



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. 80/2019*, **, ***

<i>Communication submitted by:</i>	A.M. (represented by counsel, Guido Ehrler)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Switzerland
<i>Date of communication:</i>	3 April 2019 (initial submission)
<i>Date of adoption of Views:</i>	21 May 2024
<i>Subject matter:</i>	Age assessment procedure in respect of an unaccompanied minor; return to Sweden
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Best interests of the child; right of children to be heard in any judicial or administrative proceedings affecting them
<i>Articles of the Convention:</i>	3 (1) and (3) and 12
<i>Articles of the Optional Protocol:</i>	None

1.1 The author of the communication is A.M., a national of Afghanistan born in 2000.¹ He claims that the State party's authorities have violated 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 14 September 2018, the author applied for asylum in Switzerland. He claims that, in this context, the Swiss authorities arbitrarily declared him to be an adult, in particular by ignoring the result of an age assessment carried out in Sweden, according to which he was born on 2 November 2000, and by hearing him in this connection without a representative. On 9 October 2018, the State Secretariat for Migration dismissed the author's asylum

* Adopted by the Committee at its ninety-sixth session (6–24 May 2024).

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

*** Pursuant to rule 8 (1) (a) of the Committee's rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Philip Jaffé did not participate in the examination of the communication.

¹ On 2 November 2000, according to the Swedish authorities, or on 1 January 2000, according to the Swiss authorities.



application on the grounds that he was born on 1 January 2000 and was therefore an adult when he submitted his application. The Swiss authorities took the view that Sweden, whose authorities had processed and rejected his initial asylum application in Europe, was responsible for handling his case under the Dublin III Regulation.² On the same day, Sweden agreed to take the author back into its care. On 8 November 2018, the Federal Administrative Court rejected the author's appeal. On 29 August 2019, the State Secretariat dismissed the author's request for re-examination of the decision of 9 October 2018, as he had not paid the applicable fee in advance.

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

1.4 On 31 May 2021, at its eighty-seventh session, the Committee examined the admissibility of the communication.³ It concluded that the communication was admissible *ratione personae* under article 7 (c) of the Optional Protocol. The Committee considered that the State party's obligations under the Dublin III Regulation and its argument that the author was trying to have the asylum application that he had submitted in Sweden re-examined did not demonstrate that the communication was inadmissible. Lastly, the Committee noted that all the provisions of the Convention were justiciable under the Optional Protocol, in line with the protection obligations of States parties, and that the author could therefore invoke article 3 of the Convention before the Committee. Accordingly, the Committee declared the communication admissible insofar as it raised issues under articles 3 (1) and (3) and 12 of the Convention. For more information on the facts, the complaint, the parties' observations and comments and the Committee's deliberations, see the decision on admissibility adopted by the Committee.

1.5 On 6 October 2022, the Committee informed the parties of its decision to reject the State party's request to suspend consideration of the communication pending the judgment of the Federal Administrative Court on the author's appeal against the decision of the State Secretariat for Migration of 25 June 2021.

State party's observations on the merits

2.1 In its comments of 24 January 2023, the State party points out that, in his request for re-examination of 3 May 2021, the author asserts that the present proceedings before the Committee could last for several more years, which would be irreconcilable with the objective of the Dublin III Regulation of determining as quickly as possible the State responsible for processing a given asylum application. The author therefore asked the State Secretariat for Migration to apply the sovereignty clause of article 17 (1) of the Dublin III Regulation and to examine his asylum application on the merits. On 25 June 2021, the State Secretariat for Migration rejected that request on the grounds that no developments that might justify a re-examination had taken place since the author had submitted his previous request to that effect. The State Secretariat emphasized that it was a contradiction in terms to, on the one hand, oppose, by means of the present communication, when the lengthiness of the associated proceedings is well known, the removal of the author to the State which, under the Dublin III Regulation, is responsible for examining the grounds for asylum, and then, on the other hand, argue that the procedure related to the Dublin III Regulation is taking longer than expected and that, owing to the lengthiness of the associated proceedings, responsibility for examining the asylum application must be transferred to the State which was hitherto not responsible for doing so. The State Secretariat pointed out that the procedure related to the Dublin III Regulation was based on the principle that responsibility for examining asylum applications must be assigned to a State according to clear criteria, that it is not for

² 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.

³ *A. M. v. Switzerland* (CRC/C/87/D/R.80/2019).

asylum-seekers to choose this State themselves, and that the author has known since the initial dismissal of his application that he would have to return to Sweden. On 29 June 2021, the author appealed this decision before the Federal Administrative Court. At the time of submission of the State party's comments, this appeal was still pending.

2.2 The State party asserts that it has not violated the author's rights under article 3 of the Convention. It notes that the present communication contains no new information regarding the matter of determining the author's age as it pertains to the appeal that he submitted to the Federal Administrative Court against the decision of the State Secretariat for Migration of 9 October 2018. To determine whether an asylum-seeker is a minor, the domestic authorities first rely on any authentic identity documents submitted and, if none exist, on the conclusions that they draw from a hearing focused on the applicant's situation in his or her country of origin, his or her family situation and schooling, and even on the results of any medical tests carried out to determine his or her age. Thus, in the absence of any documents, an overall assessment is made of all other relevant details. However, the onus is on the author to make the fact that they are a minor plausible. Furthermore, while article 17 of the Asylum Act (No. 142.31 of 26 June 1998) allows the State Secretariat to arrange an expert assessment to determine the age of an asylum-seeker who is allegedly a minor, this provision gives it a wide margin of appreciation and applies only in cases where the authority has doubts.

2.3 The State party notes that, in the present case, on 24 September 2018, the State Secretariat for Migration granted the author a hearing regarding his age. After examining the arguments and documents submitted, the State Secretariat concluded that the author had failed to make the fact that he was a minor plausible. First and foremost, he had not provided any identification documents. Subsequently, both the State Secretariat and the Federal Administrative Court had ruled on the author's arguments and explained in detail why they had determined his date of birth to be 1 January 2000. They noted that the author had indicated that he did not know his exact date of birth. When applying for asylum in the State party, the author stated that he was born on 2 November 2000. During questioning, however, he stated that he was born in 1997. He later claimed to have been born in 1379 according to the Islamic calendar, before stating that "I am not very sure", and that "in Sweden, I only indicated the year, that is to say, 2000". Lastly, the author referred to the date of birth recorded by the Swedish authorities – 2 November 2000 – stating that the assessment of his age carried out in Sweden had revealed that he was still a minor when he applied for asylum in that country. The author indicated that the Swedish authorities had chosen 2 November 2000 as his date of birth, as this was the day preceding his asylum application of 3 November 2015. According to the domestic authorities, the date was chosen arbitrarily. The Federal Administrative Court also noted that there was nothing in the X-ray examinations carried out in summer 2017, which had showed only that he was a minor at the time, that could help the author's cause. No examination method mentioned by the author made it possible to determine, to the nearest month or even day, his date of birth. Since the burden of proof rests with the author, and in view of all the circumstances, the Court held that it was appropriate to assume that the author was an adult.

2.4 The State party maintains that this assumption is supported by the Swedish authorities' agreeing to take responsibility for the author. In the corresponding request of 3 October 2018, the State Secretariat for Migration noted that it considered the author to be an adult. Under article 8 (4) of the Dublin III Regulation, the Swedish authorities would have had to reject the request if they had continued to consider the author a minor. The acceptance by Sweden of the request leads to the conclusion that it concurred with the Swiss authorities' assessment and questioned whether the author was a minor. Given the contradictions in the author's statements and the random nature of the date of birth used by the Swedish authorities, the State Secretariat did not have any doubts that the author was an adult. There was therefore no reason for it to request the age assessment undergone by the author in Sweden or to carry out its own age assessment. The Federal Administrative Court emphasized that the State Secretariat had not violated any provision of national law by declining to arrange such an expert assessment. The State party considers that the domestic authorities were justified, within the framework of an overall assessment, in using 1 January 2000 as the author's date of birth and that he could legitimately be considered as being over 18 years of age when he arrived in Switzerland. The State party is of the opinion that there is no remaining uncertainty

regarding his being an adult within the meaning of paragraph 31 (i) of the Committee's general comment No. 6 (2005).

2.5 The State party reiterates that it is obliged to apply the Dublin III Regulation. One of the objectives of the Regulation is to swiftly determine which member State is responsible for examining a given asylum application. It is not for asylum-seekers themselves to choose this State, as that responsibility is assigned to a State pursuant to clear criteria. Similarly, it is improper to re-submit an asylum application that has already been rejected in another State. Under article 8 (4) of the Dublin III Regulation, Sweden is the State responsible for the application for international protection submitted by the author on 3 November 2015. The latter had access to a complete asylum procedure in Sweden. As Sweden has agreed to take the author back into its care, the State party is no longer competent to examine his asylum application on the merits. According to the State party, the author cannot invoke his voluntary departure from Sweden to require the Swiss authorities to re-examine the grounds for his asylum.

2.6 The State party argues that it has not violated article 12 of the Convention. On 24 September 2018, the State Secretariat for Migration heard the author regarding his age. Since he was an adult, the domestic authorities had no reason to designate a trusted person to assist the author, as he could not rely on the specific provisions of the Dublin III Regulation or national law concerning unaccompanied persons, or on articles 3 and 12 of the Convention. In addition, the author had access to a full asylum procedure in Sweden, during which he was treated as a minor, was assisted by a trusted person and was able to appeal the decisions of the competent Swedish authorities.

Author's comments on the State party's observations

3.1 In his comments of 19 October 2023, the author notes that, in a judgment of 20 June 2023, the Federal Administrative Court rejected his appeal against the decision of the State Secretariat for Migration of 25 June 2021. The Court found that there were no humanitarian reasons for the State party to examine his asylum application on the merits, including the lengthiness of the present proceedings before the Committee. According to the author, since the State party continues to deny its responsibility for processing his asylum application, it is still in his best interests for the State party to determine whether he was a minor when he submitted his application.

3.2 The author notes that, at the hearing of 24 September 2018, he stated that he did not know his exact date of birth. He never attended school. As for the lack of documentation, the author refers to public sources according to which less than 10 per cent of the population of Afghanistan has an official birth certificate and one in four children across the world is not registered. According to the author, it is therefore critical that his not being in possession of identity documents not be taken to indicate that his statements are implausible or that he was an adult when he applied for asylum. The author notes that, in its decision on the admissibility of the present communication, the Committee stressed that the burden of proof should not rest solely with the author of the communication.

3.3 The author maintains that the State party's authorities declared him to be an adult by means of an arbitrary assessment, without taking sufficient account of his arguments, and assigned to him the "maximum" age without carrying out any checks whatsoever. The State party does not specify what the assessment of the evidence by the State Secretariat for Migration entailed or what steps were taken to establish his age or to invalidate the probative value of the age assessment conducted by the Swedish authorities. According to the author, the State party has not put forward any arguments to the effect that this expert assessment failed to meet the requirements of paragraph 31 (i) of the Committee's general comment No. 6 (2005). The author therefore considers the expert assessment to be conclusive. He fails to understand why the Swiss authorities have not applied domestic case law according to which expert age assessments have greater probative value when they are performed by a health professional, appear conclusive, are reasoned in an intelligible manner, are not contradictory and there is no concrete evidence to suggest that they are unreliable.

3.4 According to the author, his statements about his age are not implausible or contradictory. There is no evidence to suggest that he wished to pass himself off as a minor

in order to benefit from an asylum procedure in Switzerland. At the hearing, he stated that he was sent to a Qur'anic school at 9 years of age and attended it for four years until he left for the Islamic Republic of Iran, where he stayed for six months. He also stated that he was not yet 14 years of age when he left Afghanistan. According to the author, these statements are especially credible because they were not made in direct relation to the controversial question of his age. Based on his statements, the author was, at most, 14.5 years of age when he applied for asylum in Sweden on 3 November 2015. He was therefore born in 2001. This does not differ significantly from the outcome of the expert assessment carried out by the Swedish authorities using scientific methods, namely that he was born on 2 November 2000. The author denies that he claimed that his age had been determined arbitrarily in Sweden. His interpretation of the expert assessment is subjective and may not be accurate. The State party acknowledges that the author insisted that the expert assessment be recognized by its authorities, which he would not have done if he had considered that it had been conducted arbitrarily. He has consistently claimed to have been born in 2000. His claiming to have been born in 1997 at the hearing of 24 September 2018 was due to an error in converting from the Islamic calendar. According to the author, it is impossible to prove a person's exact date of birth using scientific methods.

3.5 According to the author, the Federal Administrative Court did not follow its own case law, according to which it accords greater probative value to analyses of bones in the hand if the alleged age is three years less than the permitted standard deviation of bone age. The age stated by the author and the age scientifically determined in Sweden by means of an analysis of bones in the hand and other forensic methods fall within the permissible range of three years. In another case, the Court had upheld the outcome of the age assessment performed by the State Secretariat for Migration, even though the Swedish authorities had concluded that the applicant was an adult.⁴ However, in the reverse case, where the applicant has been found to be a minor, the outcome of the Swedish age assessment is not taken into consideration. The author maintains that he has demonstrated that the age determined based on his statements was more accurate than that assigned to him by the State Secretariat. Since the domestic authorities failed to justify the derogation from the outcome of the Swedish age assessment and his statements were qualified as wholly implausible, the author refutes the assertion that a comprehensive assessment of the evidence took place.

3.6 The author asserts that the State Secretariat for Migration failed to inform the Swedish authorities of the evidence demonstrating that he is a minor. According to the information provided to the Swedish authorities, the burden of proof rests entirely with the author and, in case of doubt, the highest possible age limit, or the first day of the year of the applicant's birth, is applied systematically. However, in cases where an applicant might well be a minor, this is the exact opposite of what the needs of the child require. Instead, the lowest possible age limit must be applied if doubts remain, which is the case given the State party's position that the Swedish expert assessment is inconclusive. There is no evidence to suggest that the author was born on 1 January 2000, which is a date chosen totally at random. The reasons why Sweden agreed to take him back are unknown, and the State party cannot deduce anything from them to support its position. The procedure did not focus on the best interests of the child, but on his return to Sweden. The author is of the view that he did not commit an abuse of rights by submitting an asylum application in Switzerland, for which the State party is responsible under the Dublin III Regulation, since he was a minor when he submitted it.

3.7 The author considers that article 12 of the Convention was violated because he was a minor when he attended the hearing of 24 September 2018, which took place in the absence of a trusted person. The fact that he has already been the subject of an asylum procedure in Sweden is irrelevant.

⁴ See Federal Administrative Court, judgment F-5656/2018, 10 October 2018.

Issues and proceedings before the Committee

Consideration of the merits

4.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

4.2 The Committee must determine whether, in the circumstances of the case, the assessment of the author's age carried out under the procedure related to the Dublin III Regulation constitutes a violation of his Convention rights. In particular, the author claims that the domestic authorities failed to take his best interests into account during this procedure. Specifically, they dismissed his statements as implausible, disregarded the Swedish age assessment and did not give him the benefit of the doubt. Furthermore, he was not assisted by a representative or trusted person at the hearing of 24 September 2018.

4.3 The Committee considers that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child and, in the present case, to be treated as a child under the Dublin III Regulation. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights contained in the Convention flows from that determination. It is therefore imperative that there be due process in determining a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, 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.⁵

4.4 The Committee recalls that, in the absence of identity documents or other appropriate evidence, States, in order to make an informed estimate of age, should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner and should include interviews in a language that the child understands. Documents that are available must be considered genuine unless there is proof to the contrary, and statements by children must be given due consideration.⁶

4.5 The Committee also recalls that the burden of proof cannot 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.⁷

4.6 The Committee further recalls that the age assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child, giving due respect to human dignity and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.⁸

4.7 In the present case, the Committee notes that, in its decision of 9 October 2018, the State Secretariat for Migration concluded that the author was born on 1 January 2000, noting that he had not submitted any identity documents, that his statements about his date of birth were contradictory, that he had allegedly stated that the Swedish authorities had arbitrarily chosen 2 November 2000 as his date of birth, and that the Swedish authorities had accepted the State party's request to take the author back into their care. In addition, the Federal Administrative Court noted that the X-ray examinations carried out in Sweden in 2017 only

⁵ *N.B.F. v. Spain* (CRC/C/79/D/11/2017), para. 12.3; and *M.B. v. Spain* (CRC/C/85/D/28/2017), para. 9.8.

⁶ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 (2017) of the Committee on the Rights of the Child, para. 4; and *N.B.F. v. Spain*, para. 12.4.

⁷ *M.A.B. v. Spain* (CRC/C/83/D/24/2017), para. 9.2; and *M.B. v. Spain*, para. 9.2.

⁸ Committee on the Rights of the Child, general comment No. 6 (2005), para. 31 (i).

confirmed that the author was a minor at the time, and that none of the examination methods mentioned by the author allowed his date of birth to be determined to the nearest month or even day.

4.8 The Committee also notes the author's statement that he was a minor when he arrived in Switzerland and that, although he was unable to submit any evidence of 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 that established his status as a minor.⁹ The Committee notes that the State party's authorities ignored the content of this expert assessment and referred generally to an overall assessment of the author without delineating the specific elements of the assessment, in particular, the scientific basis for this conclusion. It further notes that, while the Federal Administrative Court emphasized that the author could not rely on previous X-ray examinations and that no examination method mentioned by the author allowed his exact date of birth to be determined, the authorities did not carry out a comprehensive assessment of the author's physical and psychological development, in accordance with the Committee's general comment No. 6 (2005). The Committee notes that the State party's authorities consequently took the position that the author was an adult and that it was for him to prove that he was a minor, thus placing the burden of proof entirely on the author. In addition, the Committee notes that the State party has questioned the author's statements but has not adduced any evidence to support its conclusion that he was an adult or that he was born on 1 January 2000.

4.9 The Committee also notes the author's claim that he was not assisted by a representative or a trusted person during the asylum procedure, in particular during the hearing regarding his age. In this respect, the Committee notes that, while the domestic authorities concluded in 2018 that the author was born in 2000, they did not apply the principle that he should be treated as a child during the procedure if there is a possibility that he might in fact be a minor. The Committee recalls that States parties are obliged to appoint a qualified legal representative, and an interpreter where necessary, for all young migrants claiming to be minors, as soon as possible on arrival and free of charge.¹⁰ The Committee is of the view that the provision of a representative for such persons during the age determination process is an essential guarantee of respect for their best interests and their right to be heard. Failure to do so amounts to a violation of articles 3 and 12 of the Convention, as the age determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

4.10 The Committee notes the State party's comments to the effect that it is obliged to apply the Dublin III Regulation, under which Sweden is responsible for the author's asylum application. Nevertheless, it recalls, without calling into question the international agreements ratified by the States parties to the Convention, 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.¹¹ In the application of an international treaty, the State party is therefore required to take into consideration its obligations under the Convention.¹²

4.11 In the light of the foregoing, the Committee considers that the age of the author, who claimed to be a child and referred to the Swedish age assessment according to which he was a child when he applied for asylum in the State party, was not determined in accordance with the guarantees necessary for the protection of his Convention rights. In the absence of a comprehensive assessment of his physical and psychological development and the designation of a representative to support him during the asylum procedure, the Committee considers that the best interests of the child were not a primary consideration, in violation of articles 3 and 12 of the Convention.

⁹ *A.M. v. Switzerland* (CRC/C/87/D/R.80/2019), para. 6.2.

¹⁰ *A. L. v. Spain* (CRC/C/81/D/16/2017), para. 12.8; *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 13.7; and *M.A.B. v. Spain*, para. 10.8.

¹¹ See also European Court of Human Rights, *Tarakhel v. Switzerland*, application No. 29217/12, judgment of 4 November 2014, para. 88.

¹² *A.M. v. Switzerland* (CRC/C/87/D/R.80/2019), para. 6.3.

4.12 The Committee, acting under article 10 (5) of the Optional Protocol on a communications procedure, finds that the facts before it disclose a violation of articles 3 and 12 of the Convention.

5. The State party should therefore provide the author with effective reparation for the violations suffered, including by granting him the benefits he would have enjoyed if he had been considered an unaccompanied child when he entered the territory of the State party. Furthermore, the State party is under an obligation to prevent similar violations in the future by ensuring that all procedures for determining the age of possible unaccompanied children are carried out in a manner consistent with the Convention and, in particular, that the domestic authorities conduct age assessments in a comprehensive manner, that they adopt protective measures for young persons claiming to be minors from the moment they enter the territory of the State party and throughout the procedure by treating them as children and recognizing all their rights under the Convention, and that the persons concerned receive prompt and free assistance from a qualified representative during such procedures, including those related to the application of the Dublin III Regulation.

6. 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 also requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish the present Views and to disseminate them widely.
