United Nations CRC/C/83/D/21/2017

Convention on the Rights of the Child

Distr.: General
10 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. 21/2017*, **

Communication submitted by:	A.D. (represented by the non-governmental organization Fundación Raíces)
Alleged victim:	The author
State party:	Spain
Date of communication:	2 June 2017
Date of adoption of Views:	4 February 2020
Subject matter:	Age assessment procedure in respect of an unaccompanied minor
Procedural issues:	Non-exhaustion of domestic remedies; abuse of the right of submission; incompatibility *ratione personae*; non-substantiation of claims
Articles of the Convention:	3, 8, 12, 18 (2), 20, 27 and 29
Articles of the Optional Protocol:	6, 7 (c), (e) and (f)

1.1 The author of the communication is A.D., a Malian national born on 30 April 2000. The author claims to be the victim of violations of articles 3, 8, 12, 18 (2), 20, 27 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 Pursuant to article 6 of the Optional Protocol, on 7 June 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt interim measures consisting of a stay in the execution of the expulsion order against the author pending the consideration of his case by the Committee, and his transfer to a child protection centre.

1.3 On 18 December 2017, the Working Group on Communications, acting on behalf of the Committee and in accordance with rule 18 (5) of its rules of procedure under the

* 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, Cephas 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.

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Optional Protocol, rejected the State party's request for the admissibility of the communication to be considered separately from the merits.

The facts as submitted by the author

Arrival in Spain and steps taken to secure a guardian

2.1 On 10 March 2017, the author was arrested by the national police as he attempted to enter the State party illegally on board a small boat. Although he was not carrying any documentation, the author stated that he was a minor. However, not only was he denied assistance, but the Almería prosecutor's office specializing in child protection ordered that medical tests, known as Greulich and Pyle, be conducted to assess his age. According to the medical report dated 10 March 2017, the author had a bone age of between 18 and 19 years.

2.2 On the same day – that is, 10 March 2017 – Almería Court of Investigation No. 6 ordered the removal of the author to his country of origin and, on 11 March, his placement in a holding centre for foreign nationals for a period of up to 60 days to allow the removal order in question to be executed. When he was placed in the holding centre for foreign nationals in Madrid, the author stated once again that he was a minor. On 7 April 2017, the author informed five different State authorities[1] that, even though he was a minor, he had been placed in a centre for adult foreign nationals, submitting an official copy of his birth certificate to support his claim.

2.3 On 20 April 2017, Almería Court of Investigation No. 6 ordered that the author's detention be brought to an end and that he be placed in the care of the child protection services. The next day, the author was placed in the initial reception centre for minors in Hortaleza (a child protection centre in Madrid).

Determination of the author's status as an adult by the State party

2.4 The prosecutor's office specializing in child protection summoned the author in order for him to undergo medical tests to assess his age on 9 May 2017. The author, who attended the appointment with a lawyer from Fundación Raíces, refused to undergo the tests. This was because he had official documents from his country of origin confirming his age and whose validity could be verified at the relevant embassy. On the same day, the prosecutor's office issued a decree stating that the author was an adult, as he had refused to undergo age assessment tests and as it did not consider the documents in the author's possession to be genuine. On 12 May 2017, the author obtained from the Embassy of Mali a receipt confirming that he had applied for a passport.

2.5 On 16 May 2017, the Directorate-General for Family and Children's Affairs of the Community of Madrid, pursuant to the decree issued by the prosecutor's office, removed the author from the child protection system, leaving him in a situation of distress. In response to this decision, Fundación Raíces sent two letters to Almería Court of Investigation No. 6 bringing the author's situation to its attention and requesting that he be kept in the child protection system. The Court issued two judgments, on 26 and 31 May 2017, respectively, confirming that its judgment of 20 April 2017 was final. In the meantime, the author was living in the streets, outside the child protection system, and unable to appeal the decree issued by the prosecutor's office specializing in child protection, which had determined him to be an adult.

Complaint

3.1 The author submits that, as a consequence of the failure to recognize the validity of the original copies of his official identity documents, issued by his country of origin, and of his refusal to undergo unnecessary tests to assess his age, he was wrongly considered to be an adult, which left him without State protection and living in the streets, and put him at risk of expulsion. The author argues that, according to the case law of the Constitutional

[1] The Madrid prosecutor's office specializing in child protection; the Almería prosecutor's office specializing in child protection; the Madrid child protection service; Almería Court of Investigation No. 6; and the Almería police.

Court,[2] the age assessment decrees issued by the prosecutor's office cannot be appealed directly before the courts and that, therefore, the available remedies do not constitute an effective means of contesting the assessment of his age.

3.2 The author claims that the State party failed to take into account the principle of the best interests of the child enshrined in article 3 of the Convention. The author cites concluding observations issued in respect of the State party in which the Committee expresses concern at its failure to consider the best interests of the child and at disparities in the methods used to assess the age of unaccompanied children.[3] The author cites paragraph 31 of general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin to claim a violation of this principle by the prosecutor's office, which failed to respect his right to be presumed to be a minor and to give him the benefit of the doubt, even though he had produced official supporting documentation. The author refers to various studies to claim that the medical estimates used in the State party, particularly the one used in his case, have a high margin of error, as the studies that established them were based on other populations with very different racial and socioeconomic characteristics. The author understands that the principle of the best interests of the child was not taken into account, in violation of article 3 of the Convention, since more weight was given to his refusal to undergo an inaccurate test than to a public document, whose validity the State party has questioned but not formally contested before the authorities of the issuing State.

3.3 The author also claims to be the victim of a violation of article 3 of the Convention, read in conjunction with article 18 (2), owing to the failure to appoint a guardian to protect his interests, which serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied minor.[4] He also maintains that he is the victim of a violation of article 3 (2), read in conjunction with article 20 (1), as a result of the State party's failure to provide him with protection, even though he was a defenceless and highly vulnerable unaccompanied child migrant. The author submits that the best interests of the child should prevail over public order concerns regarding foreign nationals and that, when dealing with a minor who is in possession of documentation duly issued by his or her country of origin, the State party should set into motion its administrative apparatus and appoint a guardian as a matter of course.[5]

3.4 In addition, the author submits that the State party has violated his right to an identity enshrined in article 8 of the Convention, since age is a fundamental aspect of a person's identity and the State party has a duty not to interfere in this regard. Moreover, the State party's obligation includes the duty to preserve and recover any data on the identity of the author that still exist or that may exist. Yet, the State party has attributed to him an age different from his real age and a date of birth that does not match the one appearing in his identity documents.

3.5 The author further claims a violation of his right to be heard enshrined in article 12 of the Convention, noting also that Spanish law provides for the protection of this right. He points out that, according to article 9 of Organic Act No. 1/1996 on the Legal Protection of Minors: "The minor has the right to be heard and listened to … To this end, the minor shall receive any information that will allow him or her to exercise this right in plain language and in formats that are accessible and tailored to his or her circumstances … Steps shall be taken to ensure that, when the minor is sufficiently mature, he or she may exercise this right of his or her own accord or through his or her designated representative.

[2] Judgment No. 172/2013 of 9 September 2013 of the First Chamber of the Constitutional Court.

[3] CRC/C/ESP/CO/3-4, para. 59.

[4] The author cites general comment No. 6 (2005).

[5] The author cites the Office of the United Nations High Commissioner for Refugees (UNHCR), La Merced-Migraciones-Mercedarios, Save the Children, Baketik, ACCEM, Cátedra Santander de Menores de la Universidad de Comillas, *Aproximación a la protección internacional de los menores extranjeros en España* (Approach to the international protection of foreign minors in Spain), 2009, p. 96: "As soon as an unaccompanied foreign minor is identified, he or she must be assigned a guardian or legal representative with the necessary knowledge to guarantee the minor's interests and tend appropriately to his or her legal, social, medical and psychological needs".

3.6 The author also claims a violation of article 20 of the Convention on account of the situation of defencelessness and social exclusion in which he was left as a consequence of the decisions and actions of the State party. The author claims that he was denied protection by the State party when it considered him to be an adult without any conclusive evidence, and cites general comment No. 6 (2005), according to which this right must be interpreted on the basis of the child's circumstances, age and ethnic, cultural and linguistic background.

3.7 Moreover, the author claims to be the victim of a violation of his rights under articles 27 and 29 of the Convention, as his proper all-round development has been impeded. The author understands that not having a guardian to guide him has prevented him from developing in an age-appropriate manner.[6]

3.8 The author proposes the following potential solutions: (a) that the State party recognize his right to be presumed to be a minor on the basis of his birth certificate, which he is using to obtain a passport; (b) that the State party recognize that his refusal to undergo age tests alone is not sufficient to determine that he is an adult; (c) that both the prosecutor's office and the child protection authorities give immediate effect to the judgment issued by Almería Court of Investigation No. 6 ordering that the author be placed in the child protection system; (d) that the possibility of appealing age assessment decrees directly before the courts be recognized; (e) that his right to be heard through a person or institution specializing in children's rights be recognized; and (e) that all his rights as a minor be recognized, including his right to State protection, to be assigned 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

Account of the facts

4.1 In its observations of 9 August 2017 on the admissibility of the communication, the State party points out that the author's account of the facts is biased and inaccurate. The State party submits that the only photographs of the author that it accepts as valid are the official photographs taken at the time of his rescue and submitted to the courts, and therefore expressly contests the photographs supplied by the author himself.[7]

4.2 The State party explains that, after he was detained at Almería police station for identification purposes, the author was informed of his rights in a clear and comprehensible manner in the presence of an interpreter.[8] During the identification process, the author, who was not in possession of any documentation, voluntarily stated that his name was A.D., that he was born on 1 January 2000 in the Gambia and that he was the son of Stoy (his father) and Roukia (his mother). Since he had claimed to be a minor, he was asked to undergo tests to assess his age, for which the author gave his express and informed consent.[9] The X-ray taken of his left hand showed his estimated bone age to be 18 or 19 years, an age range in which there is no standard deviation.

4.3 On 10 March 2017, based on these medical tests, the Almería provincial prosecutor issued a decree "very provisionally" declaring the author to be an adult. The author was personally notified of the decision to remove him, taken that same day, in the presence of a lawyer, and was informed of his right to appeal the decision before the courts.

4.4 Fundación Raíces, which had begun to represent the author on 30 March, submitted what it claims are his birth registration certificates and requested that he be removed from the holding centre for foreign nationals and placed in the care of the child protection authorities. The State party claims that the certificates submitted: (a) did not include biometric data confirming that they belonged to the author; (b) were not certificates of a

[6] The author cites general comment No. 6 (2005), para. 44.

[7] The State party encloses three photos of the author taken on 10 March 2017; the author also encloses a passport photo taken on 12 May 2017.

[8] The State party does not provide any documentation to substantiate these facts.

[9] The State party enclosed the informed consent form signed by the examining judge, the author, the interpreter and the secretary.

past birth registration, but were a record of a statement by the man presumed to be his father, which had not been reviewed and which had been made after the author had entered the State party's territory illegally; and (c) contain data that contradict those provided by the author at the time of his arrest, namely: (i) that the author was born in Mali, not in the Gambia, (ii) that his father's name is Sidy, not Stoy, (iii) that his mother's name is Rokia, not Roukia, and (iv) that his date of birth is 31 April 2000,[10] not 1 January 2000.

4.5 The State party claims that, in view of the uncertainty over whether the author was in fact an adult, the examining judge agreed that, while his correct age was being assessed, the individual should leave the holding centre for foreign nationals and "be placed in the care of the child protection services". On 3 May 2017, the author was interviewed in the initial reception centre for minors in Hortaleza, Madrid, with the help of an interpreter. During the interview, the author was noted to have said that: (a) he was born on 27 April 2000 (during his time in detention, he said that he was born on 1 January 2000 and his birth certificate states that he was born on 31 April 2000[11]); (b) he had lied about his nationality (the Gambia) because he knew that this country was at war and that he could not be sent back there; and (c) he had arrived in the territory of the State party after having paid various migrant smuggling rings for passage.

4.6 The State party submits that, in order to determine whether he was an adult, given the doubts raised by the unreliable documentation provided, which contradicts the only objective medical test conducted, the author was once again summoned to the prosecutor's office to give his consent for additional objective age assessment tests (dental X-ray, collarbone ossification test and physical examination by a forensic doctor). The author, assisted by his lawyer, refused to undergo the tests in question. In the light of his refusal to undergo testing and the lack of reliable official identity documents with biometric data, the prosecutor's office issued a decree on 9 May 2017 confirming that the author was an adult. Following the issuance of this decree, the Children's Guardianship Committee of the Autonomous Community of Madrid decided, on 16 May 2017, to remove the author from the initial reception centre for minors in Hortaleza. As the author is an adult at liberty, the State party claims that it does not know his current whereabouts.

Grounds for inadmissibility

4.7 The State party argues that the communication is inadmissible *ratione personae*, as the author is an adult. The State party submits that the author is an adult because: (a) he did not present official identity documents with verifiable biometric data at the time of his illegal entry into the State party's territory; (b) he had the appearance of an adult, as can be seen from the photographs taken at the time of his arrest; (c) the objective medical test conducted determined not only that the author was 18 years of age but that he might even be 19 years of age; (d) the birth certificate lacks the details necessary to prove that it belongs to the author, as it does not include biometric data and was issued on the basis of a biased statement that was not subject to review and that is dated after the author's illegal entry into the country; (e) the author lied about his nationality and, on several occasions, has referred to his parents by different names and to different dates of birth; and (f) the author has expressly refused to undergo other objective medical tests.

4.8 According to the State party, declaring admissible a communication when there is objective proof that the author is an adult will merely serve to "encourage migrant smuggling rings", whom the author paid, and who "recommend that migrants travel without documentation and then claim to be minors".

4.9 Furthermore, the State party submits that, under article 7 (e) of the Optional Protocol, the communication is inadmissible on the ground of failure to exhaust all available domestic remedies. The author could have: (a) requested the Public Prosecution Service to conduct additional medical tests; (b) requested the civil courts, in accordance with the procedure set out in article 780 of the Civil Proceedings Act, to review the decision denying him a guardian; (c) appealed the removal order before the administrative courts (which the

[10] This appears to be a mistake, since his birth certificate says 30 April 2000.

[11] Ibid.

author did, although a decision has not yet been taken); and (d) initiated, in accordance with Act No. 15/2015, non-contentious proceedings for age assessment before the civil courts.

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

5.1 In his comments of 25 September 2017, the author claims that: (a) he did not lie about the name of his father or mother;[12] (b) he did not give his informed consent for the age assessment test, as he had not been duly informed of the procedure or its effects, nor did he have the assistance of a lawyer; (c) it is not true that a removal order may be appealed before the courts, rather, as the order itself indicates, it is only possible to file an administrative appeal against such orders, which does not suspend their execution; (d) the documents provided could not have included biometric data in any case, as birth certificates never include such data; (e) the judgment of 20 April 2017 issued by Almería Court of Investigation No. 6 at no time makes the cessation of the author's detention contingent upon the review of his assessed age; (f) the author was neither reliably informed about nor given the option of being accompanied by his lawyer to the interview of 3 May 2017 (a violation of procedural safeguards that requires any statement made by the author to be treated as wholly invalid); (g) the author's lawyer was not allowed to take part in the drafting of the record of appearance, which is why he did not sign the document (which was never received by the author or his lawyer); (h) the author spent 26 days at the centre in Hortaleza without a guardian; and (i) the State party fails to mention that the author began the passport application process while in the care of the protection services of the Community of Madrid.

5.2 The author also claims that he said that he was born in the Gambia for fear of being deported, since there is no removal agreement with that country. With regard to the discrepancies relating to his date of birth, he claims that it could have been due to an error made when he was being identified by the police.[13] However, this information cannot be decisive, since the minor did not have the assistance of a lawyer on that occasion and had to provide the information in question at a stressful time.

5.3 With regard to the State party's argument that the communication is inadmissible *ratione materiae*, the author argues, firstly, that the Committee cannot be requested to declare the case inadmissible without having considered its merits, since the assessment of the author's age is precisely the substantive issue in this communication.

5.4 Secondly, the author argues that he cannot be considered an adult, as (a) the fact that he was not carrying official documents with biometric data when he entered the country cannot, under any circumstances, be interpreted as proof of his being an adult; (b) the subjective assessment of the author's appearance cannot be considered a valid means of contesting his presumed status as a minor; and (c) under no circumstances can the medical test conducted be regarded as an objective test allowing the precise age of the author to be determined.[14] Conversely, the documents submitted by the author (which were never considered to be false) do constitute proof of his status as a minor, since they are official documents duly issued by the Government of Mali and accepted by the examining judge.

[12] He always maintained that his father's name was Sidy, as stated in his identity documents, the informed consent form, the removal order and the printout for the holding centre for foreign nationals, submitted by the State party itself. In the appended documents, his father's name consistently appears as Sidy. In two of the documents, the name is handwritten in capital letters (SIDY) and could be mistakenly read as STOY. The discrepancy in the name of the author's mother is insignificant and not attributable to the author, since between the name Rokia in his birth certificate, and the name Roukia in the removal order, the only difference is a "u"; this can be explained by the phonetic similarity between the sounds "o" and "ou" in the French language, which may have been imperceptible to whoever transcribed his mother's name.

[13] The author explains that the State party made two errors, firstly, when it said that the author had indicated that he was born on 1 January 2017 (when it would appear that he meant to say 2000) and, secondly, when it said that his birth certificate stated that he was born on 31 April 2000, when it actually says that he was born on 30 April 2000.

[14] The author explains, once again, that, according to the most recent scientific literature on the subject, this method of age assessment has such margins of error that it does not allow authoritative conclusions to be drawn.

Moreover, when the judge issued the judgment in question, he had already assessed all the relevant circumstances, whereas the prosecutor's office disregarded the judge's finding based solely on one additional element: the author's refusal to undergo age assessment tests of questionable accuracy. The author adds that the Supreme Court itself has expressly disallowed the use of medical tests in the specific context of assessing the age of unaccompanied minors.[15] Furthermore, the fact that the author lied about his nationality has no bearing on his age. It is also untrue that the author lied about the names of his parents.

5.5 Thirdly, the author explains that his refusal to undergo very intrusive age assessment tests that yield highly questionable results cannot in any way be interpreted as proof that he is an adult. The author explains that, when he refused to undergo the tests, the State party could have approached the Embassy of Mali to confirm his identity, but that it did not do so. Thus, his presumed status as a minor and the principle of the best interests of the child must prevail over any other considerations, and in case of doubt, as understood by the judge himself, the State must ensure that he is treated as a minor (especially when official documentation confirming his age was provided). The State party's actions point to an age assessment procedure bereft of safeguards in which the burden of proof for being treated as a minor has been reversed, thus making it impossible for minors to satisfy.

5.6 As for the State party's claim that declaring the communication admissible would only serve to encourage migrant smuggling rings, the author submits that this statement is evidence that, for the State party, controlling migration flows takes precedence over respecting the best interests of the child.

5.7 As for the State party's claim that the communication is inadmissible on the ground of failure to exhaust domestic remedies, the author insists that age assessment decrees cannot be directly appealed before the courts, as indicated in the decree issued by the prosecutor's office in the present case. Similarly, all the domestic remedies mentioned by the State party are either ineffective or inaccessible to the author. Firstly, the author stresses that it is impossible for him to submit additional evidence or other forms of proof to the prosecutor's office (such as requesting that checks be made at the Embassy of Mali), since he was prevented from exercising his right to be heard and his right to legal assistance. Secondly, the remedy provided for in article 780 of the Civil Proceedings Act is ineffective for unaccompanied minors because: (a) minors who have not been assisted by a lawyer at previous stages of the administrative process cannot gain access to or pursue the avenues for contesting the assessment of their age that are available to them; and (b) the length of the proceedings and the fact that interim measures are not applied as a matter of course are evidence of the remedy's ineffectiveness. In fact, even though the Supreme Court has upheld the claims of minors who were in situations similar to that of the author, in many cases, such decisions were issued when the appeal had become partially moot and the minor had reached the age of majority.[16] In addition, appeals are processed without interim measures being adopted or with them being adopted ineffectively.[17] In fact, in the author's case, a petition was filed on 12 July in an attempt to prevent the author's guardianship arrangements from being terminated and requesting interim measures to be applied. However, the request for interim measures went unanswered for more than two months, leaving the minor without guardianship. Thirdly, the author submits that the appeal filed against the removal order is not an effective remedy, since he is a defenceless minor living in the streets without a guardian, and that, furthermore, such an appeal would counter only the effects of the expulsion, not those stemming from his situation of defencelessness. Fourthly, the author notes that, although Fundación Raíces has initiated non-contentious

[15] According to one of these judgments, "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 purpose of undergoing additional age assessment tests" especially "when he or she holds a document that has been legally issued by his or her country of origin and whose validity has not been questioned or discredited by a competent body" (STS 320/2015, 22 May). The author explains that, in keeping with the principle of the best interests of the child, it should be understood that a birth certificate is to be considered a valid document confirming his status as a minor.

[16] The author cites a range of case law of the Supreme Court.

[17] The author cites cases in which interim measures were not applied, even though the petition was later granted, and a case in which interim measures were applied one year after they had been requested.

proceedings for age assessment before the civil courts in other cases, its requests were rejected on the ground that it had not pursued the appropriate avenue of redress.

5.8 Lastly, the author explains that, since his documentation has not been contested in court, it is valid for all purposes for the rest of the Spanish public authorities, which consider him to be a minor. Therefore, if the author needs to undergo medical treatment, apply for asylum or register with the authorities, he cannot do so because he needs the authorization of a guardian who has not yet been assigned.

State party's observations on the merits

6.1 In its observations of 12 December 2017, the State party submits that the principle of the best interests of the child enshrined in article 3 of the Convention has not been violated since the author is an adult. The State party noted that persons should be presumed to be minors only "when there is doubt" as to their age, not when it is obvious that they are adults. According to the State party, "in the present case, where a person with no documentation whatsoever appears to be an adult, the authorities can legally consider him or her an adult without conducting any tests". The State party argues that considering an adult to be a minor in the absence of reliable evidence and based solely on the word of the person concerned would seriously endanger minors placed in reception centres (who could suffer abuse or ill-treatment at their hands), which would, in fact, constitute a violation of the principle of the best interests of the child.

6.2 The State party further submits that there was no violation of the principle of the best interests of the child in relation to articles 18 (2) and 20 (1) of the Convention, claiming that: (a) the author was tended to by health workers as soon as he set foot on Spanish soil; (b) he was provided with documentation and the services of a lawyer and an interpreter at the expense of the State; (c) the competent judicial authority was immediately notified of his situation to ensure that his rights were respected during the procedures relating to his irregular status; (d) as soon as the author claimed to be a minor, the Public Prosecution Service was notified and provisionally determined him to be an adult. This assessment was later reviewed at the author's request. Therefore, the author cannot be said to have been deprived of legal assistance or left unprotected; and (e) when he submitted his observations on the merits, the author was at liberty and benefiting from a remedy of protection granted by the competent administrative authorities, through which he was guaranteed access to social assistance.

6.3 According to the State party, even if the author was in fact a minor, there was no violation of the right to an identity enshrined in article 8 of the Convention, as "his stated identity was recorded as soon as he entered Spanish territory illegally".

6.4 The State party also maintains that there has been no violation of the right to be heard enshrined in article 12 of the Convention. It submits that the author has always had the opportunity to be heard and to make whatever claims he wishes. He was heard when he was arrested and claimed to be a minor, when he appointed lawyers of his choice and when he chose to refuse to undergo medical tests.

6.5 Lastly, the State party submits that there has been no violation of article 20 of the Convention, as this article "can be invoked solely with regard to minors when their age is not in question. In the present case, this right simply does not apply."

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

7.1 In his comments of 19 February 2018, the author provided an update on the case, clarifying that, at the time of writing, the State party had still not applied the interim measures requested by the Committee on 7 June 2017, consisting of his transfer to a child protection centre. On 4 September 2017, Madrid Court of First Instance No. 23 ordered the author to appear within 10 days so that it could rule on the interim measures and the petition filed against the administrative decision that had terminated his guardianship arrangements. Since the author's exact whereabouts were unknown due to the State party's failure to apply the interim measures requested, on 16 October 2017, the Court declared the petition inadmissible and closed the case. Lastly, the author is currently in possession of a card for unaccompanied minors, which he needs in order to obtain his identity card and his

passport. This is reliable proof of his identity, as it contains biometric data (a unique identification number, his fingerprints and a photograph).

7.2 As for the merits of the communication, the author submits that several decisions taken by the State party have violated the principle of the best interests of the child, in particular: (a) considering him to be undocumented even though he provided identity documents that served as incontrovertible proof of his age; (b) wishing him to undergo age assessment tests even though he was documented; (c) considering him to be an adult based solely on his refusal to undergo these tests; and (d) removing him from the child protection system. The author recalls that the Committee has expressed concern about the widespread use of this type of test, even in cases where the identity documents in question appear to be genuine, and despite the Supreme Court having issued several decisions on this practice.[18]

7.3 The author submits that it is wrong to say that the Public Prosecution Service acted as a sort of legal representative responsible for protecting his interests, since this gives rise to a clear conflict of interest, as has been identified on several occasions by Spanish case law.[19] As a result, the State party failed to meet its obligation to appoint a guardian or legal representative for the minor. Likewise, the only steps taken to provide the author with care and accommodation were those taken during the short time that he spent in the reception centre for minors in Hortaleza. Moreover, the State party claims that the author is "benefiting from a remedy of protection granted by the administrative authorities, through which he is guaranteed access to social assistance". However, it does not provide any evidence of this and, to the knowledge of Fundación Raíces, which is representing the author, he is in Almería, not enrolled in any social assistance programme and his exact status is unknown.[20]

7.4 The author submits that, with regard to the violation of article 8 of the Convention, the State party has altered important elements of his identity by attributing to him an age and a date of birth that do not match those reflected in his official documentation, which was not officially contested.

7.5 The author states that his right to be heard enshrined in article 12 of the Convention was violated on two occasions. Firstly, during the first age assessment procedure, because he had neither a guardian nor a lawyer and the informed consent form did not indicate what medical tests would be performed, or what the consequences would be if he refused to give his consent.[21] Later, during the second procedure, the author had a preliminary interview in which neither his guardian (who was never appointed) nor his lawyer took part. Then, his lawyer was not allowed to take part in the second interview, even though he found the record of appearance not to reflect what the author had actually said. The author understands that article 12 is linked to article 3 of the Convention insofar as it establishes the procedural framework of the principle of the best interests of the child, which, in the present case, was not respected.

7.6 The author claims a violation of article 6 of the Optional Protocol, as the State party failed to apply the interim measures requested by the Committee.

[18] CRC/C/ESP/CO/5-6, para. 44. The author also cited general comment No. 6 (2005), para. 31 (i) and 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.

[19] STC 183/2008 of 22 December.

[20] On 19 July 2018, Fundación Raíces submitted additional information according to which the author was in Roquetas de Mar, Almería, and had expressed his willingness to continue the proceedings before the Committee; it has enclosed the relevant statement.

[21] The author cites general comment No. 12 (2009) on the right of the child to be heard, para. 34, according to which, "A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age".

Third-party submission[22]

8. 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.[23] This submission was transmitted to the parties, who were invited to submit comments. Although the parties did not submit comments in relation to the present communication, they did so in relation to the communication concerning *J.A.B. v. Spain*,[24] in which the same third-party submission was presented. In these comments, both parties explained that their comments were applicable to all communications in respect of which the submission in question was presented.

Additional submissions by the parties

Additional information from the author

9.1 On 31 October 2019, the author submitted additional information stating that, on 14 April 2018, the Consulate of Mali in Madrid had issued him with a consular card confirming, once again, his age and identity. On 20 April 2018, the author filed an ordinary lawsuit against the Public Prosecution Service, requesting it to declare valid all the official documentation that he had submitted (birth certificate, consular identity card and card for unaccompanied minors), to recognize his status as a minor and to place him under the guardianship of the Community of Madrid. The author requested a lawyer to be appointed on his behalf but, given the urgency of the matter, filed the lawsuit without waiting for his lawyer to be assigned; he also requested that protective interim measures be applied. The lawsuit was declared inadmissible by the court on 25 April 2018 because the author had no legal counsel. The author was notified of this decision on 3 May 2018, three days after he had reached the age of majority. The author did not appeal the judgment because, in other similar cases, the courts had terminated the proceedings once the minors in question had reached the age of majority, on the ground that the proceedings had become moot.

9.2 On 17 May 2018, the author received his passport but did not present it to any authority, as he had already reached the age of majority. At the time of submission of the communication, the author claims that he is in an irregular administrative situation and that the police could issue an expulsion order against him at any time.

State party's observations on the additional information from the author

9.3 On 19 November 2019, the State party submitted its observations on the additional information provided by the author. The State party claims that the author failed in his duty of loyalty by not informing the Committee that he had received his passport and that he had reached the age of majority on 30 April 2018, as this would have abruptly rendered the communication moot. The State party adds that the author's allegations are illogical, as it was precisely because the judge recognized the author's status as a minor that he decided that the latter lacked the capacity necessary to file the lawsuit in question and that he ought to have had legal counsel. Thus, the judicial authorities recognized the validity of the documentation and the author's status as a minor.

9.4 The State party requests the Committee to discontinue the communication, since (a) the judicial authorities recognized the validity of the passport presented by the author; (b) the author did not inform the Committee that he had reached the age of majority; and (c) the communication has become moot because the author has reached the age of majority.

[22] This submission concerns communications Nos. 17/2017, 21/2017 and 27/2017, which have been registered by the Committee.

[23] 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. In that communication, the submission was made on 3 May 2018 but does not differ substantially from that made in relation to the communication at hand.

[24] CRC/C/81/D/22/2017, paras. 9 and 10.

Issues and proceedings before the Committee

Consideration of admissibility

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

10.2 The Committee takes note of the State party's argument that the communication is inadmissible *ratione personae* because: (a) the author appeared to be an adult; (b) the medical test determined that he was an adult; (c) his birth certificate does not include biometric data and therefore does not confirm that he is a minor; (d) the author lied about his nationality and referred to different dates of birth; and (e) the author has refused to undergo other medical tests. The Committee notes, however, that the author stated that he was a minor when he arrived in Spain, that he submitted a copy of his birth certificate from Mali, which confirmed that he was a minor, to the prosecutor's office and Court of Investigation. The Committee takes note of the State party's argument that, since the birth certificate lacks biometric data, it cannot be checked against the data provided by the author. The Committee recalls that the burden of proof does not rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. In the present case, the Committee takes note of the author's argument that, if the State party had doubts about the validity of his birth certificate, it should have approached the consular authorities of Mali to verify his identity, which it failed to do, especially since the author began the passport application process while he was in the child protection system and submitted supporting documentation. In the light of the foregoing, the Committee considers that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

10.3 The Committee also takes note of the State party's argument that the author did not exhaust all available domestic remedies, as he could have: (a) requested the Public Prosecution Service to conduct additional medical tests; (b) requested the civil judge to review the judgment denying him a guardian, in accordance with the procedure set out in article 780 of the Civil Proceedings Act; (c) appealed the removal order issued against him before the administrative courts; and (d) initiated, in accordance with Act No. 15/2015, non-contentious proceedings for age assessment before the civil courts. In turn, the Committee takes note of the author's arguments that the domestic remedies mentioned by the State party are either unavailable or ineffective. 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.[25] 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.

10.4 The Committee takes note of the State party's argument that the communication should be discontinued because the author's status as a minor was recognized by means of his passport and that, as he has now reached the age of majority, the communication should be discontinued as it has become moot. The Committee notes that being a minor is not a precondition for a communication to be decided, or even submitted, insofar as the alleged violations occurred when the author was a minor, as was the case here. Therefore, article 7 (f) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication. Similarly, the Committee considers that the author has not disrupted or abused the process by not having reported immediately that he had reached the age of majority. In fact, he did so 18 years after the date of birth that he has claimed to be his throughout the proceedings before the Committee and so this has no bearing on either the admissibility or the merits of the communication.

[25] *N.B.F. v. Spain*, para. 11.3.

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

10.6 The Committee, however, considers that the author has sufficiently substantiated his claims under articles 3, 8, 12 and 20 of the Convention. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

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

10.8 One of the issues before the Committee is whether, in the circumstances of the present case, the procedure for assessing the age of the author, who stated that he was a minor and later presented a copy of his birth certificate to support his 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, the best interests of the child were not taken into consideration during the age assessment procedure.

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

10.10 The Committee also recalls that documents that are available should be considered genuine unless there is proof to the contrary.[27] 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 the child understands … The benefit of the doubt should be given to the individual being assessed."[28]

10.11 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, with no additional tests, psychological tests in particular, being administered, and that there is no record of the author having been interviewed as part of the process; (b) as a result of these tests, the hospital in question determined the author's bone age to be between 18 and 19 years, according to the Greulich and Pyle atlas, without taking into account the fact that this study, which does not establish standard deviation margins for that age range, cannot be used to extrapolate reliable data on individuals with the author's characteristics; (c) on the basis of the results of the medical tests, the prosecutor's office issued a decree stating that the author was an adult; (d) upon receiving the author's birth certificate, the competent judge determined him to be a minor and placed him in the care of the child protection services; (e) the prosecutor's office specializing in child protection later summoned the author in order for him to undergo additional medical

[26] Ibid., para. 12.3.

[27] 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.

[28] *N.B.F. v. Spain*, para. 12.3.

tests; (f) based on the author's refusal to undergo them, the prosecutor's office determined that the author was an adult, which led to his removal from the care of the child protection services; and (g) the author was not assisted by a guardian during the age assessment procedure.

10.12 The Committee also takes note of the ample information in the file suggesting that X-ray evidence lacks precision and has a wide margin of error, and is therefore not suitable for use as the sole method for assessing the chronological age of a young person who claims to be a minor and who provides documentation supporting his or her claim.

10.13 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 age assessment should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner and, in the event of remaining uncertainty, the individual should be accorded the benefit of the doubt such that if there is a possibility that the individual is a child, he or she should be treated as such.[29]

10.14 The Committee also takes note of the author's claims that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age determination process, which led to 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 determination process is an essential guarantee of respect for their best interests and their right to be heard,[30] given that the role played by the prosecutor's office specializing in child protection is insufficient in this regard. Failure to do so amounts to a violation of articles 3 and 12 of the Convention, as the age assessment procedure is the starting point for its application. The absence of timely representation can result in a substantial injustice.

10.15 The Committee also takes note of the State party's assertion that an unaccompanied minor is to be considered documented if he or she is found to be in possession of a passport or other similar identity document with biometric data confirming his or her age. Not only is this requirement not laid down in the case law of the State party's own Supreme Court (see para. 5.4 above), but it cannot be imposed in opposition to what is stated in an original copy of an official birth certificate issued by a sovereign country, without the document in question being officially contested.

10.16 In the light of the foregoing, the Committee considers that the age assessment procedure undergone by the author, who claimed to be a child, lacked the safeguards necessary to protect his rights under the Convention. In the circumstances of the present case, this is a result of the failure to take into consideration the original copy of the author's official birth certificate issued by a sovereign country, his being declared an adult when he refused to undergo age assessment tests and the failure to appoint a guardian to assist him during the age assessment procedure. Therefore, the Committee considers that the best interests of the child were not a primary consideration in the age assessment procedure undergone by the author, which constitutes a violation of articles 3 and 12 of the Convention.

10.17 The Committee also takes note of the author's claims that the State party violated his rights under article 8 of the Convention insofar as it altered elements of his identity by attributing to him an age that did not match the information in the official document issued by his country of origin. The Committee considers that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements of it. In the present case, the Committee notes that the State party failed to respect the author's identity by rejecting as evidence his birth certificate, which confirmed that he was a minor, without

[29] General comment No. 6 (2005), para. 31 (i).

[30] *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8 and *J.A.B. v. Spain*, para. 13.7.

so much as assessing its validity or verifying the information that it contained with the authorities of his country of origin. Consequently, the Committee finds that the State party violated article 8 of the Convention.

10.18 The Committee also takes note of the author's claims, unrefuted by the State party, regarding the State's failure to provide him with protection, even though he was a defenceless and highly vulnerable unaccompanied child migrant, and the contradiction inherent in declaring the author to be an adult while, at the same time, requiring him to have a guardian in order to complete administrative formalities, including health-care formalities. The Committee notes that State party failed to provide the author with protection even after he had submitted his birth certificate confirming that he was a child to the Spanish authorities and a judge had ordered that he be placed in the child protection system, based on a decision issued by the prosecutor's office for the simple reason that the author had refused to undergo medical tests, the accuracy of which is highly questionable. The Committee is therefore of the view that this inaction constitutes a violation of article 20 (1) of the Convention.

10.19 Lastly, the Committee takes note of the author's claims concerning the State party's failure to apply the interim measures consisting of his transfer to a child protection centre. The Committee is of the view that, by ratifying the Optional Protocol, States parties take on an international obligation to comply with 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.[31] 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 measures in itself constitutes a violation of article 6 of the Optional Protocol.

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

11. 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. The State party is also under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

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

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

(c) Develop an effective and accessible redress mechanism that allows young unaccompanied migrants claiming to be under 18 years of age to apply for a review of any decrees declaring them to be adults issued by the authorities in cases where the age

[31] *N.B.F. v. Spain*, para. 12.11.

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, 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 comments Nos. 6, 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.