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Communication 11/2017: N.B.F. v Spain

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Subject Matter: Age assessment procedure of an unaccompanied child.

CRC Provisions: art. 3, art. 8, art. 12, art. 18(2), art. 20, art. 27, art. 29.

CRC OP3 Provisions: art. 6, art. 7(c), art. 7(e), art. 7(f).

Other relevant communications: N/A

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(I) Outline of the Substantive Issues

The communication was brought against Spain by N.B.F., a citizen of Cote d’Ivoire who had arrived in Spain irregularly and claimed to be a minor. It concerns whether an age determination procedure the author was subjected to in order to establish his age violated his rights under the CRC. The communication primarily examines the claim that the procedure did not take into the best interests of the child and the failure of the Spanish authorities to appoint a guardian or representative.

When intercepted by the Spanish National Police on 26 January 2017, N.B.F. was without identity documents, and stated that he was born on 26 March 2000. Where there is an absence of identity documents or other appropriate means to make an informed estimate of age, States must carry out a comprehensive assessment of the child’s physical and psychological development.¹ On 27 January

¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 4.

2017, the Office of the Prosecutor for Minors of the Provincial Court of Granada ordered the use of osteometric tests to determine the age of the author. The test conducted was an x-ray of the left hand, the results of which indicated that the author was over 19 years old. The author stated that there was neither any record of his consent to this procedure, nor of documents informing him of the consequences of such consent in a language that the author could understand.

The Spanish authorities and the author disputed the application of the age determination procedure relied upon. The radiological test based on the Greulich and Pyle Atlas was stated by the Spanish authorities to be an objective test, which was undertaken by specialised medical professionals under judicial supervision to provide an assessment of the author’s age in the absence of the provision of any other evidence by the author. The author argued that the Greulich and Pyle method is contested as a means for determining the age of an individual. It was noted that bone and chronological age do not necessarily coincide, due to there being factors that influence the growth and development of a person, such as genetic, pathological, and nutritional factors, with a range of studies suggesting that socioeconomic factors also have an impact on an individual’s bone development, and that the margin of error for the method should be indicated in the resulting medical reports. N.B.F. claimed that being declared an adult on the basis of an inappropriate methodology for determining the chronological age of a young person was in violation of the best interests of the child principle under Article 3 (1) CRC.

The Office of the Prosecutor for Minors adopted a decree determining that the author was of legal age as a result of the osteometric examination. The author was subsequently sent to a detention centre for foreigners for a maximum of 60 days pending the execution of a return agreement. Transferred to the detention centre for foreigners in Barcelona, the author restated that he was a minor. The centre sent a fax to the Juvenile Section of Barcelona’s Provincial Prosecutor’s Office, but the author states that he never received a response to this. The failure of the Spanish authorities to appoint a representative to defend his interests as a minor throughout this process was claimed by the author to be a violation of his right to be heard under Article 12 CRC.

The author posited that the best interest of the child must prevail throughout the duration of the age determination process, and that he had a right to the presumption of minority that was not respected by Spanish authorities. As part of this right, the author argued that unaccompanied foreign children should be placed with child protection services before and during the age determination procedure. The non-recognition of the author’s minority was submitted as being a violation of the right to identity as per Article 8 CRC. Further, the author proposed that Spain should recognize all rights that should correspond to him as a child, including the right to a legal representative and to education.

Spain argued that the communication should be considered inadmissible for failing to exhaust domestic remedies as, while the provisional determination of age is not judicially reviewable, the Public Prosecutor’s Office may agree to a review of the age when new evidence is presented. Equally, Spain argued that a minimum criterion for the admission of communications under the CRC OP3 must be that there is evidence that the author is a child.

(II) Findings

On the admissibility of the complaint, the CRC Committee stated that there is no evidence in the file that proved that the author was an adult at the moment of arrival in Spain. On the argument from Spain that the applicant did not exhaust his domestic remedies, the CRC Committee decided that remedies that are excessively prolonged or that do not suspend the execution of the expulsion order cannot be considered effective., as per article 7 (e) of the CRC OP3.

The CRC Committee emphasised the fundamental importance of age determination considering that this determines whether the person qualifies as a child for the national protection and the protection of the CRC, or is excluded from this protection. During the age determination process, the CRC Committee determined that a person should be given the benefit of the doubt and be treated as a child.² The CRC Committee referred to its Joint General Comment 23 (with the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families), in which the ‘vital importance’ of granting the benefit of the doubt during an age determination process was emphasised.³

The CRC Committee noted that Spain argued that the author clearly appeared to be of legal age. Referring to its General Comment 6, the Committee remarked that both the psychological maturity as well as the physical appearance of the individual must be taken into account. In the case at hand, the author was subjected to a medical test consisting of an x-ray of his left hand and a supposed physical examination. No other complementary (psychological) test was conducted and the author was not interviewed during the age determination process. Based on the medical test, Spain determined that the author was of legal age. In light of information suggesting that this method of age assessment lacks precision and has a wide margin of error, the CRC Committee noted that it is not appropriate as the only method to determine age.⁴

The author stated that he was not assigned a guardian or representative during this process. The CRC Committee stated that State Parties should always appoint a qualified legal representative with adequate language skills for all young people who claim to be minors as this is an essential guarantee for the respect of the best interests of the child and to ensure the right to be heard. Failure to appoint a guardian or representative amounts to a violation of Articles 3 and 12 CRC, as age determination is the “entry point” for the application of the CRC itself. Accordingly, the CRC Committee held that the age determination process conducted by Spain did not have the necessary guarantees to protect the author’s rights under the Convention and that therefore Spain acted in violation of Articles 3 and 12 CRC.

During the proceedings, Spain had furthermore argued that transferring the author to a reception centre for children would pose a serious risk for the children in these centres. The CRC Committee was of a different view and considered that the greater risk would be to send a potential child to a reception facility for adults.

The CRC Committee concluded that Spain is under the obligation to prevent similar violations in the future. In this regard, Spain has to ensure that age determination procedures for ‘possible’ unaccompanied children are consistent with the CRC and that qualified and free representation is quickly provided. The CRC Committee did not offer any remedies to the author in this particular case. In the individual opinion⁵ of CRC Committee member Mikiko Otani, she emphasised that the CRC Committee seems to confuse the issue of whether the age determination procedure in Spain in

² Para 12.3.

³ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 4; it is noted that the text cited by the Committee is an inaccurate rendering of this paragraph.

⁴ Para 12.6.

⁵ This was the first time a Committee member appended an individual opinion to a Views, which is made possible under Rule 24 of the Rules of Procedure.

general is in accordance with the safeguards provided for by the Convention and whether the treatment of the individual author is in accordance with the CRC. In her view, the decision of the CRC Committee insufficiently took into account that the author has not provided any evidence proving that he was a child and that he did not give any reasons why he could not provide such evidence.

(III) Commentary

The Views of the CRC Committee in *N.B.F* bring to light several notable questions that surround age assessment procedures and its interaction with children’s rights. It is for this reason that the conclusions are intriguing and frustrating in equal measure. While it is clearly restated that representatives should be appointed for an individual during an age assessment procedure, no guidance is provided as to whether the use of radiological medical tests are, in themselves, a violation of the CRC. Equally, while it is welcome that the CRC Committee considers that an individual should be treated as a child throughout an age assessment procedure, and thus the best interests of the child should be a primary consideration throughout the procedures, the rationale for deciding this perhaps errs in attributing this being a function of the ‘principle’ of the ‘benefit of the doubt’, rather than relying on the presumption of minority as found under Joint General Comment 23 which suggests that the presumption of minority flows from the application of the best interests of the child.⁶

The CRC Committee holds that the domestic remedies against deportation should provide for suspensive effect. The procedural requirement that available remedies against a removal order are only effective if they provide for automatic suspensive effect is apparent from the case law of the European Court of Human Rights (ECtHR) in deportation cases.⁷ In its views in *D.D. v. Spain*, the CRC Committee also held that a remedy should be effective in order to qualify as a domestic remedy that needs to be exhausted pursuant to Article 7(e) of the CRC OP3.⁸ This is in line with the position of the Human Rights Committee⁹ and the Committee Against Torture.¹⁰

The conclusion of the CRC Committee that a medical test consisting of an x-ray of the left hand and a supposed physical examination is not an appropriate procedure to assess the age of an asylum seeker who claims to be a minor is not further documented in the views of the Committee in *N.B.F*. Instead, the CRC Committee focusses on the appointment of a representative. More guidance on why radiological age assessment in combination with a physical examination is not an appropriate method and whether this in itself is in violation of the CRC would have contributed to the implementation of the CRC on the domestic level in answering the question of whether medical tests, provided that a qualified representative is appointed, can amount to an appropriate age assessment method.¹¹

⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para 32(h).

⁷ See *Gaberamadhien v France* App no 25389/05 (ECHR, 26 April 2017) para 66; *De Souza Ribeiro v France* [2012] ECHR 2066, para 82.

⁸ *D.D.* [2019] CRC/C/80/D/4/2016 (Committee on the Rights of the Child), para 13.6.

⁹ Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 415.

¹⁰ *ibid* 518.

¹¹ In this regard the Committee was more explicit in Joint General Comment 23, in which it held that “States should refrain from using medical methods based on, *inter alia*, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes.” See, UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State*

Medical tests such as radiological age assessment are widely used in asylum law in the EU Member States.¹² However, the use of such medical tests is controversial as it is argued that radiological analysis is not a suitable method to assess the age of asylum seekers due to its claimed inaccuracy, wide margins of error, and potential for being traumatic.¹³

Referring to its General Comment 6 on the treatment of unaccompanied minors,¹⁴ the CRC Committee held that in age assessment procedures, not only the physical appearance of the applicant must be taken into account, but also his or her psychological maturity. The assessment itself should be conducted in a scientific, safe and gender-sensitive manner, in which the risk of a violation of the physical integrity must be avoided. In its General Comment, the CRC Committee further states that the benefit of doubt must be accorded to the individual in the case of remaining uncertainty after assessment, meaning that if there is a possibility that the individual is a child, then the individual should be treated as such.¹⁵ The use of radiological methods to estimate the age of unaccompanied minor asylum seekers is widely criticised.¹⁶ The reason that radiological age assessment methods are not appropriate in the context of age assessment for unaccompanied asylum seekers is that its results are not reliable. The appointment of a guardian during the age assessment procedure does not remedy this. By emphasising the unreliability of radiological age assessment methods, the CRC Committee could have provided more guidance on whether the use of such methods is compatible with the CRC.

Instead, the CRC Committee focuses on the appointment of a representative for the unaccompanied asylum seeker claiming to be a minor as a procedural safeguard to guarantee that the best interests of the child are taken into account in the age assessment procedure. In its General Comment 6, the CRC Committee already established that States Parties should appoint a guardian or adviser to secure proper representations of the best interests of the child.¹⁷ The focus on the procedural guarantee of the appointment of a representative in *N.B.F.* is not surprising in this light. The EU Asylum Procedures Directive¹⁸ prescribes that the EU Member States shall appoint a representative to an unaccompanied minor asylum seeker as soon as possible.¹⁹ However, the Member States may refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of 18 before a

obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 4.

¹² European Asylum Support Office (EASO), ‘Age Assessment Practice in Europe’ (2013) 88–89.

¹³ See, Gregor Noll, ‘Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum’ (2016) 28 *International Journal of Refugee Law* 234; and, UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 4. Recently, the French Constitutional Court has accepted that radiological analysis is used in the age assessment procedure for unaccompanied asylum seekers. See Constitutional Court of France, *Décision n° 2018-768 QPC du 21 mars 2019*.

¹⁴ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6.

¹⁵ *ibid* para 31.

¹⁶ See, for an overview of the criticism of using radiological methods for age assessment, Noll (n 9).

¹⁷ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para 33.

¹⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (EU Asylum Procedures Directive).

¹⁹ Article 25(1) EU Asylum Procedures Directive

decision at first instance is taken.²⁰ From the views of the CRC Committee in its General Comment 6 and the *N.B.F.* case, it can be distilled that refraining to appoint a representative to unaccompanied minors who will in all likelihood reach the age of majority before the first instance decision on the asylum claim is in violation of Article 3 (1) and 12 CRC.²¹

The last point we would like to address in this commentary is the issue of the application of the benefit of the doubt principle in age assessment procedures.

Firstly, with regards to the benefit of the doubt leading to the presumption of minority. It is perhaps the case that there is some remaining confusion about how children’s rights apply to 'contested' children in the context of age assessment procedures. The CRC Committee asserts that while age assessment procedures are continuing “*the person should be given the benefit of the doubt and treated as a child. Accordingly, the Committee considers that the best interests of the child should be a primary consideration throughout the age determination process*”.²² This suggests that the application of the benefit of the doubt is the gateway to taking into account the child’s best interests. This stands in opposition to the guidance provided in the CRC Committee’s Joint General Comment 23 that suggests that contested children in migration should be presumed to be a child as a result of the application of the best interests of the child, rather than, as the Committee claims in *N.B.F.*, a result of the benefit of the doubt.²³ While it is crucial that individuals are provided with the relevant safeguards pending their confirmation as children in order to prevent violations of their rights, the views of the CRC Committee in *N.B.F.* suggests that it may be the case that this presumption is not currently understood to flow from a common legal base. Interestingly, the CRC Committee itself apparently does not presume that the complainant was a minor at the moment that he was arrested by the Spanish authorities. As pointed out by CRC Committee member Mikiko Otani, in her individual opinion, this would have resulted in a remedy for this individual applicant.

Secondly, regarding the benefit of the doubt, two further issues must be distinguished. The first issue is whether the benefit of the doubt should be respected during the age assessment process. The CRC Committee is clear on this issue. During the age assessment process, the person should be given the benefit of the doubt and be treated as a child. The second issue is whether the benefit of the doubt should be respected after the age assessment is conducted when there are still doubts regarding the age of the person concerned. On this issue, the CRC Committee concludes that the age assessment methods used by Spain were not appropriate and that Spain should have provided for representation of the complainant. However, the Committee does not further elaborate on the factors determining whether the State should have doubts regarding the minority of an asylum seeker.

²⁰ Article 25(2) EU Asylum Procedures Directive

²¹ Ciara M Smyth, *The Common European Asylum System and the Rights of the Child : An Exploration of Meaning and Compliance* (Uitgeverij Boexpress 2013) 144. See also UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 3.

²² *N.B.F. v. Spain*, para 12.3.

²³ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para 32(h).

Focusing on 'doubt' as a prerequisite for the appointment of a representative and for conducting age assessment is confusing. It creates the legal construct of doubt, which is isolated from the actual chronological age of an unaccompanied asylum seeker. In focusing on doubt, it gives the discretion to national authorities on holding that it has no doubts about the question whether an applicant is a minor. This development is currently taking place in the implementation of the Dublin Regulation.²⁴ An example of this is the *O.Y.K.A. v. Denmark* views of the Human Rights Committee.²⁵ In this case, an asylum seeker had provided a different date of birth in Denmark than was registered in Greece, the first Member State of entry into the EU. The Human Rights Committee ruled that Denmark should have conducted age assessment despite the fact that the applicant himself was inconsistent about his date of birth. In the EASO Practical Guide on Age Assessment, the distinction is made between 'simple doubts' and 'substantiated doubts'. It is held that "[t]he need for age assessment should be duly justified based on the substantiated doubts on the stated age, resorted to only in cases where there is an absence of evidence and/or in cases where several elements of evidence gathered contradict the applicant's claimed age."²⁶ According to the EASO Practical Guide, the claimed age can be accepted without the need for age assessment based on information from other databases, statements from family members and first estimations of physical appearance.²⁷ Only when 'substantiated doubts' are presented, an age assessment process might be needed in order to estimate the age of the applicant, according to the EASO Practical Guide.²⁸ When there is evidence that an applicant has reached the age of majority, for instance because the applicant claimed to be an adult in another EU Member State, this may result in the conclusion that there are no doubts regarding the age of the applicant, even though there might be reasons to doubt the validity of the registered age in the other Member State.²⁹ Instead of focusing on doubt as a legal concept in the age assessment process, States should apply a reliable approach to age assessment to estimate the age of asylum seekers.

The CRC Committee found another violation of Article 3(1) CRC in a case concerning the age determination process of an unaccompanied minor in Spain. In *J.A.B. v Spain*, the CRC Committee held that the process of determining the age of the author who claimed to be a child did not have the necessary guarantees.³⁰ The Committee emphasised that the Spanish authorities should have given more consideration to the official and original identity documents and should have allowed the author's representative to accompany him during the age determination procedure. Interestingly, the CRC Committee also held that the attribution of an incorrect date of birth, different than the one stated on the author's official identity documents, amounted to a violation of the individual's right to preserve his or her identity, laid down in Article 8 CRC. The fact that the author in the *J.A.B. v Spain* case was denied special protection as a minor, even after submitting his identity documents, was found to be in violation of Articles 20(1) and 24 CRC.

The only clear conclusion that can be drawn from the views of the CRC Committee in *N.B.F.* in this regard is that an x-ray of the left hand in combination with a physical examination is not an appropriate

²⁴ See for an analysis of the Dutch practice, Mark Klaassen and Germa Lourens, 'Gestelde Alleenstaande Minderjarige Vreemdelingen En de (Automatische) Erkenning van Leeftijdsvaststelling in Een Andere Lidstaat' [2018] *Journaal Vreemdelingenrecht* 45.

²⁵ *O.Y.K.A.* [2017] CCPR/C/121/D/2770/2016 (Human Rights Committee).

²⁶ European Asylum Support Office, 'EASO Practical Guide on Age Assessment, Second Edition' (2018).

²⁷ *ibid.*, 23.

²⁸ *ibid.*

²⁹ For instance, asylum applicants might be instructed to provide a wrong date of birth in the assumption that this would increase the chance to be able to transfer to another EU Member States to apply for asylum.

³⁰ *J.A.B. v Spain*, ComRC 9 July 2019, Communication No 22/2017, UN Doc. CRC/C/81/D/22/2017.

method. The result of applying an unreliable method of age assessment is that there must be doubts regarding the age of the applicant, a situation in which the applicant should be granted the benefit of the doubt and treated as a minor. The views of the CRC Committee in this case confirm this, but do not provide further guidance on the age assessment method itself.

Suggested citation:

John Dorber & Mark Klaassen, *Communication 11/2017: N.B.F. v. Spain*, Leiden Children's Rights Observatory, Case Note 2019/4, Leiden Law School, 24 September 2019.