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Convention on the Rights of the Child

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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. 165/2021*, **, ***

Communication submitted by:	K.K. (represented by counsel, Andrés Ceballos Cabrillo)
Alleged victim:	S.J.
State party:	Spain
Date of communication:	11 November 2021 (initial submission)
Date of adoption of Views:	26 January 2024
Subject matter:	Right to education of a Moroccan child born and raised in Spain
Procedural issues:	Exhaustion of domestic remedies; lack of substantiation
Substantive issues:	Discrimination: best interests of the child; education
Articles of the Convention:	2, 3, 28 and 29
Articles of the Optional Protocol:	6 and 7 (e) and (f)

1.1 The author of the communication is K.K., a national of Morocco born on 20 December 1978. She submits the present communication on behalf of her daughter, S.J., a national of Morocco born in Melilla, Spain, on 31 October 2005. The author claims that the State party has violated the rights that S.J. enjoys under articles 2, 3, 28 and 29 of the Convention. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 On 1 December 2021, 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 interim measures in order to allow S.J. immediate access to the public education system in Melilla while her case was under consideration by the Committee.

* Adopted by the Committee at its ninety-fifth session (15 January to 2 February 2024).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Aissatou Alassane Sidikou, Thuwayba Al Barwani, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chophel, Rosaria Correa, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

*** A joint opinion of Committee members Mary Beloff, Philip Jaffé and Benyam Dawit Mezmur (partially dissenting) is annexed to the present Views.

Facts as submitted by the author

2.1 In May 2020, K.K. applied for her children S.J. and A.J. to be enrolled in school for the 2020/21 academic year, using the regular procedure established under the domestic law of the State party. She attached to her application the birth certificates of both children, which show that they were born in Melilla, their medical cards and two requests, one addressed to the health-care administration requesting a social services report that would enable the author to obtain access to health care and the other addressed to the Ministry of Economic Affairs and Social Policy requesting the issue of a certificate proving that her family was resident in Melilla.

2.2 On an unspecified date, the public administration published the provisional lists of students given places in school for the 2020/21 academic year, which indicated that S.J. and A.J. had not been given places and that the reason for this was that documents were missing from their applications. The author submitted additional documentation that, according to her, proved that S.J. and A.J. were living in Melilla, including her children's passports, their medical cards and the family record book. On 22 June 2020, the School Enrolment Commission of the Provincial Directorate of the Ministry of Education and Science of Melilla published the final lists of students given places in school for the 2020/21 academic year, which indicated that the author's application did not meet the requirements, without specifying which ones.

2.3 On 7 July 2020, the author filed an appeal with the Provincial Director of Education of Melilla, but she received no response. On 6 November 2020, the author filed an application for judicial review of the presumed dismissal of her appeal in which she requested the adoption of interim measures consisting of admitting S.J. and A.J. to school. On 16 February 2021, Melilla Administrative Court No. 3 refused the request for interim measures. The Court found that, although there was a risk of causing S.J. and A.J. irreparable harm, in that they would miss the academic year, there was no evidence that the author had provided any of the documents required under in-force legislation as proof of residence, such as the certificate of inclusion on the municipal register.

Complaint

3.1 The author claims that, since S.J. was born in Melilla and proof of her residence in the city was provided, the only explanation for the refusal to enrol her in school is that she is being discriminated against on the grounds of her Moroccan origin and lack of a residence permit, in violation of article 2 of the Convention.[1]

3.2 The author claims that, because primary education is not only a right but also an obligation, refusing to give S.J. a place is contrary to her best interests, in violation of article 3 of the Convention.[2] She adds that at no point was any effort made to determine her best interests.

3.3 The author claims that not being able to attend school is preventing S.J. from enjoying a decent quality of life and developing all her abilities, in violation of articles 28 and 29 of the Convention.[3]

[1] The author cites paragraph 10 of the Committee's general comment No. 1 (2001), which states that discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. While denying a child's access to educational opportunities is primarily a matter which relates to article 28 of the Convention, there are many ways in which failure to comply with the principles contained in article 29 (1) can have a similar effect.

[2] The author cites paragraph 79 of the Committee's general comment No. 14 (2013), which states that it is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge. All decisions on measures and actions concerning a specific child or a group of children must respect the best interests of the child or children, with regard to education.

[3] The author cites paragraph 1 of the Committee's general comment No. 1 (2001), which states that article 29 (1) of the Convention is of far-reaching importance. The aims of education that it sets out,

State party's observations on admissibility and the merits

Observations on the account of the facts and the context

4.1 On 5 August 2022, the State party submitted its observations on the admissibility and merits of the communication.

4.2 As regards the facts, the State party indicates that, on 7 May 2021, the author submitted an application for her two children to be enrolled in school for the 2021/22 academic year, to which she attached certain documents, including the children's birth certificates, the family record book issued by the Spanish Civil Registry, the passports issued by the Moroccan authorities and her application for a residence permit. The State party indicates that the application for S.J. to be given a place in school was not accepted because she was over the age of compulsory education and no documentation attesting to her past studies or documentation providing for access to post-compulsory studies in the Spanish education system had been provided. S.J.'s brother, A.J., was included in a list of children for whom verification of actual residence was required, and, after verification that he was actually resident in Melilla, he was given a place in school for the 2021/22 academic year.

4.3 The State party maintains that the author submitted an application for both children to be enrolled for the 2020/21 academic year but that the application was refused on the grounds that proof of residence in Melilla was not provided and the authorities had no record of the family's residence. On 6 November 2020, the author filed an application for judicial review of the presumed dismissal of her appeal against the refusal to enrol her children in school. On 26 October 2021, it was decided that the legal proceedings in respect of A.J. could be discontinued as he had been given a place in school for the 2021/22 academic year. On 9 March 2022, Melilla Administrative Court No. 3 dismissed the appeal in the case of S.J. on the grounds that it was not possible to give her a place in school as she was over the age of compulsory education at the time of the judicial review. The Court took the view that, given her age, it was not necessary to consider whether it had been proven that she was actually resident in Melilla at the time the enrolment application was submitted. The author filed an appeal against this decision on 6 April 2022.

4.4 The State party affirms that the author did not contest the refusal of her application for enrolment for the 2021/22 school year, even though she was informed of the refusal several months before the communication was submitted to the Committee.

4.5 The State party reports that S.J. was enrolled in training programmes run by various agencies and institutions in Melilla, that, in July 2021, she was enrolled in the "Office Assistant" training programme run by the Spanish Red Cross, and that she passed all modules of the theoretical part of this course with high grades. Subsequently, she completed an internship in a company.

4.6 The State party points out that domestic legislation recognizes in absolute and unconditional terms the right of foreign minors living in Spain to have access to education under the same conditions as Spanish citizens, irrespective of the administrative status of their parents.[4] The State party adds that the authorities attach great importance to promoting access to education for foreign minors, as education is essential for their integration into Spanish society.[5] It adds that, in 2019, foreign students accounted for about 9 per cent of all students enrolled in non-university education, a percentage equivalent to approximately 800,000 foreign students. In Melilla, approximately 13 per cent of students in non-university education and 20 per cent of students in preschool, primary and compulsory secondary

which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights.

[4] The State party cites art. 9 of Organic Act No. 4/2000, of 11 January, on the rights and freedoms of foreign nationals in Spain and their social integration; art. 1 of Organic Act No. 8/1985, of 3 July, regulating the right to education; and art. 10 (3) of Organic Act No. 1/1996, of 15 January, on legal protection of minors, partially amending the Civil Code and the Civil Procedure Act.

[5] The State party explains, by way of example, that foreign nationals who have children of compulsory school age (6 to 16 years) in their care and need to carry out certain administrative formalities are required by law to provide proof of their children's enrolment in school.

education are foreign nationals and, of the total number of foreign students in Melilla, 90 per cent are of Moroccan origin.

4.7 The State party explains that, in the Spanish education system, compulsory education covers the ages of 6 to 16 years.[6] Primary and compulsory secondary education constitute basic education. Secondary education is divided into compulsory secondary education and post-compulsory secondary education, the latter consisting of the baccalaureate programme. The State party indicates that students have the right to remain in regular schooling until they reach the age of 18.[7] It explains that the public authorities have a duty to encourage students who are at least 16 years old but have not reached the age of majority to complete some form of academic or vocational training.[8]

4.8 The State party maintains that S.J., who was 16 years old at the time the communication was submitted, was not admitted to the first year of the baccalaureate programme because she was found to be over the age of compulsory education but unable to provide any proof of her previous studies.

Observations on admissibility

4.9 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies under article 7 (e) of the Optional Protocol. It affirms that, at the time the communication was submitted to the Committee, the application to be enrolled in school had been refused on two occasions, in respect of both the 2020/21 and 2021/22 academic years, and that, in the case of the first enrolment application, an application for judicial review was filed that is still under way and is currently at the appeal stage. It asserts that no judicial or administrative appeal has been filed against the refusal of the second enrolment application. The State party claims that the author did not submit an application for the 2022/23 academic year and that there is therefore unclear why she is continuing to pursue the complaint.

4.10 The State party argues that the communication is inadmissible in that it is manifestly unfounded, by virtue of 7 (f) of the Optional Protocol, referring the Committee to its arguments on the merits of the communication.

Observations on the merits

4.11 The State party submits that the author is acting in manifest bad faith since she omits the following essential data and information: (a) she submitted a new application in 2021, requesting that S.J be given a school place for the 2021/22 academic year; (b) the enrolment application for the 2021/22 academic year was refused for a specific reason that was expressly stated in the published lists of students; (c) she did not contest the refusal of this last enrolment application; and (d) S.J. was taking a training course run by the Ministry of Education. The State party claims that the author is wrong to assert that S.J. is being discriminated against owing to her status as a foreign minor without legal residence in Spain. The State party also maintains that the author insists that she applied for enrolment in compulsory, basic education, that is, in primary education, whereas in fact she applied for enrolment in the first year of the baccalaureate programme.

4.12 The State party notes that the application for enrolment for the 2021/22 academic year was refused for a duly justified reason that is provided for in in-force legislation, is compatible with the Convention, and is applicable to all minors above compulsory school age without discrimination. According to the State party, the author is wrong to claim that S.J. was not enrolled in school because she could not prove that she was legally resident in Melilla. In fact, the educational authorities officially recognized that the family is resident in Melilla and proceeded to enrol the younger brother in school.

[6] Organic Act No. 2/2006, of 3 May 2006, on Education, art. 3.

[7] Ibid., arts. 3.3 and 4.

[8] "Any person who has obtained a certificate of completion of compulsory secondary education is eligible for enrolment in the baccalaureate programme. Also eligible for enrolment in the baccalaureate programme are those who have obtained a certificate of completion of vocational training, of a visual arts and design or sports qualification or any other course provided for by law." (Ibid., art. 32).

4.13 The State party specifies that the application for enrolment for the 2020/21 academic year was refused not because S.J. was in an irregular situation in Melilla, was not registered and did not have a residence permit or visa, but because no proof of residence in Melilla was provided. The State party explains that this proof is required irrespective of nationality or regular or irregular status in Melilla. According to the State party, none of the documents submitted with the application for enrolment provided such proof.

4.14 The State party is of the view that it is pointless to enter into an assessment of a situation that arose a year and a half before the communication was submitted and that it makes more sense to assess the refusal of enrolment in the light of the application made for the 2021/22 academic year, which had just begun at the time of the communication's submission.

4.15 The State party requests that the communication be declared inadmissible or, in the alternative, that it be dismissed on the grounds that no violation of the Convention has been found.

Author's comments on admissibility and the merits

5.1 On 3 January 2023, the author submitted comments on the State party's observations on the admissibility and the merits of the communication.

5.2 With regard to the facts, the author indicates that the communication she submitted to the Committee refers to the facts relating to the 2020/21 academic year, and not to the 2021/22 academic year. She confirms that she submitted new applications for the 2021/22 academic year, that the lists indicated that she had to provide documentation, without indicating which, and that her son A.J. was enrolled in school for the 2021/22 academic year but had not been enrolled for the 2019/20 and 2020/21 academic years. The author indicates that S.J. was 14 years old at the start of the 2020/21 academic year, as she was born on 31 October 2005, and that she was therefore under the age at which compulsory education ended. She clarifies that the fact that S.J. was not admitted for the 2021/22 academic year was a consequence of her not being in school in previous years, meaning that she lost any possibility of having a full education. The author confirms that the enrolment applications for the 2020/21 academic year were refused because proof of residence in Melilla was not provided. However, she maintains that the documentation provided was sufficient to prove that the family was actually living in Melilla since she submitted the same documentation with the application for the 2021/22 academic year when the younger brother was given a place. The author also clarifies that, from March 2020 to mid-2022, the border between Melilla and the Moroccan province of Nador was closed as a result of the coronavirus disease (COVID-19) pandemic, and that this fact should serve as proof of residence since the family was not able to leave Melilla at any time. She further clarifies that the High Court of Justice of Andalusia has not yet ruled on the pending appeal and that this is why she did not contest the refusal of the enrolment application for the 2021/22 academic year. Lastly, the author maintains that S.J.'s participation in a training programme is not a solution for the lack of compulsory education.

5.3 Regarding the legal framework and context, the author confirms that, in principle, the right of children who are foreign nationals living in Spain is recognized unconditionally, irrespective of their administrative status or whether their names appear in the municipal register.[9] However, she claims that such recognition is merely formal in the case of Melilla, where it is very difficult to enrol a child who is not legally resident and does not have a certificate of inclusion in the municipal register.[10] According to the author, only minors who are legally resident are routinely admitted to State schools. The author refers to a statement in which the Provincial Director of the Ministry of Education in Melilla indicates that a lack of documentation attesting to some form of authorization to live in Spain makes enrolment in State schools a priori impossible. Regarding the enrolment of minors over 16 years of age,

[9] The author cites art. 16 of Order No. ECD/724/2015, of 22 April, regulating student admissions in public and charter schools at the upper preschool, primary, secondary and baccalaureate levels in the cities of Ceuta and Melilla, which stipulates that proof that the age requirement is met must be provided in all cases, and can be done by means of the birth certificate.

[10] *N.S. v. Spain* (CRC/C/85/D/111/2020).

the author insists that her communication relates to the 2020/21 academic year, when S.J. was 15 years old.

5.4 In relation to the exhaustion of domestic remedies, the author alleges that the remedies available were not effective and were unreasonably prolonged. She states that three applications were refused, since she also applied for enrolment for the 2019/20 academic year. She clarifies that the application for judicial review was filed in December 2020 and the appeal against the resulting decision was filed in April 2022 and remains pending, since the Malaga chamber has a congestion rate of 44 per cent that it will take 16 months to clear. The author states that these remedies are not effective for achieving the desired purpose, which is S.J.'s enrolment before the end of the academic year, which would have been achieved if the Committee's request for interim measures had been acted upon. The author reports that she did not apply for judicial review of the decision to refuse the third enrolment application as S.J. was already 16 years old and would therefore have been refused enrolment because she was no longer of compulsory school age. For the same reason, she did not submit an enrolment application for the 2022/23 academic year. The author claims that, had S.J. been give a place for the 2020/21 academic year, she would have been able to remain in school for post-compulsory education in subsequent years.

5.5 The author alleges that the application to enrol S.J. for the 2020/21 academic year was refused because of her irregular status in Melilla, not because of her age. The author confirms that the State party proceeded to enrol several minors in a similar situation to S.J. for the 2021/22 academic year, but states that this was a result of Views issued by the Committee in several other cases, which indicates that there had been systematic discrimination against minors of foreign origin who were actually living in Melilla. The author claims to have submitted sufficient documents to prove that she was actually living in Melilla, given that the same documents were sufficient to prove the family's actual residence for the 2021/22 academic year.

5.6 The author requests: (a) that the communication be declared admissible; (b) that violations of the articles of the Convention mentioned above be found; and (c) that adequate reparation be granted in the form of compensation and rehabilitation for the harm suffered by S.J. as a result of having been deprived of her right to education at least during two academic years, with compensation being provided at the rate of €5,000 for each academic year that she has missed and might miss in future as long as she has not been given a place.

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.

6.2 The Committee takes note of the State party's argument that the communication is inadmissible for failure to exhaust domestic remedies because: (a) when the communication was submitted to the Committee, an application for judicial review related to the refusal of a school place for the 2019/20 academic year was pending before an administrative court, which application was at the appeal stage when the State party submitted its observations; and (b) the author did not contest the refusal of the enrolment application for the 2021/22 academic year (see para. 4.9 above). At the same time, the Committee takes note of the authors' argument that the available remedies were ineffective for the purpose of obtaining her daughter's enrolment and that they would have been unreasonably prolonged (see para. 5.4 above). The Committee notes, in particular, the author's argument that her communication relates only to the 2020/21 academic year and that she did not contest the refusal of her application for enrolment for the 2021/22 academic year because the domestic remedies were ineffective and unreasonably prolonged. The Committee also notes the author's allegation that the refusal to enrol S.J. for the 2021/22 academic year was a consequence of the fact that she had not been enrolled in previous years, as previous attendance is a prerequisite for admission to the first year of the baccalaureate programme. Consequently, the Committee considers that the assessment of whether domestic remedies were exhausted should focus on the remedies available and effective for obtaining admission

for the 2020/21 academic year. The Committee notes that more than three years have passed since the author submitted her application for enrolment for the 2020/21 academic year in May 2020, without a definitive decision on this application having been issued. The Committee also notes the author's contention that the appeal she filed in April 2022 would in any case have been ineffective for achieving the desired end, which was her daughter's enrolment for the 2020/21 academic year. The Committee further notes that the author's request for interim measures to be applied by the State was refused and the Committee's request for interim measures consisting in S.J.'s immediate admission to school (see para. 1.2 above), issued on 1 December 2021, was also not acted upon. The Committee recalls that a child's prolonged exclusion from the compulsory education system constitutes irreparable harm within the meaning of article 6 of the Optional Protocol. Taking account of the context already known to the Committee and the fact that, more than three years after the author's application for enrolment was submitted, a definitive decision has still not been obtained through the judicial channel, and in the light of the refusal of all requests for interim measures made by the author, the Committee considers that the domestic judicial proceedings were unreasonably prolonged, which impeded her access to justice.[11] Accordingly, the Committee concludes that the author was not required to exhaust these remedies pursuant to article 7 (e) of the Optional Protocol.

6.3 The Committee notes that the author claims a violation of article 29 of the Convention but does not give any explanation to support this claim. Consequently, the Committee considers that this claim has not been sufficiently substantiated for the purposes of admissibility and concludes that it is inadmissible under article 7 (f) of the Optional Protocol.

6.4 However, the Committee is of the view that the author has sufficiently substantiated her claims under articles 2, 3 and 28 of the Convention that her daughter's right of access to education has been violated; that she was discriminated against on the grounds of her national origin and administrative status; and that her best interests were not duly considered when she was refused access to compulsory education. The Committee therefore finds that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

7.1 The Committee has considered the 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.

7.2 The Committee recalls that, under article 28 of the Convention, States parties must respect and guarantee the right of access to education for all children under their jurisdiction, without distinction of any kind. In addition, because enjoyment of the rights contained in the Convention stems from access to education, it is imperative that the best interests of the child be a primary consideration in any procedure aimed at achieving a child's enrolment in school.[12]

7.3 The Committee must make the following three determinations: (a) whether the State party has violated S.J.'s right of access to education under article 28 of the Convention; (b) whether the refusal to enrol S.J. constituted discriminatory treatment under article 2 of the Convention; and (c) whether S.J.'s best interests, within the meaning of article 3 of the Convention, read in conjunction with article 28, were duly taken into account in the process of deciding upon the application for her enrolment.

7.4 With regard to the first point, the Committee recalls that the right to education epitomizes the indivisibility and interdependence of all human rights[13] and that its importance is such that the Convention provides not only for the right of every child to have access to an education (art. 28) but also for an individual and subjective right to a specific quality of education.[14] The Committee is also of the view that the right to education should be guaranteed to all children of compulsory school age, irrespective of their nationality or administrative status. The Committee considers that the obligation of States parties to

[11] General comment No. 5 (2003), para. 24.

[12] General comment No. 14 (2013), paras. 30 and 79.

[13] Committee on Economic, Social and Cultural Rights, general comment No. 11 (1999), para. 2.

[14] Committee on the Rights of the Child, general comment No. 1 (2001), para. 9.

develop different forms of secondary education and to ensure their availability implies that such education should be available for all under the same conditions.[15] Thus, the State's obligation to uphold the right to education is applicable to all children up to the age of 18 years, irrespective of the age at which compulsory education ends.

7.5 The Committee notes that, in the case at hand, both the State party and the author agree that it is recognized that all children have an absolute right to education in Spain, on an equal basis and irrespective of their nationality or administrative status, and that school attendance is obligatory until children reach the age of 16 years old. The Committee takes note of the State party's argument that the refusal to enrol S.J. in school was related not to her national origin or administrative status but to the fact that it had not been proven that she actually lived in Melilla (see paras. 4.11–4.13 above) for purposes of her application for the 2020/21 academic year, and that she was over the age of compulsory education for purposes of admission to school for the 2021/22 academic year. The Committee also notes the State party's claim that S.J. was not given a place in the first year of the baccalaureate programme because she was over the age of compulsory education and unable to provide any proof of her previous studies (see para. 4.8 above). However, the Committee again takes note of the author's argument that the facts that prompted the complaint were the refusal to enrol S.J. for the 2020/21 academic year, during which she was 15 years old and therefore still of compulsory school age. The Committee further notes the author's argument that the documentation provided was sufficient to prove that the family was actually living in Melilla since she submitted the same documentation with the application for the 2021/22 academic year when the younger brother was given a place in school (see para. 5.2. above). The Committee also notes the author's argument that, despite the official recognition contained in national legislation, the facts reveal that, in practice, S.J., like other children with an irregular administrative status living in Melilla, faces obstacles that prevent her enrolment (see para. 5.3 above). The Committee takes note of the author's argument that, had S. J. been given a place for the 2020/21 academic year, she would have been able to remain in school for post-compulsory education in subsequent years (see para. 5.4).

7.6 The Committee recalls that article 2 of the Convention explicitly requires States parties to respect and ensure the rights set forth in the Convention, including the right to education. For this reason, the Committees has strongly urged States to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented children, from registering at schools and educational institutions.[16]

7.7 The Committee takes note of the State party's argument that S.J.'s school enrolment application for the 2021/22 academic year was refused because proof that she was living in Melilla was not provided (see para. 4.13 above). The Committee recalls that, as a general rule, it is for national bodies to examine the facts and evidence and to interpret domestic law, unless such examination or interpretation is clearly arbitrary or amounts to a denial of justice.[17] However, in the case at hand, the Committee is of the view that the documents furnished by the author when applying for S.J.'s enrolment constitute, as a minimum, sufficient evidence of her residence to give rise to an obligation on the part of the State party to proactively conduct the necessary checks to confirm her actual residence.[18] The Committee notes that the State party confirmed the family's actual residence on an unspecified date between 15 June 2021 and the beginning of the 2021/22 academic year, and that, as a result of this confirmation, S.J.'s younger brother was given a place in school for the 2021/22 academic year. The Committee is of the view that, in addition to being required to immediately enrol the children upon confirmation of their actual residence in Melilla, the State party should have taken all the steps necessary to confirm their actual residence in an

[15] Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999), para. 13.

[16] 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) (2017), para. 60.

[17] See, inter alia, *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; and *Navarro Presentación and Medina Pascual. v. Spain* (CRC/C/81/D/19/2017), para. 6.4.

[18] See *A.E.A. v. Spain* (CRC/C/87/D/115/2020 and CRC/C/87/D/115/2020/Corr.1), para. 12.7; and *A.B.A. et al. v. Spain* (CRC/C/91/D/114/2020, CRC/C/91/D/116/2020, CRC/C/91/D/117/2020 and CRC/C/91/D/118/2020), para. 10.6.

expeditious manner. In the cases at hand, the Committee cannot consider a period of more than 12 months to be a reasonable time period for the fulfilment of this obligation. The Committee also takes note of the author's claim that the same documentation was submitted for the 2021/22 academic year, and that on this occasion it was considered sufficient to prove actual residence. In the absence of any further explanation from the State party as to why the family's actual residence was considered to have been proven for the 2021/22 academic year but not for the previous academic year, or why the State administration took between 13 and 16 months to confirm the family's actual residence, and because this delay excluded S.J. definitively from the State party's education system, including post-compulsory secondary education, the Committee considers that S.J.'s right of access to education under article 28 of the Convention has been violated.

7.8 With regard to the second question to be decided, that is, whether the refusal to give S.J. a place in school constituted discriminatory treatment under article 2 of the Convention, the Committee recalls that the discrimination prohibited under article 2 may be overt or hidden.[19] This means that discrimination can be *de jure* or *de facto* and also direct or indirect.[20] The Committee considers that the prohibition of discrimination applies in both the public and private spheres and that a violation of article 2 may result from an apparently neutral rule or measure that is devoid of any discriminatory intent but nonetheless has a discriminatory effect.[21] However, not every distinction, exclusion or restriction based on the grounds listed in the Convention constitutes discrimination, provided that it is based on reasonable and objective criteria that are a necessary and proportionate means to pursue an aim that is legitimate under the Convention.[22]

7.9 Once again, the Committee notes that, although the State party itself recognizes that all children living in Spain have an unrestricted right to education, the author has shown that, in practice, she encountered obstacles to enrolling S.J. in school. The Committee considers that the author has shown how, in practice, the application of administrative requirements for access to public education disproportionately affects[23] children who, like S.J., are irregular residents in Melilla (and therefore non-nationals) and face undue delays to their schooling because all measures necessary to confirm the place where they are actually living have not been carried out in an expeditious manner. Thus, in the case in hand, the facts reveal, at the very least, indirect, de facto differentiation based on the irregular administrative status of S.J. and, by extension, her national origin. The Committee must then determine whether the application of these administrative requirements, which result in de facto and indirect differentiation, was in accordance with the criteria described in the previous paragraph.

7.10 The Committee recalls that the State party's legitimate interest in ensuring that applicants for schooling are actually resident in Spain cannot entail the de facto exclusion from the education system, for a prolonged period of time, of children who, like S.J., are in

[19] General comment No. 1 (2001), para. 10.

[20] *A.E.A. v. Spain*, para. 12.8; The Committee has on several occasions highlighted the need to combat de jure or de facto and direct and indirect discrimination, including in relation to access to education. See CRC/C/AUT/CO/3-4, para. 25; CRC/C/VNM/CO/3-4, para. 29, and CRC/C/THA/CO/3-4, para. 33. See also the various international instruments that recognize as discrimination any distinction that has the purpose (aim) or effect (result) of nullifying or impairing the recognition, enjoyment or exercise of human rights on an equal footing: United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education, art. 1; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Convention on the Rights of Persons with Disabilities, art. 2; Committee on the Rights of the Child, general comment No. 18 (1989), para. 7; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7 (which mentions both direct and indirect discrimination).

[21] See, *mutatis mutandis*, *F.A. v. France* (CCPR/C/123/D/2662/2015), para. 8.11; and *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

[22] See, inter alia and *mutatis mutandis*, *Genero v. Italy* (CCPR/C/128/D/2979/2017), paras. 7.3–7.6; *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3; *Yaker v. France* (CCPR/C/123/D/2747/2016), paras. 8.14–8.17; and *Hebbadj v. France* (CCPR/C/123/D/2807/2016), para. 7.14.

[23] See, *mutatis mutandis*, *Genero v. Italy*, para. 7.4.

an irregular administrative situation.[24] The Committee considers that the State party has not duly demonstrated that the manner in which the administrative requirements have been applied is necessary and proportionate in the light of the legitimate interest pursued, particularly in the light of the serious impact of S.J.'s prolonged exclusion from the public education system. The Committee thus concludes that the application of the administrative requirements imposed for access to public education, which resulted in S.J.'s definitive exclusion from the education system, constituted a violation of her right to non-discrimination under article 2 of the Convention, read in conjunction with article 28.

7.11 The Committee is also of the view that the failure to consider S.J.'s best interests in the context of the domestic proceedings in turn resulted in a violation of her rights under article 3 of the Convention, read in conjunction with articles 2 and 28.

7.12 Lastly, the Committee notes the State party's failure to adopt the interim measures requested by the Committee on 1 December 2021, consisting in S.J.'s immediate admission to school. The Committee recalls that it has repeatedly found in its jurisprudence that, by ratifying the Optional Protocol, States parties assume an international obligation to take the interim measures requested under article 6 of the Optional Protocol, as such measures, by preventing irreparable harm while a communication is pending, ensure the effectiveness of the individual communications procedure.[25] Consequently, the Committee considers that the failure to adopt the interim measures requested was itself a violation of article 6 of the Optional Protocol.

8. The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 28, 2, read in conjunction with article 28, and 3, read in conjunction with articles 2 and 28, of the Convention, and of article 6 of the Optional Protocol.

9. The State party should therefore provide S.J. with effective reparation for the violations suffered, which includes adequate compensation as well as taking proactive steps to help her to catch up with her education and reach the same school level as her peers as soon as possible. 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, when local administrative and judicial authorities receive applications for a child to be enrolled in school in Melilla which indicate that the child lives in the city, they take effective, affirmative and expeditious steps to confirm the child's residence;

(b) Ensure that, when the actual residence of a child requesting to be enrolled is confirmed, the local administrative and judicial authorities enrol him or her immediately;

(c) Ensure that, when there is a dispute over a child's right to education, there is an effective and accessible remedy that may be provided promptly and expeditiously, and that both the children and their parents or guardians have full knowledge of this remedy and the related procedures;

(d) Ensure recognition of the fact that the age at which compulsory education ends does not constitute a limit on the State's obligation to guarantee the right to education;

(e) Provide specialized training for judges and administrative staff on the implementation of the Convention, and, in particular, on the present Views.

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 it has taken to give effect to the present Views. The State party is requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party is also requested to publish the present opinion and disseminate it widely.

[24] See *A.B.A. et al. v. Spain*, para. 10.9.

[25] See, inter alia, *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.11.

Annex

[Original: English]

Joint opinion of Committee members Mary Beloff, Philip Jaffé and Benyam Dawit Mezmur (partly dissenting)

1. The main finding of a violation, made by the majority of the Committee, is agreeable to us. It is critical that children residing in Melilla in an irregular administrative situation have access to education without discrimination. It is also important that the determination of residence status is carried out within a reasonable period, and such processes should make children's best interests a primary consideration. Had the State party implemented the interim measure requested by the Committee, the violations of the rights of S.J. would have at least been minimized.

2. We take exception to one seemingly minor but important aspect of the recommendations that the majority of the Committee proffers, where the State party is being asked to provide specialized training for judges and administrative staff on the implementation of the Convention (para. 9 (d) of the Views). We observe some limitations here.

3. Nothing in the documentation has convinced us that it is a lack of training or awareness among judges that has led to the violation of the child's rights to education in this case. In fact, given the relative repetitive nature of cases (see, for example, *A.E.A. v. Spain* and *A.B.A et al. v. Spain*) before judges (and administrative staff) that allege comparable facts, progress in handling the right to education claims of children in Melilla has been made in the State party in recent years. If such a recommendation were to stand – and we do not believe there is merit for it to stand – a more specific geographical focus than one that seems to broadly lump together judges throughout the State party is warranted.

4. In addition, the main difference between the individual complaints mechanism and the State party reporting process that leads to the issuance of concluding observations is the opportunity to provide, in the context of the former, more tailor-made and focused recommendations primarily aimed at providing a reparation to a child or children whose rights are violated. The current overbroad recommendation under paragraph 9 (e) is more akin to a concluding observation than a recommendation under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

5. Finally, the overbroad nature of this recommendation will also face an impractical negative cascading effect at the stage of follow-up by the Committee. For example, the level, type and number of training sessions for judges that would be sufficient for the State party to comply with the recommendation is vague at best, and impossible to follow up on meaningfully at worst.