years of age are assigned a competent guardian as soon as possible so that they can apply for asylum as minors, 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 asylum-seeking minors and other migrant children and, in particular, on the Committee's general comments Nos. 6, 22 and 23.

11. The Committee recalls that, in becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Convention or its two substantive optional protocols.

12. In accordance with article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information on the measures that it has taken to give effect to the Committee's Views. The State party is also requested to include information on those 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.

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