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Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision on admissibility adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 80/2019**, ***

Communication submitted by:	A.M. (represented by counsel, Guido Ehrler)
Alleged victim:	The author
State party:	Switzerland
Date of communication:	3 April 2019 (initial submission)
Date of adoption of decision:	31 May 2021
Subject matter:	Age assessment procedure in respect of an unaccompanied minor; return to Sweden
Procedural issue:	Inadmissibility *ratione personae*; abuse of the right of submission of communications; manifestly ill-founded submission; justiciability of Convention rights
Procedural issue:	Best interests of the child; right of children to be heard in any judicial or administrative proceedings affecting them
Articles of the Convention:	3 (1) and (3) and 12
Articles of the Optional Protocol:	7 (c) and (f)

1.1 The author of the communication is A.M., an Afghan national born in 2000.[1] He claims that if Switzerland were to deport him to Sweden he would be a victim of a violation by the State party of his rights under articles 3 (1) and (3) and 12 of the Convention. The author is represented by counsel, Guido Ehrler. The Optional Protocol entered into force for the State party on 24 July 2017.

1.2 On 8 April 2019, pursuant to article 6 of the Optional Protocol, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt

* All persons handling the present document are requested to respect and observe its confidential nature.

** Adopted by the Committee at its eighty-seventh session (17 May–4 June 2021).

*** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Zara Ratou, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Benoit Van Keirsbilck.

[1] On 2 November 2000 according to the Swedish authorities or 1 January 2000 according to the Swiss authorities.

interim measures to suspend the removal of the author to Sweden pending the consideration of the case by the Committee. On 10 April 2019, the State party informed the Committee that the removal had been suspended.

1.3 On 15 October 2020, the Working Group on Communications, acting on behalf of the Committee, decided to accede to the State party's request to consider the admissibility of the communication separately from the merits.

The facts as submitted by the author

2.1 The author grew up with his three siblings in a village in Afghanistan. When he was 11 years old, the son of a powerful landowner attempted to rape him. The author's father instituted proceedings against that person in court, which handed down a sentence of 1 year's imprisonment. After his release, the person tried to kill the author. He was sent by his father to the Islamic Republic of Iran at the age of 14, from where he travelled to Europe.

2.2 On 3 November 2015, the author applied for asylum in Sweden. At the end of June 2017, he received an order from the Swedish National Board of Forensic Medicine to undergo an age assessment based on X-rays and a computed tomography scan. Following this assessment, his date of birth was determined to be 2 November 2000. However, his asylum application was rejected on appeal by the Swedish authorities, who ordered his removal to Afghanistan once he would reach the age of 18. In a letter of 14 September 2018, the Swedish authorities notified his legal representative of the enforcement order. The author left Sweden in September 2018, not long before reaching the age of majority, to avoid deportation to Afghanistan.[2]

2.3 On 14 September 2018, the author applied for asylum in Switzerland. On 24 September 2018, he was heard by the State Secretariat for Migration, with no representative or trusted person present. When asked about his age, the author stated that he was born in 2000 but did not know his exact date of birth and that, following an assessment by the Swedish authorities, his date of birth had been registered as 2 November 2000. The author was unable to produce any other proof of his age because he had lost his identity card during the crossing from Turkey to Greece. The State Secretariat informed the author during the hearing that, based on his statements, there was no evidence allowing the administration to conclude that he was a minor. Moreover, he had not been able to show evidence to prove or credibly demonstrate that he was a minor. Given that the day and month of his date of birth had been chosen arbitrarily by the Swedish authorities, the State Secretariat set his birth date at 1 January 2000, as the age assessment carried out in Sweden was not taken into consideration.

2.4 Based on the information provided by the author in his asylum application in Sweden, Switzerland initiated the procedure under the Dublin III Regulation.[3] As his asylum application had been registered in Sweden, the Swiss authorities deemed Sweden to be responsible for the asylum procedure. Consequently, on 9 October 2018, the State Secretariat for Migration decided not to examine the merits of the case and ordered the removal of the author to Sweden. In its decision, the State Secretariat once again indicated that the date of birth of 2 November 2000 had been chosen arbitrarily and that the Swedish authorities had accepted the author's readmission, and that as such he was no longer a minor.

2.5 The author filed an appeal with the Federal Administrative Court. In the appeal, he complained that the State Secretariat for Migration had violated the principle of ex officio collection of evidence by determining his age arbitrarily and departing from the findings of the Swedish assessment without taking into consideration the evidence from the Swedish procedure and without conducting its own investigation. According to the author, the fact that no trusted person was present during the hearing of 24 September 2018 constitutes a

[2] In January 2018, the author's father was killed in a suicide attack. His family left Afghanistan one month later. They stayed in the Islamic Republic of Iran for two months and are currently in Turkey.

[3] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

violation of articles 3 (3) and 12 of the Convention. The division of the burden of proof applied by the State Secretariat, under which it was for the author to bear the consequences of the lack of proof that he was a minor, along with his deportation to Sweden, also constitutes a violation of the provisions of article 3 of the Convention.

2.6 On 8 November 2018, the Federal Administrative Court rejected the author's appeal. Like the State Secretariat for Migration, the Court found that the date of birth chosen by the Swedish authorities was arbitrary. Holding that the author had provided contradictory information on his date of birth, the Court found that the State Secretariat was not obliged to provide the author with a trusted person, nor was its decision a violation of the Convention.

2.7 A medical certificate dated 3 April 2019 states that the author suffers from serious sleep problems and a suicidal condition.

The complaint

3.1 Firstly, the author considers that he is eligible to complain to the Committee. He invokes a judgment of the Court of Justice of the European Union according to which the relevant date for age assessment is the date on which the person concerned has lodged an application for international protection.[4] The author lodged his asylum application in Switzerland on 14 September 2018, as an unaccompanied minor. He was still a minor at the time because, in the absence of evidence to the contrary, his age should be determined by the findings of the Swedish asylum authorities. The author is therefore entitled to invoke his rights under the Convention by means of the procedure under the Dublin III Regulation.[5] Even if the Committee were to follow the Swiss authorities in not accepting the Swedish age assessment, the principle of assuming minor status in cases of doubt should apply. According to this principle, a person who claims to be under the age of 18 should be treated as a child and enjoy children's rights throughout the investigation.[6]

3.2 In the light of article 3 of the Convention, the author considers that the Swiss authorities violated the principle of the best interests of the child by arbitrarily declaring him to be an adult in September 2018, in contradiction with the existing age assessments, and selecting a date of birth that could not be accurate. In a recent decision, the Committee specified the procedure to be followed to determine the age of a person who claims to be a minor, which was not respected in this case.[7] Moreover, the State party failed to proceed with an investigation into his age, including by verifying the plausibility of the previous age assessment, and so, consequently, he should be considered a minor. In accordance with article 8 (4) of the Dublin III Regulation, unaccompanied minors are entitled to lodge an asylum application in the State in which they have lodged their application for international protection. In the author's view, the arbitrary conduct of the Swiss authorities in the matter of age assessment can be explained quite easily: the State party in this way can avoid taking responsibility for the author's asylum application and is thus not obliged to obey the rules on the protection of minors.

3.3 Lastly, the author invokes a violation of article 12 (2) of the Convention, as he was not assisted by a representative or trusted person during the age assessment procedure under the Dublin III Regulation, in particular at the hearing of 24 September 2018. According to article 6 (2) of the Dublin III Regulation, member States must ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in the Regulation. Contrary to this clear legal situation, in Swiss practice it is considered admissible, when there are doubts about the age of an applicant, to decide on the question of the credibility of alleged minor status prior to the hearing on the grounds for asylum and without the participation of a trusted person.[8] In applying the Dublin III Regulation, not only does the State Secretariat for Migration assess age in a prejudicial manner; it also thereby

[4] Court of Justice of the European Union, No. C-550/16, *A and S v. Staatssecretaris van Veiligheid en Justitie*, 12 April 2018.

[5] Article 6 of the Dublin III Regulation expressly mentions the best interests of the child.

[6] Committee on the Rights of the Child, general comment No. 6 (2005).

[7] *N.B.F. v. Spain* (CRC/C/79/D/11/2017).

[8] In accordance with policy decision No. 2004/30 of 29 October 2004 of the Swiss Asylum Appeals Commission, which continues to be applied.

determines the outcome of the procedure, namely the decision not to examine the case on the merits. For this reason, it is objectively necessary for a trusted person to be present.

State party's observations on admissibility

4.1 In its observations dated 6 June 2019, the State party argues that the communication is inadmissible *ratione personae* insofar as the author has not been able to demonstrate that he was a minor when he entered Switzerland in September 2018. Under article 1 of the Convention, a child means every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier.

4.2 The State party argues that the author was unable to show any identity document and made contradictory statements about his date of birth and age at the hearing of 24 September 2018. Moreover, as regards the allegation that the Swiss authorities arbitrarily departed from the date of birth registered by the Swedish authorities, the author himself stated at his hearing that the Swedish authorities had randomly chosen a day and month of birth to determine his age. Accordingly, the State party considers it difficult to justify the author's position that the Swiss authorities are required to accept the truth of a date of birth whose lack of legitimacy is not denied.

4.3 According to the State party, while article 17 (3bis) of the Asylum Act, Act No. 142.31 of 26 June 1998, indeed allows the State Secretariat for Migration to arrange an expert report on the age of an asylum seeker, this provision on the one hand leaves the State Secretariat a wide margin of appreciation and, on the other hand, only applies in cases where that authority has doubts. In this case, given the contradictions in the author's comments at his hearing and the random nature of the date of birth chosen by the Swedish authorities, the State Secretariat did not have any doubts that the author was an adult. As underscored by the Federal Administrative Court, the State Secretariat was therefore not in violation of any national provision by declining to arrange for an expert report on the author's age. In any case, the State party points out that the author had certainly reached the age of majority, according to the date of birth registered by the Swedish authorities, when the Federal Administrative Court, which freely examines the facts and applies the law ex officio, handed down its decision on 8 November 2018.

4.4 The State party also argues that the communication is inadmissible under article 7 (f) of the Optional Protocol, since it is manifestly ill-founded. It considers that the manifestly ill-founded nature of the communication results both from the reasons for which the author submitted it and from the legal nature of some of the provisions invoked.

4.5 As regards the author's motivation, the State party first recalls that under article 8 (4) of the Dublin III Regulation, Sweden is the State responsible for the application for international protection lodged by the author on 3 November 2015. In that country, he had access to a complete asylum procedure, during which he was treated as a minor, was assisted by a trusted person and was able to appeal against the decisions of the competent Swedish authorities. Accordingly, throughout the Swedish asylum procedure, the author enjoyed the guarantees specifically provided under articles 3 and 12 of the Convention and article 6 of the Dublin III Regulation, which he does not deny. Under article 18 (1) (d) of the Dublin III Regulation, the State responsible under the Regulation, namely Sweden, is obliged to take back a third-country national whose application has been rejected and who made an application in another member State of the European Union or associated State. In this case, Sweden accepted on 9 October 2018 to take back the author, in accordance with its obligations under the Dublin III Regulation and the objective of prompt and efficient processing of applications for international protection. The State party is thus no longer competent to examine his asylum application on the merits.

4.6 Accordingly, the State party considers that the author cannot invoke his voluntary departure from Sweden, which had the sole purpose of avoiding the enforcement of a Swedish decision that had entered into force and had been handed down following proceedings compatible with the requirements of the Convention, to request the Swiss authorities to re-examine the grounds for his asylum. Indeed, by acceding to this request, the State party would be in breach of its international commitments under the Agreement between the Swiss Confederation and the European Community concerning the criteria and

mechanisms for establishing the State responsible for examining a request for asylum lodged in a member State or in Switzerland (the Dublin Association Agreement) and would call into question the legitimacy of the Swedish asylum procedure that the author benefited from. Therefore, concerning the author's allegation that, by returning him to Sweden, the State party is avoiding its responsibility for his asylum application and is in violation of article 3 of the Convention, the State party considers that the motive behind the communication constitutes an abuse of the right of submission and that it should be declared manifestly ill-founded.

4.7 With respect to the legal nature of article 3 of the Convention, the State party considers that a distinction must be drawn between the provisions of the Convention that are directly applicable and whose violation may be alleged, and those that are not.[9] Directly applicable provisions are those that are unconditional and sufficiently clear and precise to be applied as such in a given case. Other provisions contain "general programmes" and leave States parties considerable room for manoeuvre. Such provisions are often formulated as a recognition of a particular "right of the child". However, whether these "rights" can form the basis for a justiciable claim against the authorities is first and foremost a question of national law.

4.8 In this regard, the case law of the Federal Supreme Court has generally been restrictive in allowing the direct applicability of article 3 of the Convention. As regards article 12 of the Convention, the State party recalls that, in a decision of 22 December 1997, the Federal Supreme Court allowed that the provision was directly applicable insofar as it was highly specific and was sufficiently clear both in its content and its implementation.[10] However, this is not the case for article 3 (1) of the Convention.[11] Accordingly, the State party considers that, as it relates to an alleged violation of article 3 of the Convention, the communication should be declared manifestly ill-founded.

Authors' comments on the State party's observations

5.1 In his comments dated 6 August 2020, the author points out that the State party accepts that the Swedish authorities recognized him as a minor. He states that he informed the Swiss authorities that he did not know his exact date of birth and never attended public school.[12] According to sources, the Tazkira is the usual identity card in Afghanistan, and less than 10 per cent of the Afghan population have birth certificates.[13] Therefore, the fact that the author did not show a Tazkira and does not know his exact age does not indicate that his statements are implausible.

5.2 The author considers the State party's allegation that he stated at his hearing on 24 September 2018 that his age had been determined arbitrarily in Sweden to be inaccurate. In fact, he stated that after applying for asylum in Sweden on 3 November 2015, he had been assigned the date of birth of 2 November. However, that was his subjective interpretation of the age assessment process in Sweden, which may not be objectively accurate. The relevant point, objectively speaking, is that the date of birth was determined in Sweden using scientific methods and did not significantly differ from the author's statements. Furthermore, the State party admits that the author insisted that the date of birth determined in Sweden should also be recognized by the Swiss authorities.

5.3 The author argues that the State party is not in a position, even in this procedure before the Committee, to invalidate the probative value of the age assessment by the Swedish authorities. That would only have been possible through a second expert assessment.

[9] The State party submits that in the original version, dated 11 October 2006, of the general guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44 (1) (b) of the Convention (CRC/C/58), the Committee recognized that not all provisions of the Convention are directly applicable.

[10] Swiss Federal Court, ATF 124 III 90, preambular para. 3a, ruling, 22 December 1997.

[11] Swiss Federal Court, ATF 124 III 90, preambular para. 5.2, decision, 16 October 2017.

[12] During the hearing on 24 September 2018, the author stated that he was sent to a Qur'anic school at the age of 9 and attended this school for four years, until he left for the Islamic Republic of Iran.

[13] See, for example, Alexandra Geiser, "Afghanistan : Tazkira − Renseignement de l'analyse-pays de l'OSAR" (Afghanistan: Tazkira − Information from an OSAR Country Analysis), Swiss Refugee Aid Organization, 12 March 2013.

However, the Swedish assessment was not even included in the domestic proceedings; the State party neither claimed that the Swedish assessment had technical shortcomings nor performed its own age assessment in line with scientific principles. The overall objection by the State party to the age assessment carried out in Sweden, which it qualifies as "arbitrary", is baseless and inexplicable. Moreover, the Federal Administrative Court did not criticize the Swiss authorities for their failure to conduct their own investigation into the author's age. In addition, the State party did not supply any evidence that the author was born on 1 January 2000.

5.4 Contrary to what the State party has stated, the author considers that there has been no abuse of the right of submission, even if the purpose of his asylum application in Switzerland was to avoid the expulsion to Afghanistan planned in Sweden for when he would reach the age of majority. According to Swiss case law, the general threat situation in Afghanistan is classified as unacceptable; only the enforcement of removal orders to Herat or Kabul is considered acceptable, on the condition that additional favourable circumstances prevail there.[14] The author is not from Kabul or Herat; according to Swiss jurisprudence, he therefore needs protection even as an adult.

5.5 The author accepts that he was treated as a minor by the Swedish authorities but asserts that the State party is unable to explain why he should suddenly have become an adult when he lodged his asylum application in Switzerland. At the time he lodged his asylum application in Switzerland, he was still a minor. Article 17 of the Dublin III Regulation expressly allows for second applications by minors. The guarantees provided under articles 3 and 12 of the Convention should also have been respected by the State party. As the responsibility for conducting the asylum procedure had been transferred to the State party, it is irrelevant that Sweden agreed to readmit the author on 9 October 2018. Moreover, that guarantee expired long ago.

5.6 Lastly, if the State party were to process the author's asylum application, that would in no way violate its international commitments; on the contrary, those commitments require the State party to process the author's asylum application. The Swiss authorities determined that the author was an adult without ordering any expert assessment of his age and departed from the age assessment that was carried out by the Swedish authorities using forensic methods, with the sole purpose of avoiding their international obligations.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* insofar as the author has not been able to demonstrate that he was a minor when he entered Switzerland. However, it observes that the author states that he was a minor when he arrived in Switzerland and that, even if he was unable to submit any evidence for his date of birth or to inform the Swiss authorities of his exact date of birth, he relied on an expert assessment that had been carried out by the Swedish authorities as part of the asylum procedure in Sweden, which established his status as a minor. The Committee also notes that the State party objects to the assessment carried out by the Swedish authorities, without putting forward a valid argument. The Committee recalls that the burden of proof does not rest solely with the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. In the present case, the Committee notes the author's argument that, if the State party had doubts as to the results of the Swedish assessment, it should have performed a second assessment of the author's age,

[14] See Federal Administrative Court, ATAF 2011/38 (decision of 28 October 2011), ATAF 2011/49 (decision of 30 December 2011) and D-5800/2016 (reference judgment of 13 October 2017).

which it did not do.[15] In the light of the foregoing, the Committee considers that article 7 (c) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

6.3 The Committee also notes the State party's argument that, were it to grant the author's asylum application, it would be in violation of its international commitments under the Dublin Association Agreement and would call into question the legitimacy of the Swedish asylum procedure to which the author had access. Without calling into question the international agreements ratified by the States parties to the Convention, the Committee considers that States parties remain responsible under the Convention for all acts and omissions of their authorities resulting from their national law or the need to comply with international legal obligations.[16] In the application of an international treaty, the State party is therefore required to take into consideration its obligations under the Convention.

6.4 The Committee further notes the State party's allegation that the author is abusing the right of submission in seeking to have the Swiss authorities re-examine an asylum application made in Sweden, where if it granted the application, the State party would be in violation of its international commitments under the Dublin Association Agreement. However, the Committee observes that article 17 of the Dublin III Regulation provides for the possibility for each member State, by way of derogation from article 3 (1) of the instrument, to examine an application for international protection lodged with it, even if such examination is not its responsibility under the criteria laid down in the Regulation. Moreover, the Committee notes that both the treaty bodies and the European Court of Human Rights have concluded that a transfer under the Dublin III Regulation may entail the international responsibility of a State party, in specific circumstances.[17] Accordingly, the Committee does not find any abuse of the right of submission by the author, given that the Dublin III Regulation provides for the possibility on an exceptional basis to have an asylum application re-examined by a State other than the one that examined the initial application.

6.5 Lastly, the Committee takes note of the State party's arguments that the provisions of article 3 of the Convention do not provide a basis for subjective rights whose violation can be invoked before the Committee. In this regard, the Committee recalls that under article 5 (1) (a) of the Optional Protocol, individual communications may be submitted against a State party to the Convention by or on behalf of individuals or groups of individuals claiming to be victims of a violation by that State party of any of the rights set forth in the Convention. Accordingly, the Committee considers that there is nothing in article 5 (1) (a) of the Optional Protocol to suggest a limited approach to the rights whose violation may be invoked in the individual communications procedure. On the contrary, it holds that all the provisions of the Convention are justiciable under the Optional Protocol, in line with the protection obligations of States parties. It also recalls that the best interests of the child, as enshrined in article 3 of the Convention, is a threefold concept which is at the same time a substantive right, an interpretative principle and a rule of procedure.[18] Lastly, the Committee recalls that it has in the past ruled on alleged violations of the article invoked under the individual communications mechanism.[19]

6.6 In the light of the foregoing, the Committee concludes that the author has sufficiently substantiated his claims under articles 3 (1) and (3) and 12 of the Convention.

7. The Committee on the Rights of the Child therefore decides:

[15] *M.A.B. v. Spain* (CRC/C/83/D/24/2017), para. 9.2; and *H.B. v. Spain* (CRC/C/83/D/25/2017), para. 9.2.

[16] See also European Court of Human Rights, *Tarakhel v. Switzerland* , Application No. 29217/12, judgment, 4 November 2014, para. 88.

[17] See *Jasin v. Denmark* (CCPR/C/114/D/2360/2014); *Harun v. Switzerland* (CAT/C/65/D/758/2016), para. 9.2; and European Court of Human Rights, *Tarakhel v. Switzerland*, Application No. 29217/12, judgment, 4 November 2014, para. 90.

[18] Committee on the Rights of the Child, general comment No. 14 (2013), para. 6.

[19] See, inter alia, *M.T. v. Spain* (CRC/C/82/D/17/2017), para. 12.5; *C.R. v. Paraguay* (CRC/C/83/D/30/2017), para. 7.5; and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 12.5.

(a) That the communication is admissible insofar as it raises issues under articles 3 (1) and (3) and 12 of the Convention;

(b) That the State party is requested to submit its observations on the merits of the communication to the Committee within four months of the date of transmittal to it of this decision;

(c) That the interim measures established on 8 April 2019 should remain in force until the Committee has made a decision on the merits of the application;

(d) That the State party's observations shall be transmitted to the author for his comments;

(e) That the present decision shall be transmitted to the State party and to the author.