



Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under article 10 of the Optional Protocol, concerning communication No. 22/2017*, **

<i>Communication submitted by:</i>	J.A.B. (represented by Fundación Raíces)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	12 June 2017
<i>Date of adoption of the decision:</i>	31 May 2019
<i>Subject matter:</i>	Procedure for determining the age of an alleged unaccompanied minor
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of the right of submission; incompatibility <i>ratione personae</i> ; non-substantiation of claims
<i>Articles of the Convention:</i>	2, 3, 6, 8, 12, 18 (2), 20 (1), 24 and 27
<i>Articles of the Optional Protocol:</i>	6

1.1 The author of the communication is J.A.B., a citizen of Cameroon born on 1 December 2000. He claims to be the victim of violations of articles 2, 3, 6, 8, 12, 18 (2), 20 (1), 24 and 27 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 June 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt interim measures consisting in the suspension of the execution of the expulsion order against the author pending the consideration of his case by the Committee and to transfer him to a centre for the protection of minors and provide him with the appropriate medical treatment for his illnesses.

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 Optional Protocol, rejected the State party's request to consider the admissibility and merits of the communication separately.

* Adopted by the Committee at its eighty-first session (13–31 May 2019).

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



The facts as submitted by the author

Arrival in Spain and steps taken to secure a guardian

2.1 The author lived in Cameroon with his father and five siblings. At the age of 10, he began to live in the streets. Without sufficient resources to feed himself or employment opportunities, on 5 May 2015, the author left Cameroon. He transited through Nigeria, Benin, the Niger, Algeria and Morocco before arriving in Ceuta (a Spanish enclave in Africa), where he was received by the Red Cross on 23 April 2016.

2.2 When he stated that he was an unaccompanied minor, he was told that “it would be better to say he was an adult because here [in Ceuta], there is nothing a minor can do”.¹ The author was taken to the police station, where, in the absence of a translator, he did not understand what was being said. He was later taken to the temporary stay centre for immigrants in Ceuta, where he was provided with the services of a lawyer and a translator. The author remained in the centre for adults for five months.

2.3 On 27 September 2016, the author was transferred to a centre for adults run by Asociación Dianova in the Autonomous Community of Madrid. Owing to the conditions in which immigrants, refugees and drug addicts were held there, the author left the centre. He slept in parks and hostels for three months.

2.4 In October 2016, the author received from his family the original of his Cameroonian birth certificate, indicating his date of birth as 1 December 2000.² With his original birth certificate in hand, the author went to the Embassy of Cameroon in Madrid on 27 October 2016 to apply for a passport. On 3 November 2016, the author received a consular identity card and, on 30 November, his certificate of consular registration.

2.5 On 29 December 2016, the author contacted the non-governmental organization Fundación Raíces, where it was explained to him how important it was to mention that he was a minor so that he could be appropriately protected by the State party. The author designated Fundación Raíces as his representative before the Spanish authorities and stated that he would refuse to undergo medical testing to determine his age since he was in possession of the original of the official documentation attesting to the fact that he was a minor. The author referred to decisions of the Civil Chamber of the Supreme Court No. 453/2013 of 23 December 2013 and No. 452/2014 of 24 December 2014, according to which “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 legally issued passport from the country of origin whose validity is not in question.”³ In addition, the author requested that: (a) his status as a minor be recognized; (b) he be transferred to the reception centre for minors; (c) he be declared as lacking protection; and (d) the child protection authority be appointed as his guardian.

2.6 That same day, Fundación Raíces contacted the Madrid municipal police with a view to their taking charge of the unprotected minor. Two child protection officers from the Hortaleza municipal police came to the premises of Fundación Raíces. In the light of the author’s unprotected status, the aforementioned statement and the fact that he held an official identity document, he was transferred to the initial reception centre for minors in Hortaleza, Madrid.⁴

¹ According to subsequent submissions, it is reportedly very common for foreign minors who arrive alone at the border areas of Ceuta and Melilla to say that they are adults in order to make the crossing to Spain (para 5.1 below).

² The file contains a colour copy of the author’s birth certificate, drawn up on 29 December 2000 on the basis of birth declaration No. 1678/2000 issued by a clinic in Douala.

³ In subsequent submissions, reference is made to other decisions of the Civil Chamber of the Supreme Court of Spain prohibiting medical tests for the purpose of determining the age of documented unaccompanied minors (such as, for example, decision No. 320/2015 of 22 May 2015).

⁴ According to the file, the author’s transfer to the centre for minors effectively placed him under guardianship.

2.7 On 11 January 2017, the author was accompanied by an educator from the minor's centre to La Paz University Hospital, where he was diagnosed with tuberculosis, schistosomiasis (a parasitic disease that has a low mortality rate but causes highly debilitating fevers), strongyloidiasis (parasitic infection of the intestine associated with poor hygiene and low socioeconomic status that can cause trauma, motor damage and inflammation of the skin, intestinal mucosa and lungs) and malaria.⁵

State party's determination of the author's status as an adult

2.8 On 23 January 2017, the author informed Fundación Raíces that he had been summoned by the Madrid Office of the Prosecutor for Minors to a hearing that same day and that he wished to be accompanied by his lawyer. However, the staff at the centre for minors informed the lawyer from Fundación Raíces that he was not permitted to accompany the author. Fundación Raíces then sent a fax to the Prosecutor's Office, which included: (a) the author's identity documents and a note stating that, according to the Embassy of Cameroon, his passport would be ready within two weeks; (b) the statement of representation and right to be heard; and (c) a reference to the jurisprudence of the Civil Chamber of the Supreme Court prohibiting medical tests for the purpose of determining the age of documented unaccompanied minors.

2.9 On 23 January 2017, the author attended the hearing without a guardian or lawyer, despite having asked to be accompanied by one. At the hearing, the prosecutor requested the author to undergo age-determination tests because his physical appearance did not match his reported age. The prosecutor informed him that, if he refused, he would be considered an adult. The author was not informed of the planned test, its nature, the consideration that would be given to its results or its implications for his health and rights. As he held the originals of official documents issued by the authorities of his country of origin, the author refused to undergo the tests.

2.10 On 26 January 2017, an age-determination decree was issued, declaring the author to be an adult, together with the administrative decision ordering his expulsion from the centre for minors. These were transmitted to the author on 3 February 2017, when staff at the centre informed him that he would be expelled from the centre that very afternoon.⁶

2.11 The decree states that the birth certification could not be assessed because it was a photocopy. The author notes that the original was with the Embassy for the issuance of his passport and that, even though the prosecution service had been informed of this fact and provided with the passport application receipt and assurances that the document would be transmitted to it within a few weeks, the prosecution service chose not to postpone the hearing. The decree also states that the consular identity card was "issued when the person concerned was already in Spain, thereby undermining its credibility", that his physical appearance did not match his reported age, that from the time of his arrival in Spain he had been considered and treated as an adult and that "the repeated refusals to undergo X-rays and a physical examination by a forensic doctor indicate that the person concerned is worried that these tests will reveal his true age". The decree lists the author's date of birth as 3 January 1998, which is the date used in the expulsion proceedings initiated against him for having illegally entered the country. The administrative decision ordering his expulsion from the centre for minors also lists this date as his date of birth.

2.12 Once out on the street, the author was taken to the Catalina Labouré open municipal centre for homeless persons, where he spent several days sleeping on a chair, along with adults. Subsequently, the author slept in the street, the San Juan de Dios municipal shelter and in the homes of individuals who took him in sporadically.

2.13 In March 2017, the Embassy of Cameroon in Madrid issued the author with a passport.

2.14 On 5 April 2017, the administrative decision to expel the author was handed down.

⁵ The file contains copies of the medical reports drawn up by the paediatric department of Carlos III Hospital dated 11 January 2017, 22 February 2017, 1 March 2017, 24 March 2017 and 21 April 2017.

⁶ According to the file, this effectively ended his guardianship.

Domestic remedies sought by the author

2.15 On 3 April 2017, the author filed a formal objection against the decision to revoke his guardianship and requested protective measures.⁷

2.16 On 19 June 2017, the author requested the prosecution service to review the age-determination decree of 26 January 2017, providing his passport as a new supporting document.⁸

2.17 On 20 June 2017, the author lodged an administrative appeal against the expulsion order of 5 April 2017.⁹

The complaint

3.1 The author submits that, as a consequence of the failure to recognize the validity of the originals of his official documentation issued by his country of origin and of his refusal to undergo unnecessary tests to determine his age, he was wrongly considered to be an adult, leaving him without State protection and living in the streets in poor health and putting him at risk of expulsion from the country.

3.2 The author claims that the age-determination decrees issued by the prosecution service cannot be appealed directly (pursuant to decision of the First Chamber of the Constitutional Court No. 172/2013 of 9 September 2013) and that he has exhausted available remedies, which are not effective for the purposes of challenging his age determination.

3.3 The author claims to be a victim of a violation of article 2 of the Convention inasmuch as the authorities discriminated against him when they called into question the originals of the official documents issued by the Embassy of Cameroon. He adds that neither his passport nor his birth certificate were at any point described as or reported to be fake and that, had there been any doubts as to their authenticity, the State party should have contacted the authorities of Cameroon in Spain to make the necessary checks.

3.4 The author also claims that the State party did not take into account the best interests of the child as enshrined in article 3 of the Convention. He submits that, as an unaccompanied minor, his situation of particular vulnerability required the especially careful application of this principle at all stages of the age-determination process, but there was no mention of the principle at any point. The author refers to paragraph 31 of the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin in his claim that the prosecution service violated that principle by disregarding the presumption of his status as a minor and failing to give him the benefit of the doubt, especially in the light of his official documentation. He also submits that the prosecution service disregarded the Supreme Court's jurisprudence and declared him an adult for refusing to undergo medical tests to determine his age.

3.5 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 is a key procedural safeguard to ensure respect for the best interests of an unaccompanied minor.¹⁰ He also claims a violation of article 3, in conjunction with article 20 (1), as a result of the State's failure to provide protection given his situation as an unprotected, highly vulnerable unaccompanied child migrant who was ill. The author contends that the best interests of the child should prevail over public order concerns regarding foreigners and that, when dealing with a minor who holds documentation duly

⁷ According to a later submission, the court dismissed the formal objection (para. 11.2 below).

⁸ According to later submissions, the Office of the Prosecutor twice rejected the request for review of the decree (paras. 5.5 and 11.1 below)

⁹ According to later submissions, the court cancelled the expulsion order but did not address the author's readmission to a centre for minors (paras. 5.5 and 11.1 below).

¹⁰ The author cites general comment No. 6, para. 21.

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.¹¹

3.6 The author further claims to be the victim of a violation of article 6 of the Convention because he was not provided with the optimal conditions for ensuring his survival and development given that he was living in the streets and was dependent on the kindness of people.

3.7 In addition, the author submits that the State party violated his right to an identity, as enshrined in article 8 of the Convention, pointing out that age is a fundamental aspect of a person's identity and that the State has a duty not to interfere in this regard. Yet, the State party assigned him an age different from his real age and a date of birth that does not match the one in his identity document. The author specifies that, under the State party's own law and according to the Supreme Court's jurisprudence, documentation issued by the authorities of a country of origin constitutes the authoritative attestation of a foreign national's identity.¹²

3.8 The author also claims that his right to be heard was not respected at any point, in violation of article 12 of the Convention, inasmuch as he was prohibited from meeting with the prosecution service in the presence of his lawyer and was unable to receive the assistance of a lawyer until the authorities had resolved the matter of his age.

3.9 The author further claims a violation of article 20 of the Convention owing to the failure of the State party to protect him as a child deprived of his family environment.

3.10 The author additionally claims to be a victim of a violation of article 24 of the Convention, not only because he has been diagnosed with various illnesses that require careful, ongoing medical follow-up which cannot be provided since he was thrown out of the protection system 23 days after his initial examination, thereby forcibly interrupting his medical treatment, but also because he has not received a number of vaccinations, either because the consent of a legal representative is required or because he must be registered as residing in Madrid, which he cannot do without the authorization of a legal representative.¹³ The author notes that his illnesses were diagnosed prior to the age determination test, that the educator from the centre for minors was aware of the diagnoses and that the medical report of 21 April 2017 noted the need for "the minor to be admitted to a reception centre until the end of his treatment".

3.11 Lastly, the author claims a violation of article 27, in conjunction with article 24, of the Convention. He maintains, on the basis of paragraph 44 of general comment No. 6, that not only was his development impeded from following its natural course owing to his lack of a guardian to guide him, but he was also prevented from developing properly because he was living on the street and, what is more, was in poor health.

3.12 The author proposes the following possible solutions: (a) recognition by the State party that the mere refusal to undergo age testing should not lead to the presumption that a person is an adult; (b) the establishment of the direct appealability of age-determination decrees before the courts; (c) recognition of his status as a minor; (d) his treatment as an unaccompanied minor who is to be provided with protection, a guardian and all necessary treatment for his illnesses; (e) recognition of all his rights as a minor, including the rights to State protection, to a legal representative, to education, and to residency and work permits in order to enable him to develop to his full potential and become integrated into society; and (f) recognition of his right to be heard through a person or institution specialized in children's rights.

¹¹ The author cites La Merced-Migraciones-Mercedarios et al., *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."

¹² The author cites article 4 of Organic Act No. 4/2000 on the rights, freedoms and social integration of foreign nationals in Spain and judgment No. 368/2015 of the Civil Chamber of the Supreme Court.

¹³ The author cites general comment No. 6, paras. 46 and 47.

State party's observations on admissibility

4.1 In its observations of 14 August 2017 on the admissibility of the communication, the State party notes that the author's account of the facts is biased and inaccurate. On 23 April 2016, 101 people stormed the border fence in Ceuta and the author, who was caught by the Guardia Civil, agreed to be transferred to the temporary stay centre for immigrants. On his admission form, the author stated that he was born on 3 January 1998 (making him 18 years and 3 months old upon entry into Spain). The State party also notes that, neither at the centre nor at the facility for adults run by the non-governmental organization Dianova, was the fact that he was an adult ever in doubt, owing to his physical appearance, and that the author did not mention being a minor until 29 December 2016, when he provided a simple photocopy of his Cameroonian birth certificate. The State party claims that, since the author did not have "reliable official documents containing biometric data", he was warned of the consequences of refusing to undergo medical tests at a hearing where he had the assistance of an interpreter.

4.2 The State party further notes that Fundación Raíces requested a review of the author's age-determination decree, providing the author's passport as a new supporting document, which had been issued on the basis of the birth certificate and "statements of the person concerned". On 26 June 2017, the prosecution service denied the request for review because: (a) no objective document attesting to the truth of the information regarding the author's parentage and birth had been provided; (b) the passport was issued on the basis of the birth certificate, which "is unreliable"; (c) the author was insistent in his refusal to undergo medical tests to determine his age, which was "evidence that these tests would reveal his true age"; and (d) the results of medical tests should supersede all documentation in cases where there are reasonable doubts about a person's age.

4.3 The State party argues that the communication is inadmissible *ratione personae* owing to the author being an adult. It submits that: (a) it defies all logic that the author was 15 years old at the time he entered Spain; (b) the author stated that he was born on 3 January 1998 and requested to be placed in a centre for adults; (c) at no time during his five months at the temporary stay centre for immigrants did the author mention to the specialized lawyers that he was a minor; (d) he did not mention being a minor when he was transferred to the facility for adults run by Dianova on the continent; (e) it was only when he contacted Fundación Raíces after learning that an administrative expulsion procedure had been initiated that he claimed to be a minor; (f) he provided only a photocopy of a Cameroonian birth certificate that did not include biometric data and whose authenticity could not be ascertained; (g) the documents that were subsequently issued are exclusively based on the aforementioned photocopy and therefore lack evidentiary value; and (h) the refusal to undergo non-invasive medical tests to determine his age can only be designed to avoid the truth coming to light.

4.4 According to the State party, admitting a communication when there is objective proof that the complainant is an adult will merely serve to "encourage migrant smuggling rings to recommend that migrants travel without documentation and then claim to be minors".

4.5 Furthermore, on the basis of article 7 (e) of the Optional Protocol and rules 20 and 21 of the Committee's rules of procedure under the Optional Protocol, the State party submits that the communication is inadmissible for failure to exhaust all available and effective domestic remedies, adding that they must *all* be exhausted. Specifically, the author could have: (a) requested the prosecution service to conduct additional medical tests; (b) requested the civil court, as part of the procedure under article 780 of the Civil Procedure Act, to review the decision denying him a guardian; (c) appealed the order referring his case to the Administrative Court; (d) brought before the civil court, in accordance with Act No. 15/2015, an act of non-contentious jurisdiction to determine his age.

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

5.1 In his comments of 6 November 2017, the author reiterates that, upon arriving in Ceuta, he informed Red Cross staff that he was a minor, but they advised him not to

mention this fact otherwise he would remain in Ceuta. The author specifies that, as noted by the United Nations Children's Fund (UNICEF), it is very common for foreign minors arriving alone at the border areas of Ceuta and Melilla to say that they are adults in order to make the crossing to Spain owing to the poor conditions at the child protection centres in both autonomous cities and the lack of transfers between child protection centres in the various Autonomous Communities.¹⁴ The author submits that he did not receive assistance from a lawyer at that time, suggesting a lack of safeguards, and that it should be borne in mind that information provided at a stressful time should not be a pivotal element of his case.

5.2 Regarding the State party's claim that the documents provided¹⁵ did not include biometric data, the author submits that they could not have, not because they were defective or contained irregularities but because these types of documents never include such data. At a minimum, the documents should have compelled the competent authorities to uphold the principle that a person should be presumed to be a minor. Given that the only documents to include biometric data are passports, and at that time his was being processed by the Embassy of Cameroon in Madrid, the prosecution service should have contacted the Embassy to verify the information.

5.3 As for the State party's claim that admitting the communication would serve to encourage migrant smuggling rings to recommend that migrants travel without documentation and then claim to be minors, the author submits that the statement is evidence that controlling migration flows takes precedence over the best interests of the child.

5.4 Concerning the State party's observations as to inadmissibility *ratione personae*, the author submits that it is precisely the matter of his age that is at the heart of the communication and should not, therefore, be considered grounds for inadmissibility. The author notes that: (a) the State party's subjective assessment of his physical appearance illustrates the complete lack of safeguards in the age-determination process; (b) having stated at one point that he was an adult does not prove that he actually was; (c) the fact that the documents he provided did not give the State party sufficient guarantees did not mean that he was an adult; (d) his refusal to undergo age tests whose results are very debatable should not be interpreted as proof of his being an adult. The author is of the view that all of the above reveals an age-determination process bereft of safeguards, in which the presumption that a person is a minor has been converted into the presumption that he or she is an adult. In this respect, the author refers to a concern expressed by various institutions as to the lack of safeguards in the age-determination process in Spain.¹⁶ In addition, the author notes that the framework protocol on procedures applying to the treatment of unaccompanied minors has been challenged before the Supreme Court on the grounds that

¹⁴ Spanish Committee for UNICEF, *Acogida en España de los niños refugiados: estudio sobre el sistema de acogida de personas refugiadas en España desde la perspectiva de derechos de la infancia* (Reception of refugee children in Spain: Study of the reception system for refugees in Spain from a children's rights perspective), 2016, available at <https://www.unicef.es/publicacion/estudio-sobre-el-sistema-de-acogida-de-personas-refugiadas-en-espana-desde-la>.

¹⁵ Copy of the original birth certificate from Cameroon, consular identity card issued by the Embassy of Cameroon in Spain and the receipt from the passport application.

¹⁶ The author cites the Save the Children reports *Infancia y Justicia: una cuestión de Derechos* (Childhood and Justice: A Matter of Rights), 2012, available at https://www.savethechildren.es/sites/default/files/imce/docs/infancia_y_justicia.pdf, and *Infancias invisibles* (Invisible Childhoods), 2016, available at <https://www.savethechildren.es/sites/default/files/imce/docs/infancias-invisibles-ninos-migrantes-refugiados-trata-save-the-children.pdf>; the report of the Spanish Committee for UNICEF, *Informe Complementario al V y VI Informe de Aplicación de la Convención sobre los Derechos del Niño en España* (Alternative report to the combined fifth and sixth periodic report of Spain on the implementation of the Convention on the Rights of the Child), 2017, available at https://www.unicef.es/sites/unicef.es/files/comunicacion/CRC-UNICEF_ESP_publicacion.pdf; the report of the Ombudsman *Asistencia Jurídica a Extranjeros en España*, 2005, pp. 316–340, available at <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2005-05-Informe-sobre-asistencia-jur%C3%ADdica-a-los-extranjeros-en-Espa%C3%B1a.pdf>; and the report of Fundación Raíces et al., *Sólo por estar Solo* (Alone), 2014, available at <http://www.fundacionraices.org/wp-content/uploads/2014/05/SOLO-POR-ESTAR-SOLO.pdf>.

it violates fundamental rights, specifically the right to be heard and the right to a lawyer, two safeguards he was denied in this case.

5.5 With regard to domestic remedies, the author stresses that his application for review of the age-determination decree was ineffective, firstly, because the prosecution service refused to review the decree on the grounds that a passport is not an objective document attesting to the truth and legitimacy of a person's identity.¹⁷ Secondly, the remedy provided for in article 780 of the Civil Procedure Act is ineffective for unaccompanied minors who have no guidance, support or legal assistance and do not speak the language. The duration of the procedure and the fact that protective measures are not automatic illustrate its ineffectiveness. In this connection, a notice of appeal against the administrative decision revoking guardianship was filed on 3 April 2017, along with a request for protective measures in the form of the author's admission to a centre for the protection of minors. This appeal was filed on 25 October 2017.¹⁸ Thirdly, the author submits that appealing the expulsion order is not an effective remedy given the lack of protection provided to him as a minor who is ill and without a guardian and that, furthermore, an appeal would counter only the effects of expulsion, not those stemming from his unprotected status. He has nonetheless exhausted this remedy, having appealed the expulsion order and requested the suspension of the impugned administrative decision and his readmission to the initial reception centre for minors in Hortaleza. On 25 July 2017, Administrative Court No. 24 of Madrid granted "the protective measures requested with regard to the suspension of the expulsion order but cannot rule on the request for admission to a reception centre since this Court is not competent in such matters". Fourthly, the author notes that Fundación Raíces has initiated acts of non-contentious jurisdiction to determine a person's age on other occasions and that these were denied on the grounds that they were not the appropriate remedy.

State party's observations on the merits

6.1 In its observations of 21 December 2017, the State party submits that the principle of the best interests of the child, as enshrined in article 3 of the Convention, has not been violated since the author is an adult. The State party notes 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 an adult without conducting any tests".

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, stating that: (a) as soon as the author set foot on Spanish soil, he was provided with medical assistance; (b) he was provided with documentation, as well as the services of a lawyer and an interpreter, at the State's cost; (c) the competent judicial authority was immediately notified of his situation to ensure that his rights were protected during the procedures relating to his irregular situation; (d) as soon as the author claimed to be a minor, the prosecution service was notified and provisionally determined that he was an adult. The determination was later revised at the author's request. Therefore, in the State party's view, the author cannot be said to have been deprived of legal assistance or left unprotected.

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

6.4 The State party also submits that there was no violation of the right to be heard, as enshrined in article 12 of the Convention, claiming that the author had always had the opportunity to be heard and to make whatever claims he saw fit.

¹⁷ The prosecution service subsequently refused a second time to review the decree, even after the Administrative Court cancelled the expulsion order on the grounds that the author was a minor.

¹⁸ According to a subsequent submission, the court dismissed the appeal (see para. 11.2 below).

6.5 Lastly, the State party submits that there was 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 5 March 2018, the author submits that there is no obligation to exhaust *all* domestic remedies, only those that are accessible and effective.¹⁹ He also claims that the aforementioned shortcomings in terms of the accessibility and effectiveness of the domestic remedies are made increasingly clear when one considers that, while the judicial appeal of the expulsion order led to the adoption of a protective measure, i.e. non-expulsion, the author was not granted the protective measure consisting in admission to a centre for minors. Furthermore, the request for protective measures as part of the formal objection against the revocation of guardianship had to be repeated owing to the State’s inaction.²⁰ The author specifies that the State party has yet to comply with the Committee’s request for interim measures consisting in his transfer to a centre for minors and that he receives only sporadic assistance from individuals and organizations to avoid him having to live on the streets.

7.2 The author submits that various of the State party’s decisions constitute a violation of the best interests of the child, in particular: (a) considering him as undocumented even though he provided an identity document that fully corroborates his age; (b) wanting to subject him to age-determination tests even though he was documented; (c) considering him as an adult based merely on his refusal to undergo these tests; and (d) failing to review the age-determination decree once he had furnished his passport. The author recalls that the Committee has expressed its concern as to the widespread use of this type of test, even in cases where the identity documents appear to be authentic, despite several Supreme Court decisions on this practice.²¹

7.3 Lastly, the author submits that the role played by the Attorney General’s Office in the age-determination procedure cannot be said to have adequately compensated for the role that the lawyer he had designated would have played, thereby violating his right to have his best interests be the prime consideration in the authorities’ decisions.

Third-party submission²²

8.1 On 3 May 2018, the Office of the Ombudsman of France made a third-party submission on the protection of unaccompanied minors that also deals with the matter of age determination, a procedure that should include all necessary safeguards to protect the best interests of the child given that it is at this stage that access to the protection system for minors is determined.

8.2 The third-party submission asserts that the Greulich and Pyle method is inadequate and inapplicable to the migrant population, which is largely composed of teenagers from Sub-Saharan Africa, Asia and Eastern Europe who are often fleeing in precarious socioeconomic conditions. Several studies show that bone development differs depending on a person’s ethnicity and socioeconomic situation, thereby justifying the assertion that

¹⁹ The author refers to the jurisprudence of the treaty bodies (CAT/C/42/D/261/2005, para. 7.1) and the European Court of Human Rights (*Moreira Barbosa v. Portugal*; *Jeličić v. Bosnia and Herzegovina*; *Karakó v. Hungary*; *Aquilina v. Malta*; *Riad and Idiab v. Belgium*; *Kozacioğlu v. Turkey*; *Micallef v. Malta*).

²⁰ According to a subsequent submission, the court eventually dismissed the appeal (para. 11.2 below).

²¹ CRC/C/ESP/CO/5-6, para. 44. The author also recalls the Committee’s general comment No. 6, 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.

²² 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, registered with the Committee.

this method is ill-adapted to determining the age of non-Europeans.²³ This method has considerable margins of error, especially among 15- to 18-year-olds.²⁴ According to the Council of Europe Commissioner for Human Rights, European paediatric societies have stated unequivocally that tooth and bone maturity do not enable the exact determination of a child's age; rather, they provide mere estimates, with a significant margin of error of between two and three years. Moreover, the interpretation of the information can vary from one country to the next and from one expert to another.²⁵ The Committee has also called on States not to use bone age determination methods.²⁶

8.3 In addition, age-determination procedures should be undertaken only when there are reasonable doubts as to a person's age, and age should be verified using identity documents, which should be considered as being authentic unless proven otherwise.

8.4 The Ombudsman makes various recommendations, of which the following are relevant to the present case: (a) age determinations should be multidisciplinary and medical tests should be a last resort when there are reasonable doubts as to a person's age; (b) an application for protection should not be denied solely on the grounds that a person has refused to undergo medical tests.

Parties' comments on the third-party submission

9. In its observations of 6 August 2018, the State party notes that Greulich and Pyle is not the only test practised in Spain and that medical tests are conducted only when the person does not appear to be a child. It acknowledges that the Supreme Court has ruled that, when a person holds a passport or similar document, there is no need to subject him or her to age-determination tests, except when there are reasonable grounds for doubting the validity of these documents or when they have been invalidated by the competent authorities. Thus, the State party acknowledges that, if the person "provides an authentic official identity document (passport or similar identity document) that contains biometric data attesting to a person's age, it is not necessary to carry out tests as the person is considered to be a minor".

10. In his comments of 17 August 2018, the author concurs with the third-party submission and notes that the Ombudsman of Spain has also ruled along these same lines. He affirms that the age-determination procedure should be initiated only when there are serious doubts as to the age of an alleged minor, never routinely, and that the person's statements and supporting documents should be assumed to be authentic unless proven otherwise.

Additional information submitted by the author

11.1 On 26 October 2018, the author informed the Committee that, on 9 April 2018, Administrative Court No. 24 of Madrid revoked the expulsion order on the grounds that he was a minor, noting that the "passport corresponds to the underage claimant and the Administration has not adduced any evidence to discredit its veracity or authenticity". The decision was declared final by the Court on 28 May 2018. Nevertheless, not only did the

²³ Fiona M. Bright et al., *The applicability of Greulich and Pyle atlas to assess skeletal age for four ethnic groups*, *Journal of Forensic and Legal Medicine*, vol. 22 (2014), pp. 26–29.

²⁴ The Ombudsman cites, inter alia, Terry Smith and Laura Brownlees, *Age assessment practices: a literary review and annotated bibliography*, UNICEF, 2011; National Academy of Medicine of France, *Rapport sur la fiabilité des examens médicaux visant à déterminer l'âge à des fins judiciaires et la possibilité d'amélioration en la matière pour les mineurs étrangers isolés* (on the reliability of medical tests in determining age for legal purposes and on possible improvements in this domain with regard to unaccompanied minors), 2007; and S. Depallens et al., "Détermination de l'âge des jeunes migrants. Position de la Société Suisse de Pédiatrie" (Determining the age of young migrants – position of the Swiss Paediatric Society), *Paediatrica*, vol. 28, No. 2 (2017), p. 3.

²⁵ Council of Europe Commissioner for Human Rights, *Methods for assessing the age of migrant children must be improved*, 2011.

²⁶ General comment No. 6 and joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration.

State party insist on conducting age-determination tests (summoning the author to Gregorio Marañón hospital on 3 July 2018 to this end), but, on 23 July 2018, the Madrid provincial prosecution service decided not to review the age-determination decree.

11.2 On 25 March 2019, the author informed the Committee that, on 12 November 2018, the formal objection against the revocation of guardianship was rejected. The court noted that the author had said he was an adult when he entered Spain, that both his physical appearance and his refusal to undergo age-determination tests were “evidence of his being an adult” and that the passport was insufficient proof of his age.

11.3 The author notes that the interim measures requested by the Committee are not being complied with as he remains without a guardian and is surviving thanks to the sporadic support of individuals and organizations. Furthermore, he notes that he will not be able to obtain the official carpentry training certificate, despite having attended classes since December 2016, because he still does not have a residency permit, a right to which he would have been entitled had he had a guardian.

Issues and proceedings before the Committee

Consideration of admissibility

12.1 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.

12.2 The Committee notes the State party’s argument that the communication is inadmissible *ratione personae* because the author clearly appears to be an adult and that his refusal to undergo medical age-determination tests can only be interpreted as an attempt to prevent the truth from emerging. The Committee nonetheless considers that the file presents no evidence that the author, a young man who claims he was a minor at the time of the events, was in fact an adult. The Committee notes in particular that the author submitted his passport, issued by the Embassy of Cameroon in Madrid, to the prosecution service and requested a review of the age-determination decree. The prosecution service denied his request on 26 June 2017 on the grounds that the passport had been issued on the basis of a birth certificate, which lacked authenticity, but did not provide any further justification. The Committee notes that, in the absence of any other information or evidence in the case file that would call into question the validity of the official passport issued by the author’s country of origin, the latter document can be presumed to be valid.²⁷ Accordingly, the Committee considers that the communication is compatible *ratione personae* with the Convention and finds it admissible under article 7 (c) of the Optional Protocol.

12.3 The Committee acknowledges the State party’s argument that the author failed to exhaust domestic remedies because he did not: (a) apply to the prosecution service for additional medical tests; (b) appeal the decision denying him a guardian before the civil court in accordance with article 780 of the Civil Procedure Act; (c) challenge the deportation order before the Administrative Court; or (d) file an act of non-contentious jurisdiction with the civil court to have his age determined. However, the Committee notes that: (a) additional medical tests would not be an appropriate remedy for the author in the light of the decisions of the Supreme Court prohibiting medical tests for the purpose of determining the age of documented minors (see para. 2.5 above); (b) an appeal before the civil courts of the decision to deny guardianship did not constitute an effective remedy for the author, as an unaccompanied minor without a guardian or lawyer (see para. 5.5 above); (c) on 20 June 2017, the author lodged an appeal with the Administrative Court against the expulsion order, which the Court overturned on the grounds that the passport did belong to the author; however, this did not entail a review by the State party of the author’s age determination (see para. 11.1 above); and (d) Fundación Raíces has, on other occasions, initiated acts of non-contentious jurisdiction for age-determination purposes which have been rejected for not being the appropriate remedy (see para. 5.5 above). Accordingly, the

²⁷ *Y.M. v. Spain* (CRC/C/78/D/8/2016), para. 8.2.

Committee considers that article 7 (e) of the Optional Protocol does not constitute a barrier to the admissibility of the present communication.

12.4 The Committee considers that the author's claims under articles 6, 18 (2) and 27 of the Convention have not been sufficiently substantiated for the purposes of admissibility and finds them inadmissible under article 7 (f) of the Optional Protocol.

12.5 However, the Committee considers that the author has sufficiently substantiated his claims under articles 2, 3, 8, 12, 20 (1) and 24 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

13.1 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.

13.2 The issue before the Committee is whether, in the circumstances of this case, the age-determination procedure to which the author was subjected violated his rights under the Convention. Specifically, the author claims that: he was a victim of discrimination because the originals of the official documents issued by the authorities of his country of origin were not taken into account; the best interests of the child were not considered at any point of the age-determination procedure; his right to be heard was infringed; his right to an identity was violated; and the medical treatment he needs cannot be administered because he was excluded from the protection system and does not have a legal representative.

13.3 The Committee considers 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 in determining a person's age, as well as the opportunity to challenge the outcome through an appeals process. Accordingly, the Committee considers that the best interests of the child should be a primary consideration throughout the age-determination process.²⁸

13.4 The Committee recalls joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 (2017) of the Committee on the Rights of the Child, which states that identity documents should be considered genuine unless there is proof to the contrary.²⁹ Furthermore, a person should not be declared to be an adult exclusively on the basis of his or her refusal to undergo medical tests.

13.5 In the present case, the Committee notes that: (a) the originals of the official identity documents submitted by the author during the age-determination procedure, including his full birth certificate (the original of which was available at the Embassy of Cameroon in Madrid), consular identity card, consular registration certificate and passport application receipt, were at no point regarded as valid prior to the age-determination decree declaring him to be an adult and nor was his biometric passport, which was subsequently provided to the authorities in support of a request for review of the age-determination decree; (b) consequently, the State party considered the author as an undocumented immigrant and requested him to undergo medical tests; (c) based on the author's refusal to undergo the tests because he held originals of official identity documents, the Office of the Prosecutor for Minors issued a decree stating that the author was an adult; and (d) the author did not enjoy the assistance of a guardian or representative during the age-determination procedure to which he was subjected.

13.6 The Committee acknowledges the State party's conclusion that the author clearly looked like an adult and could, therefore, be considered as such without looking into the matter further. However, the Committee recalls its general comment No. 6, which states

²⁸ *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.3.

²⁹ Para. 4.

that age assessment must not take into account only the physical appearance of the individual, but also his or her psychological maturity, that the assessment must be conducted in a scientific, safe, fair and child and gender-sensitive 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.³⁰

13.7 The Committee also notes the author's allegations, unrefuted by the State party, that he did not receive the assistance of a guardian or representative of his choosing to defend his interests as an alleged minor during the age-determination procedure. The Committee considers that States parties should appoint a qualified legal representative, with the necessary linguistic skills, for all young persons claiming to be minors, or recognize the representatives they designate. The Committee is of the view that the provision of a representative to such persons during the age-determination process is essential to safeguarding their best interest and their right to be heard. Conversely, the absence of timely representation can result in a substantial injustice.³¹

13.8 The Committee also acknowledges the State party's assertion that an unaccompanied minor is considered documented if he or she holds a passport or other similar identity document with biometric data attesting to his or her age. Nevertheless, the Committee notes that in this case, the author provided his biometric passport, whose authenticity was rejected by the prosecution service without proof.

13.9 In the light of the foregoing, the Committee considers that the age-determination procedure undergone by the author, who claimed to be a child, was not accompanied by the safeguards needed to protect his rights under the Convention. In the circumstances of the present case, in particular the failure to consider the author's originals of official identity documents issued by a sovereign country, the declaration of adulthood in response to the author's refusal to undergo age-determination tests, and the State's refusal to allow his representative to assist him during this process, the Committee is of the view that the best interests of the child were not a prime consideration in the age-determination procedure to which the author was subjected, in breach of articles 3 and 12 of the Convention.

13.10 The Committee further notes the author's allegations 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 a date of birth that did not correspond to the information in the official documents issued by his country of origin, including his original passport. The Committee considers that a child's age and date of birth form 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 that identity. In the present case, the Committee notes that the State party failed to respect the author's identity by rejecting as evidence all the official documents attesting to his being a minor, without even as much as assessing their validity or verifying the information they contained with the authorities of his country of origin. Consequently, the Committee finds that the State party violated article 8 of the Convention.

13.11 The Committee further notes the author's claims, unrefuted by the State party, regarding the State's failure to provide protection in response to his situation as an unprotected, highly vulnerable unaccompanied child migrant who was ill, as well as 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 receive medical treatment and vaccinations. The Committee observes that this lack of protection occurred even after the author submitted identity documents to the Spanish authorities proving he was a child. It is of the view that the foregoing constitutes a violation of articles 20 (1) and 24 of the Convention.

13.12 Having found a violation of articles 3, 8, 12 and 20 (1) and 24 of the Convention, the Committee will not separately consider the author's claim that the same acts constituted a violation of article 2.

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

³¹ *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.8.

13.13 Lastly, the Committee notes the author's claims concerning the State party's failure to implement the interim measures of transferring him to a child protection centre while his case was pending consideration and providing him with the necessary medical treatment. The Committee is of the view that, by ratifying the Optional Protocol, States parties undertake 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. Consequently, the Committee considers that the failure to implement the requested interim measures in itself constitutes a violation of article 6 of the Optional Protocol.

13.14 The Committee, 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 reveal a violation of articles 3, 8, 12, 20 (1) and 24 of the Convention and article 6 of the Optional Protocol.

14. Consequently, the State party must provide the author with effective reparation for the violations, including by providing him with the opportunity to regularize his administrative status in the State party. In addition, the State party is under an obligation to prevent similar violations in the future, in particular by ensuring that all procedures for determining the age of possible unaccompanied children are carried out in a manner consistent with the Convention and that, in the course of such procedures, the documentation submitted by the persons subjected to them is taken into consideration and that these persons are promptly assigned a qualified legal representative free of charge or that their freely designated lawyers are recognized.

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

16. 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 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 disseminate them widely.
