



Convention on the Rights of the Child

Distr.: General
17 August 2021
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. 76/2019* **

<i>Communication submitted by:</i>	R.Y.S. (represented by Fundación Raíces)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	28 February 2019 (initial submission)
<i>Date of adoption of Views:</i>	4 February 2021
<i>Subject matter:</i>	Determination of the age of an unaccompanied migrant who may be a minor
<i>Procedural issues:</i>	Inadmissibility <i>ratione personae</i> ; non-exhaustion of domestic remedies
<i>Articles of the Convention:</i>	3, 8, 12, 16, 18 (2), 20, 22, 27, 29 and 39
<i>Articles of the Optional Protocol:</i>	7 (c), (e) and (f)

1.1 The author of the communication is R.Y.S., a national of Cameroon born on 10 May 2001. She claims that the State party has violated her rights under articles 3, 8, 12, 16, 18 (2), 20, 22, 27, 29 and 39 of the Convention. The author is represented by Fundación Raíces. 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 28 February 2019, the working group on communications, acting on behalf of the Committee, requested that the State party transfer the author to a child protection centre while the consideration of her case by the Committee was pending.

The facts as submitted by the author

2.1 On 31 August 2017, the author arrived in Madrid via Madrid-Barajas Airport. The Spanish National Police registered her as an asylum-seeking minor. She was not interviewed on her arrival at the airport because she was considered a minor.

2.2 The author was admitted to the centre for the initial reception of minors, in Hortaleza, where she remained for two months, under the protection of the Autonomous Community of Madrid. A medical report drawn up on her admission to the centre stated that she had the

* Adopted by the Committee at its eighty-sixth session (18 January–5 February 2021).

** The following members of the Committee participated in the consideration of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.



physical appearance of a 16-year-old, which was the age that she claimed to be. The medical report contains a record of the physical after-effects of the violent abuse she was subjected to by her father in Cameroon. At this point, the author was interviewed as part of an application for protection. During the interview, she gave an account of the persecution that she had experienced, stating that her father had abused her sexually on multiple occasions.

2.3 The author maintains that, despite her claims, the Directorate General for Family and Children's Affairs of the Community of Madrid, the body responsible for her guardianship and protection as a minor, did not take any of the steps it should have. It did not notify her of her rights as an asylum seeker, failed to comply with the obligation to provide her with written information on those rights and did not contact the Office for Asylum and Refuge. Moreover, it did not help her with the interview or her application for asylum. For example, she received no help with obtaining the documentation that she needed for her application.

2.4 The managers of the reception centre encouraged the author to contact her parents to obtain documentation proving that she was a minor, which she refused to do because she feared getting back in touch with them given the abuse that she had experienced in her family environment. Ignoring the significant reasons for her refusal, and despite the fact that she appeared to be a minor, a fact that no one had previously disputed, the reception centre for minors requested the Madrid Office of the Prosecutor for Minors to initiate the age determination procedure.

2.5 On 2 November 2019, the author was taken to the premises of the Madrid Office of the Prosecutor for Minors to begin the procedure. The Office of the Prosecutor also failed to take into consideration the author's need for international protection and did not take any action in that regard – it did not mention the persecution and abuse that she had described in the decree in which it declared that she was an adult or, subsequently, in the decree by which she was denied a review of the age finding. Moreover, the Office failed to provide the author with any information on her rights in connection with the process of applying for international protection.

2.6 The author notes that she was not represented by counsel during the age determination procedure and that she was examined by a forensic physician without the assistance of an interpreter. She was not provided with any information on the results of the medical age tests or given the opportunity to object to the tests. The author adds that she was not interviewed, that she was not asked to provide any medical information – meaning that her medical history, medical condition and personal and family background were not assessed – and that no attempt was made to assess her psychological maturity. She was merely put through a physical examination – including an examination of her genitalia – for which she was required to undress completely. The author was not informed of the reasons or need for this invasive examination or of its possible consequences.

2.7 The author claims that two bone age tests were performed: (a) a wrist X-ray, which determined the author's bone age to be 17 years, according to the Greulich and Pyle atlas; and (b) an X-ray of the jaw, which, according to the first forensic medical report, produced a "very poor quality image" that "cannot be assessed". Nonetheless, another forensic physician, who had not examined the author, wrote in his report of 8 November 2017 that an "overall assessment of the patient's radiological age, dentition and secondary sexual characteristics makes it possible to establish a bone maturation age of at least 18 years". In his report, this forensic physician, referring to the wrist X-ray, stated that "the X-ray performed on the wrist of the left hand shows that the patient's bone age is at least 18 years"; in court, it was found that such a statement could not be made with certainty. The forensic physician did not take into consideration that this type of test has a scientifically recognized margin of error of between 20 and 24 months.

2.8 On 8 November 2017, the Prosecution Service issued a decree finding the author to be an adult. The finding, according to text of the decree itself, is not subject to appeal. The author indicates that the Community of Madrid expelled her from the reception centre in Hortaleza and then, a few days later, adopted an administrative decision not to grant her protection. The author was not notified of this decision. In fact, no attempt was made to notify her personally, according to her administrative protection file, which is the complete report that the protection agency provided to the Administrative Litigation Court and contains a

record of all the proceedings. The author points out that this administrative decision was, according to the text of the decree finding her to be an adult, the only decision subject to appeal. The author was left completely defenceless.

2.9 On 24 November 2017, the author applied to the Administrative Litigation Court for revocation of the decree finding her to be an adult. The Court dismissed her application on the grounds that it lacked jurisdiction, since age determination decrees are not explicitly regulated as administrative acts that can be appealed. The author explains that the Court found her application inadmissible after having held a hearing and requesting the Prosecution Service to provide it with a file containing records of all the steps that had been taken to determine her age. It was only at this point that the author gained access to the results of the medical tests she had undergone and records of the proceedings conducted by the police at the airport.

2.10 On 15 January 2018, having reviewed the entire file, in particular the results of the medical tests, which had been incorrectly recorded – the forensic physician had indicated that the results of the wrist X-ray showed the author's bone age to be 18 years rather than 17 – the author petitioned the Office of the Prosecutor for Minors to have the error in the forensic report corrected. On 25 January 2018, her request was refused by way of a decree denying a review. When the Office of the Prosecutor requested a review by a forensic physician, the same forensic physician who had written the forensic age determination report of 8 November 2017 reconfirmed the findings of that report.

2.11 On 18 January 2018, the author filed a complaint with the Ombudsman, the consideration of which was subsequently suspended because court proceedings were initiated.

2.12 On 8 February 2018, the author filed a complaint with the regional Ministry of Justice, the Interior and Victims of the Community of Madrid concerning the Prosecution Service's refusal to review the age determination decree despite the error found in the forensic medical report. On 10 July 2018, the author's request for a correction was denied.

2.13 Also on 8 February 2018, the author, assisted by counsel, filed an application for asylum with the Office for Asylum and Refuge. She noted that she intended to contest the decree declaring her an adult. However, the Office registered the author as an adult asylum seeker, in accordance with the decree issued by the Office of the Prosecutor. She was given accommodation in a facility that was part of the reception system for adult asylum seekers, which was not appropriate for her, as demonstrated in the reports of the non-governmental organization (NGO) Rescate, which manages the facility.¹ In June 2018, the author again requested the Office for Asylum and Refuge to consider her a minor for the purposes of her asylum application, but her request went unanswered.

2.14 On 12 February 2018, the author filed a petition with Madrid Court of First Instance No. 75 to contest the termination of the protection that she had been receiving as a minor and to request urgent interim measures. The Court denied her request for interim measures in an order of 21 June 2018. The author filed an appeal with the Provincial High Court of Madrid; the appeal was dismissed in November 2018. In December 2018, she filed an application for *amparo* with the Constitutional Court and requested that the Court adopt interim measures. She notes that, at the time of submission of the present communication, she had not received a reply regarding the admissibility of her application or been informed of the decision on the interim measures that she had requested.

2.15 On 3 December 2018, Court of First Instance No. 75 dismissed the author's petition contesting the termination of her protection. In its decision, the Court did not take into consideration or respond to the author's claims that her rights had been violated during the tests she had been given.

¹ In a report of 15 February 2019, Rescate stated that the author needed a protected, safe space of her own that was appropriate for someone of her age, a space with access to experts who could assist her in her personal development and psychological recovery.

2.16 On 3 January 2019, the author filed an appeal with the Provincial High Court of Madrid, which was still pending at the time of submission of the present communication.² The author points out, however, that by the time this appeal is resolved she will have reached the age of 18 and the outcome will therefore have no practical effect.

The complaint

3.1 The author claims that, during the age determination process, the State party, in breach of article 3 of the Convention, failed to make the best interests of the child a primary consideration, as it did not presume that she was a minor or give her the benefit of the doubt. The author submits that there was objective evidence that supported the presumption that she was a minor – namely: (a) documentation provided by the author showing her date of birth to be 10 May 2001 (vaccination records, a school card and other school documents); (b) the medical report issued by the initial reception centre for minors; (c) the fact that she appeared to be a minor; (d) psychosocial reports provided to the courts and written by specialists, who found the author's behaviour and degree of maturity to be compatible with the age that she claimed to be; (e) the wrist X-ray showing that the author's bone age was 17 years, according to the Greulich and Pyle atlas, as assessed by a specialist; during the court proceedings, the results of the X-ray were confirmed by this specialist, who was of the view that, allowing for the applicable margin of error, the results were compatible with the author's claim that she was 16 and a half at the time; and (f) the initial error in the forensic physician's report, which recorded the results of the wrist X-ray as showing her to be aged 18 years rather than 17, and the application of a mistaken margin of error for bone age tests, which was contrary to the scientific criteria set out in the guidance on best practices for Institutes of Forensic Medicine in the performance of age determination procedures in Spain. The author adds that neither the decrees issued by the Prosecution Service nor the decision of the Court of First Instance makes any reference to steps taken specifically to assess her best interests, her personal, social and psychological situation or her protection and assistance needs in view of her situation as a possible asylum-seeking minor.

3.2 The author claims that the State party also violated article 3 of the Convention, read in conjunction with articles 18 (2) and 20 (1), by failing to assign her a guardian or legal representative to ensure that she was properly represented and protected during the age determination procedure and the asylum application process.³

3.3 The author maintains that the State party violated her right to preserve her identity, which is enshrined in article 8 of the Convention. She notes that age is a fundamental aspect of identity and that the State party has an obligation not to interfere with her identity, as well as to preserve and re-establish the elements thereof.

3.4 The author alleges a violation of article 12 of the Convention, as she was not heard by any of the State party's authorities. She repeatedly expressed a need to avoid any contact with her family members because of the harm that they, especially her father, had inflicted on her, although she also indicated that she could not contact her mother, because instead of supporting her she had sided with her father. She has no family members or other persons to whom she can turn for support. She no longer has any ties to her country, placing her in a serious situation of vulnerability and dependence on the Spanish protection services. The author claims that, since her arrival in Spain, she has never changed her story, as reflected in the psychosocial reports, in which it was noted that she showed external and behavioural signs of what she had experienced. These reports were not even mentioned in the decision of the Court of First Instance despite having been admitted as evidence. The author adds that the failure to appoint a legal representative and an interpreter for her from the outset of the age determination procedure fundamentally undermined her ability to exercise her right to be heard.

3.5 The author alleges that the State party violated her right, under article 16 of the Convention, not to be subjected to arbitrary or unlawful interference with her privacy, as the

² The appeal was admitted for processing by the Provincial High Court of Madrid on 14 March 2019, and a decision was handed down in September 2019 (para. 4.1).

³ Committee on the Rights of the Child, general comment No. 6 (2005), para. 33.

age determination tests were conducted without her informed consent. The author claims that although there is no record of her having given her informed consent to these tests, the prosecutor accepted the test results.

3.6 The author believes that the invasiveness of the examination of her naked body, including of her genitalia and her sexual maturity, was particularly egregious. As she had claimed to have been subjected to sexual abuse in her family environment, there should have been a particularly careful assessment of the need for such an examination. Moreover, a general medical report had already been issued following her arrival at the reception centre; that report contains information on the physical examination performed on her at the time, which included an examination of her genitalia, making it unnecessary for her to have to undress again. In the author's view, being required to undress outside of a health-care context, for no reason other than to determine her age and without an explanation, in a language that she could understand, of why she had to undress, was a violation of her dignity. She argues that the test was unnecessary since, on average, according to the Practical Guide on age assessment produced by the European Asylum Support Office, girls have already reached full sexual maturity by the age of 16 and a half – the age that she claimed to be at the time of the examination – making the results of the test irrelevant for age determination purposes.

3.7 She also maintains that the State party, by failing to provide her with the protection that she was entitled to as a child deprived of her family environment, violated article 20 of the Convention.

3.8 In addition, the author claims to be the victim of a violation of article 22 of the Convention, as she was forced to apply for asylum as an adult. The fact that she was considered an adult at the time of both her flight from her country of origin and her application for protection could have an impact on the processing and outcome of the application. As she was considered an adult, she did not enjoy the special protection provided under the Spanish Asylum Act for particularly vulnerable asylum seekers, such as unaccompanied foreign girls, of whom she was one. In addition, according to the framework protocol on specific measures in relation to unaccompanied foreign minors, the Spanish protection authorities should have provided the author with information on her rights as an asylum seeker and on the asylum procedure. The author was also denied the safeguard of having a legal representative to protect her rights as an unaccompanied girl during the asylum process.

3.9 The author submits that, by failing to take her best interests into account and thus impeding her full development, the State party violated her rights under articles 27 and 29 of the Convention. In addition to the absence of a guardian to assist her, the failure to provide her with specialized social and psychological assistance for victims of the type of abuse that she suffered is particularly serious. The author should have been allowed to remain in a centre for minors where she could have received special psychological and social assistance for victims of child abuse. Moreover, she has not been able to pursue studies in preparation for a university education, something she has always wanted. She explains that because she does not have the status of a protected minor, it will be impossible for her to obtain a legal residence permit allowing her to live with full rights in Spain if her application for asylum is rejected.

3.10 In addition, the author alleges that her rights under article 39 of the Convention have been violated as a result of the inadequate psychological support she received, which was not provided by professionals specializing in the care of minors and of victims of child sexual abuse in particular.

3.11 The author proposes the following possible solutions: (a) that the State party recognize that she is a minor; (b) that she receive treatment appropriate to her status as a minor and accommodation appropriate to her age and circumstances; (c) that her age, as indicated in all documentation relating to her application for asylum, be amended and that she be considered a minor for the purpose of the assessment of her application; (d) that she be allowed to transition to adulthood, being provided in the meantime with appropriate accommodation to allow for continuity of treatment, in particular specialized psychological care; (e) that all her rights as a minor be recognized, including her right to be afforded the protection of the competent public authorities, to be assigned a legal representative and to receive an education;

(f) that she be granted a residence permit for protected minors that allows her to apply for international protection; and (g) that the State remedy the damage that she has suffered throughout the period during which her rights have been violated.

Additional information from the author

4.1 In her observations of 3 April 2019, the author indicates that on 14 March 2019 the Provincial High Court of Madrid decided to admit her appeal and stated that it would be considered in September 2019; however, it dismissed the request that she had made, in view of her impending adulthood, for priority consideration.⁴ The author has appealed this decision before the Provincial High Court; at the time of submission of the additional information, the appeal was still pending.

4.2 The author states that, following the Committee's request for interim measures, she was invited to a meeting with the Community of Madrid and Rescate at which she was offered accommodation that she would be allowed to use only until 10 May 2019, the date on which she would turn 18. She was also offered the option of extending her stay in the accommodation provided by Rescate, an offer she accepted. Although she had informed the Community of Madrid that she had appointed lawyers from Fundación Raíces as her legal representatives, the Community failed to inform those representatives of the meeting.

State party's observations on admissibility and the merits

5.1 In its observations of 7 August 2019, the State party notes that on 29 August 2017, the author arrived at Madrid-Barajas Airport from Malabo using a Cameroonian passport showing her date of birth as 10 May 1991, according to her own statement and the information on file with the airline. The passport was destroyed during the trip. On arrival, the author told the police that she was a minor and that her date of birth was 10 May 2001. She told them that she intended to apply for asylum but refused to sign an application form. The State party claims that the author was provided with the assistance of a lawyer and an interpreter free of charge from the moment of her illegal entry into Spain.

5.2 On 30 August 2017, she was admitted to the initial reception centre for minors in Hortaleza, managed by the Community of Madrid, where she received comprehensive assistance as a minor. The Community of Madrid asked the author to provide an official document proving her identity and date of birth. Because the author refused to take steps to obtain such a document, she was referred to the Public Prosecution Service in order to determine her age.

5.3 On 2 November 2017, in the presence of the public prosecutor, the author was informed of the specific medical and radiological tests that she would be given to determine her age, to which she agreed. A physical examination, a wrist X-ray and a panoramic dental X-ray were performed. The results of two of the three tests – the physical examination and the panoramic dental X-ray – were consistent with a person of adult age, while the results of the third – the wrist X-ray – were consistent with a person of 17 years of age. In a combined assessment of the results, the forensic physician concluded that the author was over 18 years of age.

5.4 On 8 November 2017, the public prosecutor issued a decree finding that, in view of the fact that the official passport that the author claimed to have carried and which she had subsequently destroyed indicated that the year of her birth was 1991, and taking into account the forensic medical evaluation, the author should provisionally be considered an adult, unless more reliable evidence to the contrary was produced. In the absence of any new evidence, and in the light of confirmation by another forensic physician, a request for a review of the author's provisionally determined age was denied.

5.5 On 15 November 2017, the Autonomous Community of Madrid decided not to grant the author administrative protection. The author's appeal against this decision was dismissed by the courts because she did not provide any new evidence or request any further tests. The

⁴ On 16 July 2019, the Provincial High Court of Madrid issued notice of its decision to deny the author's appeal against the decision of the Court of First Instance. See para. 6.1.

author left the Hortaleza reception centre for a care centre for adults run by Save a Girl, Save a Generation, an NGO.

5.6 On 8 February 2018, for the first time, the author, with the assistance of a lawyer and an interpreter, submitted an application for asylum in writing. Since then, she has been receiving assistance from Rescate, which works in cooperation with the Ministry of Labour, Immigration and Social Security, and has received the following services, with due consideration for the fact that although she is provisionally considered an adult for legal purposes, she may have specific needs: (a) detailed psychological assessment and care, with a possible future referral to the child psychiatric unit; (b) accommodation in an apartment shared with five women in which she has her own room; (c) medical and social care; and (d) access to basic vocational training in information technology.

5.7 The State party notes that, upon receipt of the Committee's request for interim measures, it immediately transmitted the request to the Autonomous Community of Madrid. A meeting was held in relation to the request with the author's legal representatives, the author herself and Rescate, which is providing assistance to the author as an adult asylum seeker but taking into account the needs that she might have if she were a minor. The author stated that she did not wish to be transferred to a child protection centre because she was happy with the assistance that she was receiving at that time.

5.8 On 6 August 2019, the author was granted asylum and, consequently, a residence and work permit.

5.9 The State party submits that because the communication constitutes an abuse of the right of submission and is manifestly ill-founded, it is, in accordance with article 7 (c) and (f) of the Optional Protocol, inadmissible.

5.10 The State party argues that at no point has the author been neglected by the national authorities. As soon as she set foot on Spanish soil, her application for asylum was processed and her claim that she was a minor was taken into account, and she was referred to the public authorities responsible for the care of unaccompanied minors for all appropriate checks. The Autonomous Community of Madrid welcomed her immediately and, faced with her lack of cooperation, referred her case to the Prosecution Service. Once the appropriate medical tests had been carried out, it was provisionally determined that she should be considered an adult for legal purposes. The author then benefited from another free public service designed to facilitate her social integration as an asylum seeker. The State party argues that the possible solutions suggested by the author at the end of her submission are in no way relevant to her interests.

5.11 The State party also indicates that the decision on the author's right of asylum expressly states that the date of birth that she has currently been assigned for legal purposes – 10 May 1991 – is presumed, so that if she were to provide a Cameroonian passport, for which she can apply without the help of her family, since she is already of age, her real, official date of birth would be registered in its place.

5.12 In addition, the State party argues that the communication is inadmissible under article 7 (e) of the Optional Protocol on the grounds of failure to exhaust domestic remedies, since the author did not wait for the outcome of her asylum application, which was an effective domestic remedy, as demonstrated by the fact that on 6 August 2019 she was granted asylum and the right to live and work in Spain.

5.13 With regard to the other remedies sought by the author – namely, her request to the Prosecution Service to review the provisional declaration finding her to be an adult and her appeal to the civil courts against the decision of the public authorities not to grant her protection – the State party is of the view that she “has exhausted these remedies only superficially, and in a negligent manner that has undermined their effectiveness”. The author did not provide any reliable proof of her age, any documentary evidence, such as an official passport or a document containing biometric data, or any expert evidence, such as a medical or psychological report. She did not ask the courts to order any medical tests or undergo any such tests on her own initiative with a view to submitting the results to the prosecutor or the courts.

5.14 The State party is also of the view that the reason for the submission of the communication has become moot and that, in accordance with rule 26 of the rules of procedure under the Optional Protocol, the Committee should discontinue its consideration of the communication, as the author has reached the age of majority. She has also been granted asylum and has the right to live and work in Spain.

5.15 With regard to the merits of the communication, the State party notes that its submissions show that, notwithstanding her assertions to the contrary, the author received assistance from specialized interpreters and lawyers free of charge. She also gave her informed consent to the prosecutor before the medical tests she underwent, with the assistance of an interpreter.

5.16 The State party argues that the best interests of the author as an asylum seeker were always taken into account, in particular her psychological and developmental needs, regardless of whether she was considered a minor or an adult. It stresses that the author stated that she was travelling on an official passport that proved she was an adult and that her account of who provided her with her documents and paid for her journey is very unclear. The State party considers it unusual for a minor to have the wherewithal to emigrate by air from Cameroon to Peru (the final destination shown on her ticket).

5.17 The State party also argues that no one has denied the author's identity – that is, her name and nationality – and that “it has simply proved difficult to establish her real date of birth”.

5.18 In addition, the State party argues that the author, as can be seen, has been heard by all the authorities involved in her case. She has received very close and frequent personalized psychological assistance, and the competent authorities have at all times given priority to her physical, psychological and social recovery. Moreover, the actions of the public authorities have always been governed by the author's needs for housing, food, clothing, hygiene, health, education and social integration.

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

6.1 In her observations of 16 December 2019, the author states that on 16 July 2019 the Provincial High Court of Madrid issued notice of its decision to dismiss her appeal against the decision of the Court of First Instance. In its decision, the Provincial High Court did not rule on the violation of her rights and guarantees during the age determination procedure, which she had invoked in her appeal. In addition, the Court argued that the proceedings had become moot and even stated that what the author wanted with her appeal was unclear.

6.2 On 10 September 2019, the author, claiming that she had been a victim of a procedural violation, lodged an appeal with the Supreme Court. The Supreme Court had not ruled on the admissibility of this appeal at the time of submission of the author's comments. The author also points out that a decision on the admissibility of her application for *amparo*, filed with the Constitutional Court on 3 December 2018 for violation of the fundamental right to effective judicial protection in respect of interim measures, is still pending.

6.3 The author indicates that when she turned 18 and the decree declaring her an adult became moot, she again requested the Office for Asylum and Refuge to amend the date of birth in her asylum application. On 20 June 2019, the Office refused the author's request, noting that such an amendment could be made only if a passport or an official birth certificate were provided. The author continues to express an insurmountable fear of any contact with her family and of approaching the Cameroonian Consulate in Madrid, since she is still a minor under Cameroonian law.⁵

6.4 The author claims that, despite the State party's assertion to the contrary, consideration of an application for international protection did not begin as soon as she arrived in Spain, since she did not formally submit any such application until February 2018. She reiterates that the authorities did not take any steps to provide her with information about the asylum process or put her in contact with a specialized lawyer.

⁵ The legal age of majority in Cameroon is 21 years.

6.5 The author notes that, in the documents provided by the State party, there is no record of her having been provided with the assistance of a lawyer or interpreter at the airport; for example, there are no signatures or references to the presence of or any other information about such persons. There is a record, however, of the author's having requested such assistance. There is no record of any statements or notes written by a police officer to the effect that the author refused to sign an asylum application. The author also indicates that, contrary to the State party's claims, she was not appointed legal counsel or a representative to inform her of her rights as an asylum seeker in the months following her entry into Spain. Moreover, the records of the proceedings show that she was not assisted by a legal representative at any time during the age determination process. She was also not provided with legal assistance by the State party during the initial interview for her asylum application in February 2018.

6.6 The author states that although the public child protection agency was made aware in August 2017 that she had been subjected to sexual abuse in her family environment, she did not receive psychological assistance until eight months after her arrival in Spain. Such assistance was provided by Rescate until November 2018. That assistance was not equivalent to the assistance that could be provided by a professional specializing in helping victims of child abuse.

6.7 The author considers it important to stress that, as shown in her file, the police, the centre for minors and the Prosecution Service have at no time expressed doubt that she appears to be a minor. Under the Spanish framework protocol on specific measures in relation to unaccompanied foreign minors, it is not necessary to undertake age determination procedures when a child's appearance makes it unquestionably clear that he or she is a child. The author also notes that she was not heard during the consideration of the only documentation that she was able to show upon her arrival – namely, her vaccination records, a school card and other school documents – which showed her date of birth. The State party, in the author's view, appears to be unaware that in Cameroon the legal age of majority is 21, not 18. She therefore continues to believe that her stated reason for not taking steps to obtain official documentation – namely, her fear that her family members will find her and continue somehow to subject her to abuse, given the authority granted to them over her by the law of Cameroon – is sound.

6.8 Moreover, the State party did not respect the principle of presumption of minority or the guidance on best practices for forensic physicians, which provides that if various tests produce different results, the test whose results determine the youngest age must take precedence, in keeping with the aforementioned principle.

6.9 With regard to the State party's claim that the author did not provide any new evidence when she applied for a review of the decree finding her to be an adult, the author states that she did not have access to the results of the bone age tests until she initiated judicial proceedings with legal assistance from Fundación Raíces. Since obvious mistakes had been made – specifically, the mistake the forensic physician had made in copying out the results of the wrist X-ray – the author requested a review of the decree. The Prosecution Service, however, simply requested a new forensic report, in which the same forensic physician reconfirmed the conclusion of his previous report. The Prosecution Service accepted this report unreservedly, without any attempt to reinterpret the results or give the author the benefit of the doubt.

6.10 In connection with access to education, the author notes that she applied to continue her schooling in order to work towards university studies. However, she was unable to gain access to the public education system at a level appropriate to her age because she did not have a legal guardian and because she had been declared an adult by the Prosecution Service. She was given access only to the education system for adults, which did not suit her needs. As a minor, the author has been seriously affected by this lack of education, which has contributed to her loss of motivation and feelings of resignation.

6.11 The author also notes that, notwithstanding the State party's claim that she opted to leave the Hortaleza reception centre for minors for a care centre for women run by Save a Girl, Save a Generation, she did not leave the centre voluntarily but was in fact expelled, which caused her to break down in tears and left her in a state of total confusion. After being

expelled from the centre, she spent three days in the lodgings offered by Save a Girl and was then transferred to a shelter run by Karibu, an association for adult African women, many of whom had children.

6.12 With regard to the State party's compliance with the request for interim measures, the author explains that the Committee's request that she be transferred to a centre for the protection of minors prompted the public authorities to extend her stay in the apartment provided by Rescate. The author explains that her accommodation situation therefore changed and that she was no longer required to leave immediately.

6.13 With regard to the State party's arguments concerning the non-exhaustion of domestic remedies, the author reiterates that in her communication she alleges that her rights as a minor have been violated and that having been granted asylum is not a remedy for that violation. The author stresses that her appeal against the administrative decision not to grant her protection is not an appropriate vehicle with which to contest the finding that she was an adult, not least because the Prosecution Service has consistently defended its own findings rather than her interests as a possible minor.

6.14 In response to the accusation of negligence in respect of the procedural action brought by her lawyers, the author states that: (a) she provided psychosocial reports issued by a psychologist and a social worker commissioned by Rescate, which were admitted as evidence but were not taken into account or assessed when the decision was handed down. These reports confirmed that the author's psychological traits, behaviour and level of maturity were all consistent with the age that she claimed to be; (b) the rights violations committed during the age determination procedure in the present case have been described and substantiated in exactly the same way as violations already found by the Committee in other decisions concerning the Spanish age determination procedure; (c) she submitted a request for the presentation of expert evidence and the testimony of a radiology specialist, who confirmed at a hearing held before Madrid Court of First Instance No. 75 that the comparison of the wrist X-ray and the Greulich and Pyle atlas indicated a bone age of 17 years. The radiologist confirmed that the results of the X-ray were compatible with the age of 16 and a half years, the age that the author claimed to be at the time of the test; (d) the forensic physician, at the request of the author's representatives, also gave testimony, in which he stated (without explaining his reasons for his choice either in his reports or at the hearing) that he had chosen a margin of error of 12 months rather than the margin of between 20 and 24 months recognized by the Prosecution Service and the scientific community – he also acknowledged that he had made a clerical error in his forensic report of 8 November 2018; and (e) the Court of First Instance, and subsequently the Provincial High Court, refused to summon the forensic physician who had assessed the author's sexual maturity to court to testify.

6.15 The author asserts that, as she has consistently acknowledged in all her statements to the national authorities, she had to travel with a false passport. She explains that it is very common for asylum seekers to have to travel with false passports. She needed support for her trip, which was the only way for her to escape the situation she was in.

6.16 Although the author has been granted refugee status and is currently over 18 years of age, the State party continues to refuse to rectify the date of birth that appears in her documentation and to request that she provide identity documents that she cannot obtain on account of the persecution that she has described and the other circumstances that have already been satisfactorily explained. In cases where other asylum seekers have reached the age of majority and have been unable to provide documents issued by their countries of origin, the usual procedure has been to register their stated dates of birth. For these reasons, the author reiterates that the State party's actions have violated article 8 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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, whether the communication is admissible under the Optional Protocol.

7.2 The Committee takes note of the State party's argument that the author failed to exhaust domestic remedies because: (a) she did not wait for the outcome of her asylum application, which was an effective domestic remedy, as demonstrated by the fact that on 6 August 2019 she was granted asylum; and (b) she exhausted domestic remedies only superficially and not effectively, insofar as she failed to provide reliable proof of her age. In this regard, the Committee notes the author's argument that the violation of her rights has not been remedied by the positive outcome of her asylum application, which she was forced to submit as an adult rather than as a minor. The Committee also notes that the author made effective use of the remedies available before the Office of the Prosecutor for Minors and the administrative and civil courts, providing documentation and requesting the presentation of expert evidence in an attempt to prove her age. Accordingly, the Committee finds that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

7.3 In addition, the Committee notes the State party's argument that the communication is inadmissible as it constitutes an abuse of the right of submission and is manifestly ill-founded, in accordance with article 7 (c) and (f) of the Optional Protocol, because the State party did in fact take into account the author's claim that she was a minor and because, after it was provisionally determined that the author was an adult, she did not provide any documentary or medical evidence to the contrary. However, the Committee notes the author's argument that the positive outcome of her asylum application, which she was forced to submit as an adult, does not constitute a remedy for the violations of her rights as a minor that she endured from the moment of her arrival in Spain. According to the author, those violations include the State party's failure to presume that she was a minor, its failure to provide her with information and enable her to be heard with the assistance of a legal representative and an interpreter during the age determination procedure, its failure to ensure that she was given the protection and care that she required as a child victim of sexual abuse, its violation of her privacy through the genital examination to which she was subjected and its failure to provide her with access to education and ensure her proper development.

7.4 The Committee considers that the author has not sufficiently substantiated her claims under articles 18 (2) and 29 of the Convention and therefore finds them inadmissible under article 7 (f) of the Optional Protocol.

7.5 The Committee is of the view that the author has, however, sufficiently substantiated her claims under articles 3, 8, 12, 16, 20, 22, 27 and 39 of the Convention and that article 7 (c) and (f) of the Optional Protocol therefore does not constitute an obstacle to the admissibility of the communication. The Committee therefore finds the above claims admissible and proceeds to consider them on the merits.

Consideration of the merits

8.1 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.

8.2 One of the issues before the Committee is whether, in the circumstances of the case, the process of determining the age of the author, who repeatedly and firmly stated that she was a minor, had documentation attesting to her status as a minor and looked like a minor, violated her rights under the Convention. In particular, the author has claimed that, because of the failure to respect the principle of presumption of minority, the medical tests used to determine her age and the failure to appoint a guardian or representative for her, the best interests of the child were not a primary consideration during the process.

8.3 The Committee notes 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 – that is, presumed to be and treated as a minor. The Committee emphasizes, in

that respect, that the best interests of the child should be a primary consideration throughout the age determination process.⁶

8.4 The Committee also notes that any available documents should be considered genuine unless there is evidence to the contrary. Only in the absence of identity documents or other appropriate evidence should States, to make an informed estimate of age, undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children, in a language the child understands.⁷ The benefit of the doubt should be given to the individual being assessed.⁸ In that connection, the Committee notes the State party's argument that the prosecutor issued a decree in which the author, in view of the forensic medical examination and her travel on a passport indicating the year of her birth as 1991, was declared of age. The Committee also notes the author's explanation that, as she had consistently explained to the national authorities, she had had to travel with a false passport to extricate herself from the abusive situation in which she found herself, as asylum seekers are often forced to do. The Committee observes that, as the passport was destroyed during the author's journey, its authenticity could never be directly assessed by the State party's authorities.

8.5 In this case, the Committee also notes that, since her arrival in Spain, the author has consistently and repeatedly claimed to the authorities that she is a minor and that she was born on 10 May 2001 (as confirmed by the vaccination booklet and school documents she was carrying) and that she appeared to be a minor, as noted by the police authorities on her arrival and in the medical report drawn up on her admission to the centre for minors. In addition, the Committee notes that the author communicated her intention to apply for asylum as a child subjected to sexual abuse by her father and expressed well-founded fears rooted in the abuse that she had suffered, which discouraged her from contacting her family in Cameroon in order to apply for a passport and prove her age. The Committee further notes that: (a) to determine her age, the author was subjected to medical tests consisting of a physical examination for which she was required to undress completely and have her genitalia examined, an X-ray of her wrist and a panoramic dental X-ray, and that no further tests, such as psychological tests, were performed; (b) the result of the wrist X-ray indicated a bone age of 17 years when compared against the Greulich and Pyle atlas but that, owing to a clerical error, this result was recorded as 18 years in the relevant medical report; (c) the medical report concludes that, following an evaluation of the results of all the tests that the author was given, her bone age was determined to be at least 18 years, with no margin of error; (c) the author was not assisted by a representative during the age determination procedure; (d) on the basis of the medical findings, the State party's authorities issued a decree finding the author to be an adult, which was not reviewed when the author complained that the results of the wrist X-ray had been incorrectly recorded; and (e) once it was decided that the author was an adult, she was expelled from the reception centre for minors where she was staying.

8.6 The Committee also takes note of the ample available information suggesting that X-ray evidence lacks precision, has a wide margin of error and is therefore unsuitable for use as the sole method of assessing the chronological age of a young person who claims to be a minor. The Committee notes the author's argument that the forensic physician did not apply the margin of error recognized by the scientific community as appropriate for X-ray evidence.

8.7 In its general comment No. 6 (2005), the Committee states that an age assessment should take into account not only the physical appearance of the individual but also his or her psychological maturity, that the assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner and that, in the event of remaining uncertainty, the

⁶ *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.3.

⁷ Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 4.

⁸ *N.B.F. v. Spain*, para. 12.4.

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 (para. 31 (i)).

8.8 The Committee also notes the author's allegations regarding the invasiveness of the physical examination she was given. Her genitalia were examined and her sexual maturity was assessed simply to determine her age, not for any health-related reason. The examination was all the more invasive in view of the author's consistent claims that she had suffered sexual abuse in her family environment and had already undergone a general medical examination, including an examination of her genitalia, on arrival at the reception centre. Furthermore, the Committee notes the author's claim that the examination was unnecessary, since she claimed that she was 16 and a half years old at the time and, on average, girls have already reached full sexual maturity by that age, making the results of the test irrelevant for age determination purposes. The Committee notes that, since the State party has not provided any justification for the examination, and since the author did not receive information on the reason for the examination in a language that she could understand and was not represented by counsel, she cannot be said to have given informed consent to the examination. The Committee is of the view that tests that are conducted to determine the age of a child and that involve nudity or an examination of genitalia or other intimate parts of the body violate a child's dignity, privacy and bodily integrity and should be prohibited. In the light of the circumstances surrounding the examination the author underwent, the Committee finds that it constituted unlawful interference in her private life and violated her rights to privacy and dignity, as protected under article 16 of the Convention.

8.9 In addition, the Committee notes the author's allegations that she was not assigned a guardian or representative to defend her interests as a possible unaccompanied child migrant upon her arrival in the State party or during the process that led to the issuance of a decree indicating that she was an adult. As the Committee has often stated, States parties should appoint a qualified legal representative and, where necessary, an interpreter, for all young persons claiming to be minors, as soon after their arrival as possible and at no charge. The Committee is of the view that the appointment of a representative for such persons during the age determination process is an essential guarantee of respect for their best interests and their right to be heard.⁹ Failure to take such a step constitutes a violation of articles 3 and 12 of the Convention, as the age determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

8.10 The Committee is therefore of the opinion that the age determination procedure undergone by the author, who claimed and appeared to be a child, was not accompanied by the safeguards needed to protect her rights under the Convention. In this case – in particular in view of the examination used to determine the author's age and the absence of a representative to assist her during this process – the Committee finds that the best interests of the child were not a primary consideration in the age determination procedure and that, as she was a victim of sexual abuse, the procedure was also an act of unlawful interference with her privacy, in breach of articles 3, 12 and 16 of the Convention.

8.11 The Committee notes the author's allegations that the State party violated her rights insofar as it altered elements of her identity by attributing to her an age and a date of birth that did not match her real date of birth of 10 May 2001, as shown in the documents that she was carrying (a vaccination booklet and school documents). The Committee believes that a child's date of birth forms part of his or her identity and that States parties have an obligation to respect the right of the child to preserve his or her identity without depriving him or her of any elements thereof. In the present case, the Committee notes that the State party failed to respect the author's identity by denying that the documentation that she submitted had any evidentiary value, especially in view of the fact that her well-founded fear of contacting her family in Cameroon, caused by the abuse she had suffered at her father's hands, made it impossible for her to obtain a passport. The Committee also notes that, although the author requested on several occasions that her real date of birth be used in her asylum application, the State party failed to respect the author's identity by denying her the possibility of

⁹ *A.L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8, and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 13.7.

submitting her application using her real date of birth. Consequently, the Committee finds that the State party violated article 8 of the Convention.

8.12 The Committee must also determine whether the author's inability to apply for asylum as a minor was a violation of her rights under the Convention. The Committee notes the author's claims that: (a) she tried to lodge an asylum application with the Office for Asylum and Refuge as a minor but was not allowed to; (b) she was considered an adult at the time of both her flight from her country of origin and her application for protection, which could have had an impact on the processing and outcome of the application; and (c) she was deprived of the safeguard of having a legal representative to protect her rights as an unaccompanied minor during the asylum process.

8.13 In this regard, the Committee highlights its general comment No. 6 (2005), in which it notes that States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations. Where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation (paras. 34 and 36).

8.14 The Committee notes that considering the author to have been an adult at the time of her flight from her country of origin could have had very serious consequences for the accurate assessment of the allegations of persecution made in her asylum application and put her at risk of irreparable harm in the event of her being returned to her country of origin. Furthermore, the failure to appoint a guardian for the author or to allow her to apply for asylum as a minor had the effect of depriving her of the special protection that should be afforded to unaccompanied minor asylum seekers, in violation of articles 20 (1) and 22 of the Convention. The Committee notes the particularly serious consequences of this lack of protection for the author, who, as a child who had been subjected to sexual abuse by her father, clearly needed to be given special protection by the competent national authorities.

8.15 Lastly, the Committee notes the author's allegations that the State party, by failing to provide her with psychological support as an asylum-seeking child victim of abuse in the family environment, violated her rights under articles 27 and 39. The Committee notes the State party's claim that the author was provided with access to vocational training and psychological assistance. However, according to the information available, the author was unable to continue her studies in the regular education system – the option that best met her educational needs – since she was considered an adult. The Committee further notes that the author did not receive psychological assistance until eight months after her arrival in Spain, and that this assistance was not provided by a professional whose expertise involved working with victims of child abuse. In this regard, the Committee, in paragraph 48 of its general comment No. 6 (2005), has stated that the obligation under article 39 of the Convention sets out the duty of States to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflicts. In order to facilitate such recovery and reintegration, culturally appropriate and gender-sensitive mental health care should be developed and qualified psychosocial counselling provided. In the light of the above, the Committee finds that the State party violated articles 27 and 39 of the Convention.

8.16 The Committee, acting under article 10 (5) of the Optional Protocol, finds that the facts of which it has been apprised amount to violations of articles 3, 8, 12, 16, 20 (1), 22, 27 and 39 of the Convention.

9. The State party should therefore provide the author with effective reparation for the violations in question, including adequate compensation for the non-pecuniary damages, specialized psychological counselling appropriate for victims of sexual abuse and the rectification of the date of birth that appears in her identity and other documents. The State party is also under an obligation to prevent similar violations in the future. In this regard, the Committee recommends that the State party:

(a) Ensure that all procedures for determining the age of young persons claiming to be minors are in line with the Convention and, in particular, that in the course of these

procedures: (i) the documents submitted by the young person concerned are taken into consideration and, if issued or authenticated by the relevant State authority or embassy, accepted as genuine; (ii) the young person is assigned a qualified legal representative or other representatives without delay and free of charge, any private lawyers chosen to represent the young person are recognized and all legal and other representatives are allowed to assist the young person during the age determination procedure; and (iii) genital examinations as a method of age determination must never be performed on children;

(b) Ensure that young unaccompanied asylum seekers claiming to be under 18 years of age are assigned a competent guardian as soon as possible to enable them to apply for asylum as minors, even if the age determination process is ongoing;

(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 or decisions by authorities finding them to be adults in cases where the age determination process was not accompanied by the safeguards needed 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 comment No. 6 (2005), joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017), and joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), and on the integration of a gender perspective where migrant girls are concerned;

(e) Ensure that unaccompanied minors who are seeking asylum and claim to have been victims of violence receive qualified psychosocial counselling to facilitate their rehabilitation.

10. 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.
