



# Convention on the Rights of the Child

Distr.: General  
24 March 2020  
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. 24/2017\* \*\*

<i>Communication submitted by:</i>	M.A.B. (represented by counsel, Albert Parés Casanova)
<i>Alleged victim:</i>	M.A.B.
<i>State party:</i>	Spain
<i>Date of communication:</i>	12 July 2017
<i>Date of adoption of Views:</i>	7 February 2020
<i>Subject matter:</i>	Age determination procedure in respect of an alleged unaccompanied 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 (1), 27 and 29
<i>Articles of the Optional Protocol:</i>	7 (c), (e) and (f)

\* Adopted by the Committee at its eighty-third session (20 January–7 February 2020).

\*\* 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 Jaffé, Olga A. Khazova, Cephass Lumina, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aïssatou Alassane Moulaye Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.



1.1 The author of the communication is M.A.B, a Guinean citizen born on 24 December 1999. The author claims to be a victim of violations of articles 3, 8, 12, 18 (2), 20 (1), 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 In accordance with article 6 of the Optional Protocol, on 13 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 in Motril, Granada, the Spanish national police intercepted the small boat in which the author was travelling as he attempted to enter Spain illegally. On 4 June 2017, the national police decided that the author should be returned to his country of origin. The author, who was undocumented, informed the police that he was a minor, but this assertion was not taken into account. On 6 June 2017, Motril Court of Investigation No. 2 ordered that the author be placed in a holding centre for foreign nationals in Barcelona for a period of no more than 60 days, pending his expulsion.

2.2 When the author informed the director of the holding centre for foreign nationals in Barcelona that he was a minor, the director passed on the information to Barcelona Court of Investigation No. 1. On 26 June 2017, the Court ordered that the author undergo medical age determination tests consisting of a hand X-ray and a panoramic dental X-ray.

2.3 The author maintains that he was never notified of any such tests. On 7 July 2017, he contacted lawyers at the holding centre for foreign nationals, who requested information about the tests. On the same day, he sent a copy of his birth certificate to Motril Court of Investigation No. 2 in order to prove that he was a minor. At the time of submission of the complaint to the Committee, the author had still not received any information about either the medical tests or any decision adopted by the State party regarding the determination of his age.

### **The complaint**

3.1 The author claims that the State party failed to take into account the best interests of the child, as required by article 3 of the Convention, during the age determination procedure. He points out that, as the Committee itself has noted, the State party does not have a standardized national protocol for protecting unaccompanied minors. Age determination methods, for instance, vary from one autonomous community to another.<sup>1</sup>

3.2 The author refers to a report by the United Nations Children's Fund (UNICEF), which states that age determination tests should be carried out only when strictly necessary and should not be based solely on the Greulich and Pyle method but rather on advice from experts, the use of appropriate technology and a combination of different techniques.<sup>2</sup> The report also states that the Convention must be properly applied and that, in all measures taken to that end, the best interests of the child should prevail over public order concerns regarding foreign nationals.

3.3 The author notes that the only methods of age determination 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

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<sup>1</sup> The author cites CRC/C/ESP/CO/3-4, paras. 27 and 59.

<sup>2</sup> UNICEF, General Council of Spanish Lawyers and Banesto, *Ni ilegales ni invisibles: realidad jurídica y social de los menores extranjeros en España* (Neither illegal nor invisible: The legal and social reality of foreign minors in Spain), 2009. The author also cites a report by La Merced Migraciones (Mercedarios), the United Nations High Commissioner for Refugees, Save the Children, the Santander Chair in Law and Minors at the Pontifical University of Comillas, Baketik and the Asociación Comisión Católica Española de Migración (Spanish Catholic Migration Association) 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).

available documentation, knowledge and local information, are not used. 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 makes it possible to estimate the age range within which a person falls. This study, like other studies carried out subsequently, is merely indicative. 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 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.

3.4 The author maintains that the best interests of the child should be the primary consideration throughout the age determination process and that only medical tests that are necessary and 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 who specialize in reading X-rays, and the overall assessment of the results should be carried out not, as often occurs, by radiology departments, but by medical personnel specializing in forensic medicine.<sup>3</sup> Lastly, age assessments should draw on a variety of supplementary tests and examinations.

3.5 The author also 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, a practice that serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied child.<sup>4</sup> He submits that, having been declared an adult on the basis of unreliable evidence, he has been left defenceless, without the protection to which he is entitled and in a situation of extreme vulnerability.

3.6 The author maintains that the State party has violated his right to preserve his identity, which is 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.

3.7 He also alleges a violation of article 20 of the Convention because the State party did not provide him with the protection to which he was entitled as a child deprived of his family environment.

3.8 Lastly, he alleges a violation of his rights under articles 27 and 29 of the Convention, as the failure to appoint a guardian to look after his interests impeded his proper development.

3.9 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 test carried out; (b) that he be notified of any decision concerning him; (c) that the possibility of appealing age determination decrees before the courts be recognized; and (d) that all his rights as a minor be recognized, including the rights to receive State protection, to have a legal representative, to receive an education and to be granted a residence and work permit to allow him to fully develop as a person and to be integrated into society.

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

4.1 In its observations of 27 October 2017, the State party maintains that, on the day of his illegal entry into Spain, the author and the other occupants of the small boat in which he was travelling were held at Granada police station, where they were identified and informed of their rights with the help of an interpreter. In the presence of legal counsel and with the

<sup>3</sup> The author cites a 2011 report by the Síndic de Greuges (the Ombudsman of Catalonia) on the process of assessing the age of unaccompanied foreign minors.

<sup>4</sup> The author cites general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 21.

help of an interpreter, he was personally notified of the removal order and was informed that he could appeal it before the courts.

4.2 The State party reports that, on 29 June 2017, members of the Institute of Forensic Medicine and Science of Catalonia examined the author in accordance with the general protocol for age estimation, as ordered by Barcelona Court of Investigation No. 1. It reports that, according to the national police, the author's date of birth is 24 December 1999. The results of the examination, which included a wrist X-ray and a panoramic dental X-ray, showed that the author had an estimated bone age of 19 years, based on the Greulich and Pyle atlas, bearing in mind that there is no standard deviation for this age group.

4.3 On 7 July 2017, with the help of lawyers of his own choosing, the author applied to Motril Court of Investigation No. 2 for a review of the decision to place him in the holding centre for foreign nationals; he provided an uncertified photocopy of what he claimed was his birth certificate, which supposedly proved that he was a minor. The author urged the Court to remove him from the holding centre for foreign nationals and to hand him over to the child protection authorities. The prosecutor considered that it was not appropriate for him to be admitted to a child protection centre because the results of the medical tests showed that he was an adult. On 28 July 2017, the Court decided that it was not appropriate to review his detention, given the results of the medical age determination tests, which showed that he was over 18 years of age, as well as the information contained in the register of unaccompanied foreign minors. This decision became final because no request for review was made.

4.4 On 26 July 2017, the national police released M.A.B. by officially discharging him from the holding centre for foreign nationals in Barcelona.

4.5 The State party notes that: (a) there is no document proving that the birth certificate belongs to the person who arrived in a small boat and was placed in detention, as he was not carrying any documents at the time of his arrest; (b) the document submitted does not contain any biometric data proving the identity of the applicant; and (c) there are doubts as to whether the document is genuine, especially as it contradicts the results of the medical tests carried out.

4.6 In its observations of 27 October 2017, the State party claims that the communication is inadmissible *ratione personae*, under article 7 (c) and (f) of the Optional Protocol, because the author is an adult. This is evident because: (a) the author did not present official identity documents with verifiable biometric data when he entered Spain illegally; (b) the birth certificate that he submitted does not constitute sufficient proof of his identity, as it is merely a photocopy that does not contain biometric data; (c) his appearance is that of an adult, as shown by the photographs taken of him at the time of his illegal entry into Spain (174 cm in height, with a moustache); and (d) the results of the objective medical tests that were carried out show that he is at least 18 years of age, with an estimated bone age of 19 years, based on the Greulich and Pyle atlas, bearing in mind that there is no standard deviation for this age group. The State party adds that, since there is no conclusive evidence that the author is a minor, declaring this communication admissible would only encourage migrant smuggling rings, whom the author paid and whose services he used.

4.7 The State party also maintains that the communication is inadmissible under article 7 (e) of the Optional Protocol because the available domestic remedies have not been exhausted, since the author could have: (a) requested additional medical tests, different from those already carried out, in order to prove that he was minor; (b) requested a review of any autonomous community decision finding that he is not a minor for the purposes of child protection, by following the procedure set out in article 780 of the Civil Procedure Act; (c) challenged the removal order before the administrative courts; and (d) initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015.

4.8 The State party also notes that, according to Constitutional Court decision No. 172/2013 of 9 September 2013 concerning *amparo* application No. 952/2013, age determination by the Public Prosecution Service is "strictly provisional" and a final ruling as to the age of an undocumented person may be sought from the judicial authority through the appropriate channels, which have not been exhausted in the present case.

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

5.1 In his comments of 13 December 2017, the author notes that the State party has not provided any information about how the author, a possible minor, was informed of his right to legal assistance specifically in connection with age determination or under article 12 of the Convention. The State party has also failed to explain how the age determination decree issued by the Public Prosecution Service could be appealed.

5.2 The author claims that the unaccompanied foreign minors protocol has been challenged before the Supreme Court because many of its provisions are considered illegal, irregular and unconstitutional. The author refers to the sixth section of chapter 2 of the protocol, which states that persons may be considered adults if their physical appearance is not that of a minor, regardless of whether they are in possession of a passport. The author claims that the Supreme Court has stated precisely the opposite in a number of judgments. The author refers specifically to a Supreme Court judgment that established the following as case law:

An immigrant whose passport or equivalent identity document indicates that he or she is a minor cannot be considered an undocumented foreign national for the purposes of conducting additional age determination tests, since it would be inappropriate to conduct such tests without reasonable grounds for doing so when he or she holds a valid passport. It is therefore appropriate to conduct a proportionality test and to properly analyse the reasons why the document is considered to be unreliable and why age determination tests should therefore be used. In any event, whether the person is documented or undocumented, medical techniques, especially invasive ones, cannot be applied indiscriminately for the purpose of age determination.<sup>5</sup>

5.3 According to the author, the medical tests carried out have never been shown to be accurate and completely reliable. He maintains that he was never informed of all the judicial remedies mentioned by the State party in its observations. He notes that the necessary legal proceedings could only have been initiated if he had been assigned a lawyer during the age determination process. He argues that these remedies should be considered extraordinary, since the proceedings in question must be requested by a party and cannot be used to challenge age determination decisions.

5.4 He considers that, if the State party had returned him to his country of origin, it would have repatriated a minor in a manner that was completely irregular and contrary to its own legislation, which requires that repatriation be carried out in accordance with a strictly regulated procedure.<sup>6</sup> Returning him, as a possible minor, to his country of origin would have caused harm that would have been difficult to repair.

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

6.1 In its observations of 9 January 2018, the State party reiterates its account of the events and its arguments regarding the admissibility of the communication.

6.2 With respect to the author's claim that his best interests were not taken into account, 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 his claim is generic in nature and that he fails to specify the exact nature of the violation that the State party is alleged to have committed in this regard. Furthermore, his claim is seemingly founded on the argument that any finding that a person is an adult based on medical age determination tests constitutes a violation of the Convention. The Committee's general comment No. 6 establishes that a person should be presumed to be a minor in the event of uncertainty, but not when it is obvious that the person is an adult, in which case the national authorities may legally consider him or her as such without having to conduct any tests. However, in the

<sup>5</sup> Judgment No. 453/2014 of the Civil Division of the Supreme Court, concerning appeal No. 1382/2013.

<sup>6</sup> The author refers to article 191 et seq. of Royal Decree No. 557/2011 of 20 April 2011, approving the implementing regulations for Organic Act No. 4/2000 on the Rights and Freedoms of Foreign Nationals in Spain and their Social Integration, as amended by Organic Act No. 2/2009.

present case, the authorities gave the author the opportunity to have objective medical tests carried out to determine his age, with his prior informed consent.

6.3 The State party maintains that general comment No. 6 does not preclude or prohibit the use of objective medical tests in order to determine the age of persons who appear to be adults, have no documents and claim to be minors. It notes that the author criticizes the various types of objective medical age determination test but does not indicate which age determination tests he would consider valid.

6.4 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.

6.5 Regarding the author's claim that his best interests were not taken into account, with regard 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 provided with a lawyer and an interpreter free of charge; that his situation 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 upholding 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.

6.6 As to the allegations concerning the author's right to preserve his identity, the State party considers that the author has not shown how he was deprived of this right. It adds that the Spanish authorities registered him under the name that he gave when he illegally entered Spanish territory and that the resulting documents are, in fact, what allow him to exercise his rights today.

6.7 As to the author's allegations that he was deprived of his right to receive special protection and assistance from the State, which is enshrined in article 20 of the Convention, the State party notes that "in the present case, since there is evidence that he is an adult, the right in question simply does not apply".

6.8 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 has been properly cared for by the State party since his arrival in Spain.

6.9 As to the possible solutions put forward by the author in his initial communication, the State party maintains that the author is neither requesting nor proposing any means by which his age could be determined 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 acknowledge 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 presumed to be a minor on the basis of his or her statement alone. As to the request relating to the possibility of appealing age determination decrees issued by the Public Prosecution Service before the courts, the State party claims that such decisions are "strictly provisional", that they can be reviewed by the prosecutor who issued them if new evidence is presented and that they can be replaced by final decisions handed down 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, Spanish residence and work permits can be acquired only if the general legal requirements are met; they are not met by the author, as he entered the country illegally and did not apply for international protection.

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

7.1 In his comments of 28 February 2018, the author reiterates that the State party did not assign him a lawyer for the age determination process and that he was therefore unable to invoke any of the remedies mentioned by the State party. He maintains that age determination decrees issued by the Public Prosecution Service cannot be directly appealed, which clearly and unequivocally leads to a grave lack of judicial protection.

7.2 The author claims that the State party is ignoring the forensic medical report which explicitly states that, “based on the results of the interview, the physical examination and the supplementary tests, the most likely minimum age is 18 years”. This shows that the report in question does not establish his age with certainty.

7.3 Regarding the State party’s assertion that the Motril Court of Investigation decided that it was not appropriate to review his detention, given the results of the medical age determination tests, which showed that he was over 18 years of age, and that this decision became final because no request for review was made, the author maintains that he was never notified of this decision. This resulted, once again, in a clear lack of judicial protection, as he was not given the opportunity to lodge any kind of appeal.

7.4 The author points out that, in the days prior to his release, many people from his country had an interview with the consul at the holding centre for foreign nationals. He argues that, if the State party had doubts as to whether the documents proving that he was a minor were genuine, it could have contacted the consul in order to verify their authenticity.

7.5 As to his allegations of a violation of article 3 of the Convention, read in conjunction with articles 18 (2) and 20 (1), the author claims that these should be interpreted in the light of article 12 of the Convention as meaning that he has the right to be accompanied by someone in asserting his right to be heard. The author refers to article 9 of Organic Act No. 1/1996 on the Legal Protection of Minors, which governs the right to be heard, and alleges that the State party has failed to comply with its own domestic legislation. He considers that his right to be heard through a representative has not been respected.

7.6 The author also considers that, as the authority that carries out age determination tests, the Public Prosecution Service cannot also be expected to defend the right of the child to invoke the available remedies relating to age determination.

7.7 The author alleges a violation of article 8 of the Convention because his identity was not verified with the consular authorities of his country of origin.

### **Third-party submission<sup>7</sup>**

8. On 3 May 2018, the French Ombudsman made a third-party submission on the issue of age determination and detention in centres for adults pending expulsion.<sup>8</sup> Although the parties did not submit comments thereon in the present case, they did so in the case of *J.A.B. v. Spain*,<sup>9</sup> in which the same third-party submission was made. Both parties stated that their comments in that case were applicable to all the cases concerned by the submission.

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

#### *Consideration of admissibility*

9.1 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.

9.2 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 because the author is an adult and has not provided any conclusive documentary or medical evidence to the contrary. The Committee notes, however, that the author claims to have stated that he was a minor when he entered Spain and that he submitted a copy of his Guinean birth certificate attesting to his status as a minor to Motril Court of Investigation No. 2 but received no response. The Committee also takes note of the State party’s

<sup>7</sup> This submission concerns 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, which have been registered with the Committee.

<sup>8</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.

<sup>9</sup> CRC/C/81/D/22/2017, paras. 9 and 10.

argument that the birth certificate submitted by the author could not be considered proof that he was a minor because it did not contain biometric data. The Committee recalls that the burden of proof does not rest solely with 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.

9.3 The Committee also takes note of the State party's argument that the author did not exhaust all available domestic remedies because: (a) he could have requested additional medical tests, different from those already carried out, in order to prove that he was a minor; (b) he could have requested a review of any autonomous community decision finding that he was not a minor, under article 780 of the Civil Procedure Act; (c) he could have challenged his removal order before the administrative courts; and (d) he could have initiated non-contentious proceedings for age determination before the civil courts, in accordance with Act No. 15/2015. However, the Committee notes that the author submitted his birth certificate to Motril Court of Investigation and requested a review of the decision to place him in the holding centre for foreign nationals; that the Public Prosecution Service considered that it was not appropriate for him to be admitted to a child protection centre because the results of the medical tests showed that he was an adult; and that the Court decided that it was not appropriate to review his detention, basing its decision solely on the results of the medical age determination tests, without taking into account the author's birth certificate. The Committee also takes note of the author's claim that he was not assigned a lawyer during the age determination process and was therefore unable to invoke any of the remedies mentioned by the State party. 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 expulsion order cannot be considered effective.<sup>10</sup> The Committee notes that the State party has not indicated that the remedies to which it refers would have suspended the author's deportation. Accordingly, the Committee concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

9.4 The Committee considers that the author's claims under articles 18, 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.

9.5 The Committee is nonetheless of the view that the author has sufficiently substantiated his claims under articles 3, 8, 12 and 20 (1) of the Convention, in connection with the failure to give consideration to the best interests of the child and the failure to appoint a guardian or representative during the age determination process. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

#### *Consideration of the merits*

10.1 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.

10.2 One of the issues before the Committee is whether, in the circumstances of the present case, the process of determining the age of the author, who stated that he was a minor and presented his birth certificate, violated his rights under the Convention. In particular, the author has claimed that the process did not take account of the best interests of the child, owing to the type of medical test used to determine his age and the failure to appoint a guardian or representative during the age determination process.

<sup>10</sup> *N.B.F. v. Spain*, para. 11.3; *M.T. v. Spain* (CRC/C/82/D/17/2017), para. 12.4; and *R.K. v. Spain* (CRC/C/82/D/27/2017), para. 8.3.



10.3 The Committee recalls that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights set out in the Convention flows from that determination. It is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, the person should be 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 determination process.<sup>11</sup>

10.4 The Committee takes note of the State party's argument that general comment No. 6 does not preclude or prohibit the use of objective medical tests in order to determine the age of persons who appear to be adults, have no documents and claim to be minors (para. 6.3 above). The Committee recalls, however, that the documents that are available should be considered genuine unless there is proof to the contrary.<sup>12</sup> Moreover, 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 ... in a language the child understands. ... The benefit of the doubt should be given to the individual being assessed.<sup>13</sup>

10.5 In the present case, the Committee notes that: (a) for the determination of his age, the author, who arrived in Spain without documents, underwent medical tests consisting of a wrist X-ray and a panoramic dental X-ray, with no additional tests, particularly psychological tests, being administered; (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) based on this medical result, the judicial authorities of the State party decided that the author should remain in the holding centre for foreign nationals because he was an adult; and (d) the authorities of the State party did not consider the birth certificate submitted by the author to be valid.

10.6 The Committee notes, however, that there is ample information to suggest that bone age assessments lack precision and have a wide margin of error, and are therefore not suitable to be used as the sole method for assessing the chronological age of a young person who claims to be a minor and presents documents supporting that claim.

10.7 The Committee takes note of the State party's conclusion that the author's appearance was clearly that of an adult. However, the Committee recalls its general comment No. 6, which states that age assessment should take into account not only 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 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>14</sup>

10.8 The Committee also takes note of the author's allegations that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant upon his arrival in Spain and during the age determination process that led to the

<sup>11</sup> *N.B.F. v. Spain*, para. 12.3.

<sup>12</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 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 4.

<sup>13</sup> *N.B.F. v. Spain*, para. 12.4.

<sup>14</sup> Para. 31 (i).

issuance of a medical report indicating that he was an adult. The Committee recalls that States parties should appoint a qualified legal representative and, where necessary, an interpreter, for all young persons claiming to be minors, as soon as possible on their arrival and free of charge. The Committee is of the view that the provision of a representative for such persons during the age determination process is an essential guarantee of respect for their best interests and their right to be heard.<sup>15</sup> Failure to do so constitutes a violation of articles 3 and 12 of the Convention, as the age determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

10.9 In the light of the foregoing, the Committee considers that the age determination procedure undergone by the author, who claimed to be a child and provided evidence to support this claim, was not accompanied by the safeguards needed to protect his rights under the Convention. Given the circumstances of the present case, in particular the examination used to determine the author's age, the fact that he was not assisted by a representative during the age determination procedure and the fact that the State party almost automatically rejected as evidence the birth certificate that he provided, without even formally assessing the information that it contained and clearing up any doubts with the Guinean consular authorities, the Committee is of the view that the best interests of the child were not a primary consideration in the age determination procedure undergone by the author, contrary to articles 3 and 12 of the Convention.

10.10 The Committee also takes note of the author's allegations 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. 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 thereof. 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 identity of the author by rejecting the certificate as evidence, without first asking a competent authority to formally assess the information that it contained or asking the authorities of the author's country of origin to verify that information. Consequently, the Committee finds that the State party violated article 8 of the Convention.

10.11 Having found a violation of articles 3, 8 and 12 of the Convention, the Committee will not consider separately the author's claim that the same acts constitute a violation of article 20 (1) of the Convention.

10.12 Lastly, the Committee notes that the State party has failed to apply the interim measure of transferring the author to a child protection centre. The Committee recalls that, by ratifying the Optional Protocol, States parties undertake an international obligation to implement the interim measures requested under article 6 of the Optional Protocol, which, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.<sup>16</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 might pose 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 also notes that there is a risk involved in sending someone who may be a child to a centre that is reserved for individuals who have been recognized as adults. Consequently, the Committee considers that the failure to implement the requested interim measure in itself constitutes a violation of article 6 of the Optional Protocol.

10.13 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 a violation of articles 3, 8 and 12 of the Convention and article 6 of the Optional Protocol.

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<sup>15</sup> *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8 and *J.A.B. v. Spain*, para. 13.7.

<sup>16</sup> *N.B.F. v. Spain*, para. 12.11.

11. The State party should therefore provide the author with effective reparation for the violations suffered, including by giving him the opportunity to regularize his administrative status in the State party, taking due account of the fact that he was an unaccompanied minor when he arrived in Spain. The State party is also under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

(a) Ensure that all procedures for determining the age of young persons claiming to be minors are in line with the Convention and, in particular, that in the course of these procedures: (i) the documents submitted by the young person concerned are taken into consideration and, if issued or authenticated by the relevant State authority or embassy, accepted as genuine; and (ii) the young person concerned is assigned a qualified legal representative or other representatives without delay and free of charge, any private lawyers chosen to represent the young person are recognized and all legal and other representatives are allowed to assist the young person during the age determination procedure;

(b) 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 or decisions of majority by the authorities in cases where the age determination procedure was not accompanied by the safeguards needed to protect the best interests of the child and the right of the child to be heard;

(c) Provide training to immigration officers, police officers, officials of the Public Prosecution Service, judges and other relevant professionals on the rights of migrant children and, in particular, on the Committee's general comment No. 6 and joint general comments Nos. 22 and 23.

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

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