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Age determination of unaccompanied migrant children: An appraisal of the jurisprudence of the Committee on the Rights of the Child

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ABSTRACT

Unaccompanied migrant children arriving in Europe without documentation face an immediate hurdle to access the special protection measures that most states have in place for them. Many European states seek to establish the chronological age of a person using methods of age determination that the United Nations Committee on the Rights of the Child, which oversees the implementation of the UN Convention on the Rights of the Child, has found unreliable and to infringe children's rights. This article examines the Committee's jurisprudence through a consideration of its General Comments and a series of decisions under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. It concludes with reflections on the contribution that the Committee's jurisprudence makes to states' guidance on age determination methods that are consistent with children's rights.

KEYWORDS

age assessment;
unaccompanied; migrant
child; asylum; wrist X-ray;
CRC Committee; OPIC;
Europe

1. Introduction

Unaccompanied migrant children arriving in Europe without documentation face an immediate hurdle to access the special protection measures that most states have in place for children on the move. When they declare their age they are often met with scepticism by officials dealing with migrants, and so they find themselves having to prove their age in order to obtain the benefits and services on offer for children. According to a study undertaken by the International Law Association Study Group on Cross-Border Violations of Children's Rights,¹ many states in Africa and Asia operate on a 'declaratory' basis, meaning that children are accepted as children based on what they declare their age to be. This is not generally the case in Europe. Many European states resort to methods of age determination or assessment in an attempt to

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¹Warren Binford and others, 'Report on Enforcing the Rights of Children in Migration' (2023) 12(5) *Laws* 1.

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establish a person's chronological age or age range (for example between 18 and 20 years).² According to studies of age-determination methods being used in Europe, however, none have been demonstrated to be accurate enough for full reliability.³

In addition to their inaccuracy, medical models of age determination raise ethical and health-related concerns.⁴ As discussed in further detail below, methods such as taking an X-ray of the left hand and wrist, or evaluating the third molar maturation, have also been criticized due to their doubtful applicability to children from all ethnic backgrounds (International Law Association 2022). The current methods were developed almost a century ago, based on Caucasian children from upper-middle-class families.⁵

We commence with a discussion of the international legal framework pertaining to the protection under the United Nations Convention on the Rights of the Child (CRC) and its related instruments on children insofar as age determination is concerned. The next part of the article considers the relevant jurisprudence of the UN Committee on the Rights of the Child (CRC Committee, or the Committee). Medical age determination methods have been harshly criticized by the CRC Committee for lack of accuracy, for potentially being contrary to the best interests of the child, and for not upholding other rights, such as to privacy and dignity. This jurisprudence has developed through a range of communications to the CRC Committee, which we examine here in detail. The discussion pinpoints various problems, including the harms caused to children by inaccurate age assessment, the difficulties they face regarding burden of proof, and states' refusal to give them the benefit of the doubt in age-assessment cases. The article also evaluates the remedies provided by the CRC Committee, showing a development in the complexity and strength of the outcomes of its decisions over time. We conclude with a synopsis of the main guiding points that emerge from the jurisprudence and an assessment of what this adds to the guidance provided to states to ensure that age determination procedures comply with children's rights standards.

2. Scope and methodology

2.1 Scope

This article focuses on the jurisprudence of the CRC Committee regarding age determination of unaccompanied migrant children, including General Comments and the Views issued under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (A/RES/66/138 2011).⁶ The Optional Protocol will be

²Separated Children in Europe Programme, 'Position Paper on Age Assessment in the Context of Separated Children in Europe' SCEP Research Paper 2012, <<https://www.separated-children-europe-programme.org/p/1/76/position-papers/>> accessed 10 October 2024.

³Anders Hjern, Maria Brendler-Lindqvist, and Marie Norredam, 'Age Assessment of Young Asylum Seekers' (2012) 101(1) *Acta Paediatrica* 4. European Asylum Support Office, 'Practical Guide on Age Assessment' EASO Research Paper 3/2018, <<https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assessment-v3-2018.pdf>> accessed 11 October 2024.

⁴Henriette Roscam Abbing, 'Age Determination of Unaccompanied Asylum Seeking Minors in the European Union: A Health Law Perspective' (2011) 18(1) *EUR.J.Health L.* 11. Ranit Mishori, 'The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights' (2019) 6(7) *Children Basel* 85.

⁵Khalaf Alshamrani, Fabrizio Messina and Amaka C Offiah 'Is the Greulich and Pyle Atlas Applicable to all Ethnicities: A Systematic Review and Meta-analysis' (2019) 29(6) *Euro. Radiology* 2910.

⁶While unaccompanied migrant children span a broad range of categorization—including, for example, trafficked and stateless children—the cases selected here from the jurisprudence of the Committee on the Rights of the Child concern unaccompanied migrant children seeking asylum, and so the article's scope is limited accordingly.

discussed further below, under the international legal framework. As all of the Committee's communications concerning age assessment to date have been brought against states parties in Europe, we consider relevant aspects of regional guidance on children in migration situations, such as the European Asylum Support Office (EASO) guide on age assessment and the European Union Asylum Procedures Directives. Most notably, the Lisbon Treaty (European Union 2007), which entered into force in December 2009, identified as one of its objectives the protection of children both externally and internally; this strengthened the obligation of the European Union (EU) to respect children's rights. Several methods can be used to assess the age of migrant children. Rather than extend the scope of this article to a detailed discussion of such methods, we focus on the most common method, namely the hand or wrist x-ray, which the jurisprudence of the CRC Committee has addressed; we make specific reference to other methods where relevant.

This article focuses on age determination through age-assessment processes. The cases dealt with by the CRC Committee also engage with procedural safeguards, such as the need for children to be supported by guardians, legal representatives, and interpreters, their right to be heard and to have their best interests considered as a primary consideration, and to have procedures explained to them in a manner that they understand. These aspects are mentioned here where relevant but not discussed in detail.

Communications on rights violations related to age-determination processes comprise of a significant number of the communications received under the CRC Committee's Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. As the Committee's guidance can make a real difference to the ways in which migrant children are treated, it is valuable to examine how its jurisprudence has developed and the guidance it has provided to states that may prevent future rights violations.

2.2 Methodology

Most of the cases discussed in this article are selected from the period between February 2019 to February 2022. During those three years, 14 communications were brought against one state party, Spain.⁷ We also include two of the most recent cases on age assessment in order to track new developments, as well as discussing the early case in which the Committee established its legal position. We then examine the remedies it has provided—including measures for remediation of the rights violations in individual cases and measures to prevent future violations.

The most salient issues that emerge in the selected cases concern the age-assessment methods used by states parties, the acceptance (or not) of the authenticity of documents submitted as proof of age, and debates about whether young people claiming to be children should be granted the benefit of the doubt. Other important factors found in the cases are identification of the rights being violated and the remedies prescribed by the CRC Committee. The themes discussed here stem from the prevailing issues in the communications. We analyse the Committee's Views against the CRC, the relevant general comments, relevant international law applicable to migrant children, the general development of the Committee's jurisprudence in age-assessment cases over time, as well as the relevant research and literature on the subject.

⁷United Nations Human Rights Office of the High Commissioner, 'UN Treaty Body Database' (OHCHR 2024) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 11 October 2024.

The following section, on the international legal framework, consists of a discussion of relevant international human rights instruments and standards, as well as European Directives applicable to unaccompanied migrant children. These set the context in which we will examine the cases.

3. International legal framework

3.1 *The Convention on the Rights of the Child and relevant General Comments*

The Convention on the Rights of the Child (CRC) is the most ratified treaty under the UN Treaty Body system. Except the United States of America, every state in the world is a party.⁸ States parties' progress in implementing the CRC is monitored by the Committee on the Rights of the Child, an eighteen-member body that hold sessions in Geneva three times a year. The CRC Committee also issues General Comments which are authoritative interpretations of the CRC, in line with Article 45(d) of the CRC, which empowers the Committee to 'make suggestions and general recommendations' to states parties.⁹ In this article, reference is made to specific articles of the CRC and to General Comments.

In CRC Article 22, states parties are called upon to take measures to ensure protection and humanitarian assistance for all children, whether accompanied or unaccompanied. Article 22 is limited to refugee and asylum-seeking children, but the CRC Committee has made clear in its General Comments, discussed below, that it views all children in situations of migration to be eligible for special measures of protection.

We focus here on unaccompanied migrant children, defined in General Comment No.6 (2005) of the CRC Committee (hereafter CRC/C/GC/6) as 'children who have been separated from both parents and other relatives and are not being cared for by an adult, who by law or custom, is responsible for doing so.'¹⁰ Paragraph 31(i) CRC/C/GC/6 provides the following on age assessment:

The 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, s/he should be treated as such.

In 2017 the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the CRC Committee issued two joint General Comments.¹¹ The first, which we will refer to as Joint GC CMW 3/CRC 22, deals with the general principles regarding the human rights of children in the context of

⁸Ann Skelton, 'Committee on the Rights of the Child (CRC)' in *Max Planck Encyclopaedia of International Procedural Law*. <<https://opil.ouplaw.com/view/10.1093/law-mpeipro/e1333.013.1333/law-mpeipro-e1333>> accessed 14 October 2024.

⁹Jaap E Doek, 'The Human Rights of Children' in Ursula Kil Kelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer 2019).

¹⁰UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para 7.

¹¹UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (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, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017.

international migration. The second, Joint GC CMW 4/CRC 23, deals with state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return. In joint GC CMW 4/CRC 23, the two committees provide specific guidance on age assessment. In paragraph 3 they express the concern that children, especially those between the age of 15 and 18, are sometimes considered adults. The committees advise in paragraph 4 as follows:

To make an informed estimate of age, States 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, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed. 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. States should ensure that their determinations can be reviewed or appealed to a suitable independent body.

This advice can be distilled into four key guidelines for child-rights compliant age assessment: First, states should use age-assessment methods that are safe, child- and gender-sensitive, and which preserve the dignity of children. Second, where there is doubt about a child's age, the child should be given the benefit of the doubt and be accorded child-related benefits and protections. Third, states should avoid age-determination methods that are invasive and traumatic. Finally, the child must be assisted and legally represented in proceedings, including having the right to review and appeal.

3.2 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure

Of central importance for the purposes of this article is the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), which was adopted by the General Assembly in December 2011 (A/RES/66/138) and came into force on 14 April 2014, three months after the 10th state ratified it. Ratifications of OPIC have come at a fairly steady rate, averaging five per year since 2011, yet as of November 2024 only 53 states have ratified it—a relatively small proportion of the 196 states that have ratified the Convention. European and Latin American states have the highest levels of OPIC ratification. OPIC procedures are similar to the communications procedures of other international treaty bodies. Child rights violations can be brought under OPIC in three ways: individual communications, inquiries, and inter-state communications. This article focuses on individual communications, as it is under this procedure that the jurisprudence on migration predominates; to date there have been no inter-state communications and no published inquiry reports dealing with migration. Individual communications, sometimes referred to as 'complaints', may be brought before the CRC Committee by or on behalf of any child or group of children whose rights under the Convention or the first two optional protocols have been violated by a state, provided that the state has signed and ratified OPIC and that the children are within that state's

jurisdiction. In terms of Article 5, Children may be assisted to bring the application, or an application may be brought on their behalf by a designated representative or a person acting with their consent. The consent requirement can be dispensed with if the author of the complaint can justify his or her action.

A complaint must be submitted within one year of exhausting domestic remedies, unless it can be demonstrated that this was not possible. Article 7 of OPIC sets out the admissibility criteria, and Liefwaard has observed that the cases so far indicate that the Committee takes a cautious approach to admissibility.¹²

Individual communication is received by the petitions section at the Office of the High Commissioner for Human Rights. The Committee is empowered by Article 6 to request the state in question to take interim measures to prevent grave impact or irreparable harm from occurring, and it has done so in numerous cases to prevent the deportation of migrant children.¹³

3.3 EU Asylum Procedure Directives

In addition to the above guidance on age determination provided in international law, the European Union Asylum Procedure Directives (hereafter EU Directives 2013/32/EU) provide specific requirements for EU member states. This is relevant to the cases discussed in this article, as many were brought against states in the EU. The EU Directives stipulate that prior to any age-assessment test, the child and his or her representative must be informed of the procedure, the risks involved, and the consequences of the result and of a refusal to proceed. This information must be communicated in a language and manner which the child or his or her representative can understand.¹⁴

The EU Directives prescribe that EU member states should appoint a representative for unaccompanied minors seeking asylum as soon as possible.¹⁵ However, they allow member states to refrain from appointing a representative where there is a likelihood that the unaccompanied child will reach the age of 18 before a decision at first instance is taken.¹⁶

The following discusses age assessment in the context of Europe, as well as common methods used by European states.

4. Age assessment: background and context in Europe

4.1 Introduction

According to UNICEF, the number of unaccompanied children seeking asylum in Europe during the first half of 2020 was 69,010,¹⁷ meaning almost a third of the total

¹²Ton Liefwaard 'Children's Rights Remedies under International Human Rights Law: How to Secure Children's Rights Complaint Outcomes in Access to Justice?' (2023) 56 *De Jure Law Journal* 486.

¹³Committee on the Rights of the Child (CRC) 'Guidelines for Interim Measures under the Optional Protocol to the Convention on the Rights of the Child' Adopted by the Committee on the Rights of the Child at its 80th session 2/2019, <<https://www.ohchr.org/en/treaty-bodies/crc/individual-communications>> accessed 6 October 2024.

¹⁴European Union: Council of the European Union, *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 (recast)*, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, 29 June 2013.

¹⁵*Ibid.*

¹⁶*Ibid.*, art 25.

¹⁷UNICEF, 'Latest Statistics and Graphics on Refugee and Migrant Children' 2020, <<https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children>> accessed 26 October 2024.

number of people who sought asylum that year in Europe.¹⁸ Asylum-seeking children often leave their home countries to escape conflict, poverty, or persecution. Europe has become a popular continent for asylum-seeking children who hope for a better chance of furthering their education, finding respect and protection of their rights, and ultimately living a better life.¹⁹

In many countries in Europe, proving one's status as a minor is important for an unaccompanied child to benefit from protection under both international law and domestic law. Unlike in various countries in Africa and Latin America, where childhood status is declaratory (meaning that persons claiming to be children are to be regarded as children until determined otherwise),²⁰ in Europe an unaccompanied migrant child tends to face the challenge of proving that he or she is a minor—declaring one's age is not seen as sufficient.²¹ European countries commonly reject an unaccompanied migrant child's self-declared age because they often use age assessment as to control migration. Birth registration documents presented by unaccompanied children are widely treated as fraudulent, and methods of age assessment are imposed to decide whether they qualify for asylum.²² The methods used by European countries in age-assessment processes are often contested in international human rights law. The following section discusses one of the most prevalent means of age assessment in Europe, the wrist or carpal X-ray method.

4.2 Age-assessment methods used in Europe

In international refugee law, as Pobjoy notes, states retain control of the design and implementation of refugee status-determination processes.²³ The Refugee Convention does not provide direction on the procedural aspects of international refugee protection, leaving determination procedures to states' discretion.²⁴ States therefore employ various means to ascertain the ages of unaccompanied children, as evident in the communications received by the CRC Committee. Methods of age assessment used by European countries include the Greulich and Pyle method (that is, the X-ray of the left hand or wrist), physical examination (the estimation of age based on physical appearance), so-called sexual maturity observation (which assesses adolescents' physical development during puberty), X-ray of the collar bone, dental X-rays, and hip X-rays.²⁵

4.3 The wrist or carpal X-ray method (Greulich and Pyle Atlas)

The hand/wrist or carpal X-ray is the most common method of age assessment even though it has a four-year margin of error (comprising two years on either side of the

¹⁸Ibid.

¹⁹Ibid.

²⁰Separated Children in Europe Program (n2).

²¹Binford (n1).

²²Ibid.

²³Jason Pobjoy, *The Children in International Refugee Law* (Cambridge University Press 2017).

²⁴UN General Assembly, *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951.

²⁵European Asylum Support Office, 'Age Assessment Practices in EU+ Countries: Updated Findings' EASO Practical Guide Series 2021, <https://euaa.europa.eu/sites/default/files/publications/EASO_Age_assessment_practices_updated.pdf> accessed 26 October 2024.

age of 18), followed by dental examinations and dental X-rays, and, to a lesser extent, collar-bone and hip x-rays as well as physical development assessments.²⁶ The carpal or hand/wrist method is discussed here in detail because it is the most common method and the method on which the CRC has expressed most of its views. In this method, x-rays of the hand and wrists are taken and compared to an 'atlas' of the standard bone development of the left hand and wrist, as compiled by William Walter Greulich and Sarah Idell Pyle in the US in the 1930s.²⁷ It consists principally of an evaluation of the form and size of bone elements as well as the degree of epiphyseal ossification, and determining the skeletal age of an individual accordingly.²⁸

All medical methods of age assessment have been shown to have a wide margin of error. Günter, Andreas, and Ernst have observed that in the carpal or hand/wrist method, variations are not only dependent on gender, but also on ethnicity and nutrition.²⁹ A study regarding ethnicity revealed that:

ethnic and racial differences in growth patterns exist at certain ages; [...] the Greulich and Pyle atlas does not recognize this fact. Assessment of bone age in children with use of the Greulich and Pyle atlas can be improved by considering the subject's ethnicity.³⁰

Alshamrani, Messina, and Offiah have also found the Greulich and Pyle standard to be imprecise and conclude that it should be used with caution when applied to Asian male and African female persons, particularly when used to determine chronological age for forensic or legal purposes.³¹ General physical development can be delayed in cases of malnutrition, and tooth development can be impacted by certain types of nutrition.³² The correlation between bone development and ethnicity can also be confused by socio-economic status.³³ For the purposes of this article, these findings signal that age-assessment methods can produce inaccurate findings. Children are thus sometimes falsely assessed as being adults. Moreover, children undergoing age-assessment tests can experience disproportionate invasion of their privacy and, in the worst cases, inhuman degrading treatment.

Dorber and Klaasen point out that the appointment of a guardian during age-assessment tests does not remedy the inherent unreliability of the method.³⁴ They argue that the CRC Committee should have clarified in *N.B.F v. Spain* (CRC/C/79/D/11/2017) whether the use of such method is compatible with the CRC. This point is elaborated on below.

A survey by the European Asylum Support Office (EASO) in 2021 on age assessment in 20 European countries found that: Switzerland had abandoned the Greulich and Pyle

²⁶Günter Schumacher, Andreas Schmeling and Ernst Rudolf, *Medical Age Assessment of Juvenile Migrants* (Publications Office of the European Union 2018).

²⁷Alshamrani, Messina and Offiah (n5).

²⁸Schumacher, Schmeling and Rudolf (n26).

²⁹*Ibid.*

³⁰Aifeng Zhang and others, 'Racial differences in growth patterns of children assessed on the basis of bone age' (2009)250(1) *Radiology* 228.

³¹Alshamrani, Messina and Offiah (n5).

³²Schumacher, Schmeling and Rudolf (n26).

³³Du Y Zhao and others, 'Socioeconomic Status and Bone Mineral Density in Adults by Race/Ethnicity and Gender: The Louisiana Osteoporosis Study' (2017) 28(5) *Osteoporos Int* 1699.

³⁴John Dorber and Mark Klaassen, 'Communication 11/2017: N.B.F. v. Spain, Leiden Children's Rights Observatory, Case Note 2019/4', Leiden Law School 2019 <<https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/jr-communication-11-2017-n.b.f.-v-spain.-dorber-and-klaassen-2.pdf>> accessed 11 October 2024.

method due to its lack of precision; Cyprus had abandoned physical examinations because applicants refused them for cultural reasons; Luxembourg had abandoned sexual maturity observations without providing a reason; Russia had abandoned the carpal X-ray method for MRI pictures of the knee joint and dental X-ray of the wisdom teeth; and Slovenia had opted for X-ray of the collar bone and wrist in place of magnetic resonance imaging of the wrist and collar bone.³⁵ Six European countries said they had not abandoned any method, which suggests that despite proven inaccuracies in several age-assessment methods, they are still employed. Thirteen countries either responded that the question was not applicable to them or did not respond to it at all.³⁶ Unsurprisingly, Spain, the country from which the CRC Committee has received the most communications on age assessment, did not participate in the survey.

The European Union Agency for Fundamental Rights (EUFRA) has provided guidelines to member states on age assessment of unaccompanied migrant children, including the need to seek consent from both the child and their legal representative before conducting age-assessment tests.³⁷ The EUFRA has also advised that fingerprints of unaccompanied migrant children should be taken with the objective of protecting the child and has affirmed that sexual maturity tests are prohibited.³⁸ It is important to note here that a sexual maturity test conducted on a girl in Spain was found to be a violation of the Convention in the case of *R.Y.S.*,³⁹ as discussed in detail later in this article.

Research by EUFRA in 2018⁴⁰ on age assessment and fingerprinting made the following findings regarding EU member states:

- In eight member states, an age-assessment test could only proceed with the consent of the child; the consent of the legal representative was not required and could not be substituted for the consent of the child.
- In eight member states, age-assessment tests required either the consent of the child or their legal representative.
- In five member states, age-assessment tests required only the consent of the legal representative and not the child.
- In five member states, consent was required of both the child and the legal representative.
- In two member states, age-assessment methods were not used; age was determined through interviews.

In 2017, research conducted on child-friendly justice revealed that unaccompanied children faced an absence of translation services during hearings.⁴¹ Specifically, unaccompanied children in Croatia, Bulgaria, France, Germany, and Poland highlighted

³⁵European Asylum Support Office, 'Age Assessment Practices in EU+ Countries: Updated Findings' (n25).

³⁶*Ibid.*

³⁷European Union Agency for Fundamental Rights, 'Age Assessment and Fingerprinting of Children in Asylum Procedures-Minimum Age Requirements Concerning Children's Rights in the EU' 2018 EUFRA Report <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-minimum-age-asylum-procedures_en.pdf> accessed 10 October 2024.

³⁸*Ibid.*

³⁹CRC/C/86/D/76/2019.

⁴⁰EUFRA, 'Age Assessment and Fingerprinting' (n37).

⁴¹European Union Agency for Fundamental Rights, 'Child-friendly Justice Perspectives and Experiences of Children Involved in Judicial Proceedings as Victims, Witnesses, or Parties in Nine EU Member States' EUFRA Report 2017

having experienced incomprehension and indicated that the lack of translation, both in terms of documents and representation at hearings, contributed to this. Some children indicated that foster parents or host-center staff were their main source of information. The children interviewed recommended that translation services be made available during information sessions, that information about proceedings be made more accessible, and that proceedings be adequately explained.⁴²

As demonstrated in the next part of the article, the CRC Committee has reaffirmed in its jurisprudence that medical tests are inaccurate due to their wide margin of error. GC CRC/ 6 and GC CMW 4/CRC/23 provide that states should refrain from using medical methods, in particular if they are the only methods used. Both General Comments (CRC/C/GC/6 and GC CMW 4/CRC/23) assert the need for a comprehensive assessment, which includes both procedural and substantive elements.⁴³

5. Appraisal of the Views of the CRC Committee on age determination

5.1 Introduction

As will become evident through the discussion below, in the cases brought under the Optional Protocol to the CRC on a Communications Procedure on age assessment, the central focus of the CRC Committee consists of the procedural aspects of the age-determination process used by the state where the child arrives.

The CRC Committee adopted over 14 views regarding Spain on the issue of age determination between February 2019 and February 2022.⁴⁴ In particular, the CRC Committee has found violations of the right to identity, the right to be heard, the right to special protection for children deprived of their family environment, and the right to healthcare. The following is a discussion of selected views from the Committee's jurisprudence on age assessment.

5.2 Children's rights violations before, during, and after age assessment

The rights of a child can be infringed before, during, and after age-assessment processes. Before such a process, for example, failure to appoint a legal guardian for the child involved is a violation. The age-determination process can itself invade the child's privacy, and when a child is wrongfully found to be an adult, the violation involves not being provided with the rights and protections which unaccompanied children benefit from under both international and domestic law.⁴⁵ The following cases demonstrate the specific rights that have been infringed due to inaccurate findings of ages of unaccompanied migrant children and demonstrate the complexity of the Committee's jurisprudence. Although all the cases deal with age determination, the factual context

<<https://fra.europa.eu/en/publication/2017/child-friendly-justice-perspectives-and-experiences-children-involved-judicial>> accessed 10 October 2024.

⁴²Ibid.

⁴³See also Pablo Ceriani Cernadas, 'Communication 16/2017: A.L. v. Spain et. al., Leiden Children's Rights Observatory, Case Note 2020/2' Leiden Law School 2020 < <https://www.childrensrightsobservatory.org/case-notes/casenote2020-2> > accessed 11 October 2024.

⁴⁴UN Jurisprudence Treaty Body Database(n7).

⁴⁵A.D. v. Spain CRC/C/83/D/21/2017 para 10.9, N.B.F. v. Spain CRC/C/79/D/11/2017 para 12.3.

of each case was carefully considered by the Committee and gives rise to a range of rights violations.

5.3 *The right to have a child's best interests taken as a primary consideration*

The best interests principle in article 3 of the CRC dictates that in all matters concerning children, their best interests should be a primary consideration. It is a substantive right, an interpretive legal principle, and a rule of procedure.⁴⁶ In the case of an unaccompanied migrant child, the best interests principle requires an assessment of the child's identity, nationality, and ethnic, linguistic, and cultural background, as well as their vulnerabilities and specific protections they might need.⁴⁷ The expeditious appointment of a guardian and a legal representative is also in line with the best interests principle.⁴⁸

In *N.B.F v Spain*,⁴⁹ adopted in February 2019, the Committee held that the best interests of the child has to be a primary consideration throughout an age-determination process. It also held that the enjoyment of the rights contained in the Convention flows from the determination of whether one is a child, so it is imperative that there be due process to determine age, as well as the opportunity to challenge the outcome through an appeals process.⁵⁰ Furthermore, while the process is underway, the person should be given the benefit of the doubt and treated as a child.⁵¹ In this case, the CRC Committee found violations of article 3 (the best interests principle) and article 12 (the right to be heard). It also found a violation of article 6 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Interim measures) since the state party had failed to implement its interim order that the complainant be taken to a child protection centre while his case was pending consideration by the Committee; he was instead entrusted to a private social entity as an adult.

The CRC Committee held that a medical test consisting of an X-ray of the left hand and a physical examination is not an appropriate procedure for a child seeking asylum, but it did not elaborate on this view. The CRC is more explicit about its position on the use of medical methods in paragraph 4 of its GC CMW 4/CRC/23, which specifies that states should refrain from medical methods, including dental examinations, as they are inaccurate and have wide margins of error.

Another case on the best interests principle is *A.M. v Switzerland*,⁵² adopted in May 2024. The complainant was a national of Afghanistan who applied for asylum in Switzerland in September 2018. He had previously made an application in Sweden, where an age assessment in 2018 had determined that he was born on 2 November 2000. The Swiss authorities decided he was born on 1 January 2000 and was therefore an adult when he lodged his claim in Switzerland on 14 September 2018. Sweden agreed to take the

⁴⁶UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC /C/GC/14, 29 May 2013, para 22.

⁴⁷CRC/C/GC/6 (n10) para 20.

⁴⁸*Ibid*, para 21.

⁴⁹(n45).

⁵⁰*N.B.F. v. Spain* para 12.3.

⁵¹*Ibid*, para 9-13.

⁵²CRC/C/96/D/80/2019.

boy back into its care, in accordance with the Dublin Regulation.⁵³ His applications for appeal and later for a re-examination were rejected by the Swiss authorities. He then turned to the Committee under OPIC. The Committee found that his age was not determined in accordance with the guarantees necessary for the protection of his rights. It also found that 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, his best interests were not considered a primary consideration, in violation of Articles 3 and 12 of the Convention. The jurisprudence in this case only adds one feature to previous jurisprudence: that the requirement to treat young persons as minors throughout such proceedings expressly applies to procedures related to the Dublin Regulation.

5.4 The right to healthcare

The right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation is recognized under articles CRC 23, 24, and 39. States are obligated to ensure that the unaccompanied child has the same right of access to healthcare as national children.⁵⁴ The right to healthcare as applied to the unaccompanied child means that states must assess the child's plight and vulnerabilities, bearing in mind that they have been separated from their families and might have experienced trauma, loss, disruption, and violence, which means that states must treat their case with special sensitivity and attention.⁵⁵

In *J.A.B. v Spain*,⁵⁶ adopted in July 2019, the complainant was removed from a child protection centre after being declared an adult. Moreover, he was left without the assistance of a guardian and not given a legal representative. His removal from the child protection centre interrupted the medical treatment and vaccinations he was receiving. The Committee found a violation of articles 20 (protection of children deprived of their family environment) and 24 (the right to healthcare) of the CRC. GC CMW 4/CRC/23, serving as sufficient basis to reinforce policies aimed at providing children with timely and proper care and protection. As Gornik, Sauer, and Semak note,⁵⁷ the term 'unaccompanied child migrant' already highlights the fact that such children are not being cared for by an adult and recognizes that their separation puts them in a vulnerable position.

5.5 The right to an identity

The child's right to an identity is recognized under article 8(1) of the CRC. This includes the right to preserve their name, nationality, and family relations without any

⁵³(EU) 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 (recast), OJ L 180/31-180/59; 29.6.2013.

⁵⁴CRC/C/GC/6 (n10) para 46.

⁵⁵*Ibid*, para 47.

⁵⁶CRC/C/81/D/22/2017.

⁵⁷Mateja Sedmak, Birgit Sauer and Barbara Gornik, 'Unaccompanied Minor Migrants in Europe: Between Compassion and Regression' in Mateja Sedmak, Birgit Sauer and Barbara Gornik (eds), *Unaccompanied Children in European Migration and Asylum Practices* (Routledge 2019).

interference. The CRC Committee has noted that a child's age and date of birth also forms part of their identity.⁵⁸ Moreover, article 8(2) provides that 'where a child is illegally deprived of some or all of the elements of his or her identity, states parties shall provide appropriate assistance and protection, with a view to re-establishing speedily, his or her identity'.

In *A.L. v. Spain*, adopted in July 2019, an X-ray test performed on the complainant's left hand found that his bone age was over 19 years, two years older than his actual age, which was on his birth certificate. The CRC Committee held that the state party should have considered the birth certificate as proof that he was indeed 17 years old. The state party failed to respect his identity by denying that the birth certificate had any probative value, without assessing the data contained in the birth certificate. In light of this, the CRC Committee found a violation of his right, under Articles 3, 8, 12, 20 and 27 of the CRC.⁵⁹

5.6 The right to protection as an unaccompanied child

The unaccompanied child's right to protection is recognized under article 22 of the CRC and includes the setting up of a functioning asylum system and the enactment of legislation to address the treatment of unaccompanied children, in line with the rights contained in the CRC and other international human rights and humanitarian protection instruments.⁶⁰ The unaccompanied child has the right of access to asylum procedures and other mechanisms which provide asylum protection regardless of their age.⁶¹ They should also be represented by a competent adult familiar with the child's background and able to represent their best interests. This does not negate the need for access to free legal representation, and where necessary, an interpreter.⁶² The asylum application process for children should be treated with priority.⁶³

In *M.T. v Spain*,⁶⁴ and in *R.K. v. Spain*,⁶⁵ both of which were decided on the same day in November 2019, the complainants were declared adults and therefore did not have guardians appointed for them. They could not apply for asylum prior to the age determination because they were considered adults. The CRC Committee was of the view that impeding their applications for asylum as children put them at a risk of deportation, which carries a foreseeable risk of irreparable harm. According to the Committee, CRC article 22 was violated due to the procedural obstacles the complainants faced in claiming asylum as unaccompanied children. Ceriani Cernadas suggests that the Committee could have gone beyond procedural issues, as unaccompanied children who are seeking asylum face restraints not only due to a lack of guarantees but also as a result of policy gaps which would not be resolved by, for instance, the appointment of a guardian.⁶⁶

⁵⁸*A.L. v Spain* CRC/C/81/D/16/2017 para 12.10

⁵⁹*Ibid*, para 12.13.

⁶⁰CRC/C/GC/6, (n10) para 64.

⁶¹*Ibid*, para 66.

⁶²*Ibid*, para 69.

⁶³*Ibid*, para 70.

⁶⁴CRC/C/82/D/17/2017.

⁶⁵CRC/C/82/D/27/2017.

⁶⁶(n43).

5.7 The right to be heard

Article 12 of the CRC provides for children's right to express their own views and have the opportunity to be heard in judicial or administrative proceedings affecting them. The right to be heard, for unaccompanied children, means being provided with all relevant information concerning their rights, availability of services, means of communication, the asylum process, family tracing, and the situation in their country of origin. This allows them to exercise their right to be heard effectively through well-informed expressions.⁶⁷ The unaccompanied migrant child's right to be heard also involves the appointment of a guardian and or a legal representative, and where necessary an interpreter. This is important for age determination processes to guarantee respect for the child's best interests.⁶⁸ Children's view should also be given due consideration in the appointment of a guardian, legal representative, as well as care and accommodation.

In *M.B. v. Spain*, adopted in September 2020, the state party failed to conduct any age assessment on the complainant and registered him as a 21-year-old adult. He was held in a detention centre for 52 days with adults. He was not recognized as a child, assigned a guardian to look after his legal interests, or offered the protection that he was entitled to as a minor under both national and international law. It was later proven that he was under the age of 18. The CRC Committee noted the need for a guardian or legal representative to protect the interests of unaccompanied migrant children and held that by failing to appoint one the state party had violated his right to be heard (CRC article 12) and his best interests as a child (CRC article 3).⁶⁹ The CRC Committee also found a violation of article 20(1) in that the state party failed to protect the author as an unaccompanied, vulnerable, and defenceless minor.⁷⁰

5.8 The right to protection against unlawful or arbitrary interference with one's privacy

Article 16 of the CRC protects children against arbitrary or unlawful interference with their privacy. CRC/C/GC/6 provides that age assessment must be conducted in a scientific, safe, child- and gender-sensitive, and fair manner. Most importantly, the assessment procedure must avoid any risk of violation of the physical integrity of the child involved, while considering their dignity.⁷¹ It is unsurprising that the CRC Committee has held that examinations involving intimate parts 'should be precluded from age assessment'.⁷² The CRC Committee's Views in *R.Y.S. v Spain* is considered in detail below.

R.Y.S. v Spain,⁷³ adopted in February 2021, was different from cases that had gone before it, in that the complainant was a girl and was subjected to a physical examination to determine her age, including an examination of her genitalia, for which purpose she was made to undress completely. The Committee held that tests that include nudity or

⁶⁷CRC/C/GC/6 (n10), para 25.

⁶⁸*M.B. v Spain* CRC/C/85/D/28/2017, para 9.12.

⁶⁹*Ibid*, para 9.12.

⁷⁰*Ibid*, para 9.16.

⁷¹(n10), para 31A.

⁷²*R.Y.S. v Spain* para 8.8.

⁷³*Ibid*.

examination of genitalia or other intimate parts of the body ‘violate a child’s dignity, privacy and bodily integrity and should be prohibited’.⁷⁴

The Committee noted the complainant was already a victim of sexual abuse, which made the procedure even more invasive, and that the procedure amounted to an arbitrary interference with her privacy, in breach of CRC articles 3 (best interests principle), 12 (the right of the child to be heard and express their views on matters affecting them), and 16 (the right of the child to not be subjected to unlawful or arbitrary interference with privacy).⁷⁵

The formulaic prose of the Views fails to convey the deep concern that the facts of this case must have evoked. Valentine and Morlachetti have criticized the Committee for missing the opportunity to elaborate on the significant gender aspects of the case.⁷⁶ They argue that the Committee had itself previously pointed out, in its General Comment 13 on violence against children, that while children of any gender may be at risk of violence, violence often has a ‘gender component’. The authors also point to the fact that sexual violation in the context of migration are common, as evidenced by a report of the International Federation of the Red Cross and Red Crescent Societies (2018), which found that a significant number of unaccompanied migrant children are exposed to sexual and gender-based violence on their journeys, and that they lack access to health and psychosocial support services.⁷⁷

5.9 The right to special protection for children deprived of their family environment

Article 20(1) of the CRC provides for special treatment of children deprived of their family environment. This means that due to the permanent or temporary separation from their family environment, the state in which an unaccompanied child seeks asylum is obligated to provide them with care and protection, as it would for child nationals of the state who are permanently or temporary separated from their family environment, as provided for under paragraph 39-40 of CRC/C/G/6. Article 20(3) of the CRC lists a range of care and accommodation options which the state party can employ to protect the unaccompanied child, including foster placement, adoption, *kafalah* in Islamic law, and placement in institutions suitable for children.

Most of the cases discussed in this article were filed against Spain, but some age-determination cases have been brought against France. *S.E.M.A. v France*,⁷⁸ adopted in January 2023, concerned a Pakistani migrant child who entered France on 27 August 2019. He had a copy of his birth certificate with him which indicated that his birth date was 31 December 2002. The authorities did not accept the veracity of the document and, judging his physical appearance, decided to treat him as an adult. He was thus not offered any of the services available to unaccompanied minors. In December 2019 he filed an appeal and during a hearing nine months later, in September 2020, he presented his

⁷⁴Ibid, para 9.

⁷⁵Ibid, para 8.16.

⁷⁶Jessica Valentine and Alejandro Morlachetti, ‘Communication 76/2019 R.Y.S. v. Spain, Leiden Children’s Rights Observatory, Case Note 2021/7’, Leiden Law School 2021< <https://www.childrensrightsobservatory.org/case-notes/casenote2021-7>> accessed 9 October 2024.

⁷⁷Ibid.

⁷⁸C/92/DR/130/2020.

original birth certificate, authenticated by the Embassy of Pakistan in Paris. The Lyon court of appeal ordered an expert analysis of the identity documents and postponed the hearing to 12 January 2021, by which time he would no longer be a child. The author's lawyer had repeatedly asked the authorities to place him in the child welfare system, but this never happened.⁷⁹ When his case was first brought to the CRC Committee under the Optional Protocol on a Communications Procedure on 10 December 2020, the working group on communications asked the state party to place the boy in a child welfare facility until 31 December 2020, at which date he would turn 18 years of age. The state party did not do so. In its Views, the Committee notes the complainant's claim that the state party's authorities 'failed to protect him despite his situation of abandonment and extreme vulnerability in the context of the COVID-19 epidemic', which was in violation of article 20(1) of the CRC (special protection for children deprived of a family environment). The Committee adds that his allegations raise, in substance, a violation of article 37(a) of the CRC (cruel, inhuman, or degrading treatment).⁸⁰ This was innovative in that the CRC committee had generally not raised violations of articles of its own accord, generally relying on the article violations claimed by the parties. In this case the remedy includes effective reparation and an opportunity to regularize his administrative status, taking due account of the fact that he was an unaccompanied minor at the time of his arrival in France. To accord the individual the benefit of the doubt, if there is a possibility that they are a child they must be treated as such. To avoid such violations in the future, the state party was required to 'ensure that children have access to remedies that lead to prompt decisions, that children are aware of these avenues, and that young persons claiming to be under 18 years of age are considered to be children and benefit from the relevant protections'.⁸¹

5.10 Missed opportunities: migration detention of unaccompanied minors

The issue of migration detention appears in some of the age-assessment cases. For example, the complainants in *M.T. v Spain*⁸² and *R.K. v Spain*⁸³ were held in detention centres for 15 days and 50 days respectively. These facilities were meant for adults awaiting deportation decisions. The boy in *M.B. v Spain*⁸⁴ was detained for 52 days while his deportation was being considered and the boy in *A.L. v Spain*⁸⁵ was detained in a police station for four days and later held in a migration detention centre for 60 days, the maximum period allowed by Spanish migration law.⁸⁶ While the facts of these cases suggest detention for migration-related reasons, none of the complainants alleged a violation of their rights under article 37(b) of the CRC, that no child shall be deprived of his or her liberty unlawfully or arbitrarily. These four cases involving migration detention could have been suitable opportunities for the CRC Committee to reaffirm its standards on the prohibition of detention of children for immigration

⁷⁹Ibid, para 2.1.-2.7.

⁸⁰Ibid, para 6.4.

⁸¹Ibid, para 10.e.

⁸²(n64).

⁸³(n65).

⁸⁴(n68).

⁸⁵(n58).

⁸⁶Ceriani Cernadas, (n43).

purposes, a point on which the Committee was very forthright in paragraph 5 of GC CMW 4/CRC/23.⁸⁷

5.11 Missed opportunities: some rights violations found inadmissible or unsubstantiated

In *J.A.B. v. Spain*⁸⁸ the complainant alleged a violation of article 6 (the right to child survival and development), but this was declared inadmissible by the CRC Committee on grounds of insufficient substantiation. Similarly, in *A.L. v Spain*,⁸⁹ *M.B. v. Spain*,⁹⁰ and *R.K. v. Spain*,⁹¹ allegations of a violation of article 29 (the right to education) were declared inadmissible for lack of substantiation. Unfortunately, because it found no violation in respect of these particular articles, the Committee made no full discussion of them.

5.12 Summary and conclusion regarding cases

It has been established above that age-assessment procedures used by some states parties violate multiple rights. Most importantly, inaccurately finding that a child is an adult is to treat the child in a prejudiced manner. The fact that the rights and protections embedded in the CRC and in domestic law flow from the determination of childhood means that inaccurate findings rob children of these rights and in some instances cause or perpetuate other violations. For instance, inaccurately finding that a child is an adult is more likely to lead to the deportation of that child, exposing them to risks of irreparable harm. This situation can breach the principle of *non-refoulement*, which prohibits the expulsion of migrants, including children, to territories where they will be at a risk of irreparable harm. As Ceriani Cernadas notes:

An important remark by the Committee in all the cases—as in previous decisions—is on the relevance and impact that an age determination may have on children’s rights. Namely, that the application or not of the Convention would depend on the outcome of such assessment. This is especially relevant in counties where, as at the Spanish Southern border, policies aimed at responding to the arrival of migrants and asylum seekers have given considerable weight to age determination procedures.⁹²

The CRC Committee’s guidance for states in these cases makes it clear that age-assessment procedures can result in inhuman and degrading treatment because they can be invasive. The fact that it recently took the step of raising article 37(a) of its own accord, in a case in which a child had been left to fend for himself during the COVID-19 pandemic because the authorities refused to accept his documents, is an indication of the Committee stepping up its response to careless, drawn-out age-determination processes that leave children in perilous situations.

⁸⁷Ciara Smyth, ‘Towards a Complete Prohibition on the Immigration Detention of Children’ (2019) 19 *Human Rights Law Review*, 1.

⁸⁸(n56).

⁸⁹(n58).

⁹⁰(n68).

⁹¹(n65).

⁹²(n43).

The cases in which alleged violations were declared inadmissible due to lack of substantiation reveal several rights that may be infringed when a child is incorrectly declared an adult.

6. The burden of proof and the benefit of the doubt in age determination

6.1 Guidelines and the Committee's jurisprudence

According to the UNHCR's Guidelines on child asylum claims,⁹³ even though the burden of proof in adult refugee assessment claims is shared between the claimant and the examiner, the examiner must assume a greater burden of proof if the claimant is a child, especially an unaccompanied child. The Guidelines provide that if the examiner cannot ascertain the facts of the case or if the child is incapable of properly articulating their claim, the examiner must consider all known circumstances and apply a liberal approach to the principle of benefit of the doubt.⁹⁴

Furthermore, if there is a chance that the individual concerned is a child, they must be treated as such. The UNHCR guidelines sum up this position succinctly:

The margin of appreciation inherent to all age assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child. As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child.⁹⁵

The CRC Committee asserts that while age-determination processes are ongoing, the person should be given the benefit of the doubt and treated as a child.⁹⁶ Dorber and Klaasen argue that this suggests that the application of benefit of the doubt gives way to a consideration of the best interests of the child.⁹⁷

Dorber and Klaasen argue that the wording 'presumption of minority' should be preferred over 'benefit of the doubt'.⁹⁸ They emphasize that GC CMW 4/CRC/23 suggests that the presumption of minority flows from the best interests principle. Therefore, rather than relying on 'benefit of the doubt', the CRC Committee should use 'presumption of minority'.⁹⁹

The EASO Practical Guide on Age Assessment (2018) makes a distinction between so-called simple doubts and substantiated doubts:

The 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.¹⁰⁰

⁹³United Nations High Commissioner for Refugees 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1952 Convention and/or 1967 Protocol Relating to the Status of Refugees' UNHCR 2009 <<https://www.unhcr.org/sites/default/files/legacy-pdf/5ddfc47.pdf>> accessed 10 October 2024.

⁹⁴Ibid.

⁹⁵Ibid, para 75.

⁹⁶*M.B. v Spain*(n68) para 9.2.

⁹⁷(n34).

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰(n2).

It provides that the claimed age of an applicant should be accepted based on information derived from other databases, statements from family members, and estimations based on physical appearance rather than on age-assessment tests. Only when there are substantiated doubts should an age-assessment test be considered.¹⁰¹ It has been suggested that where there is evidence to the effect that an applicant has reached the age of majority, a state party may conclude that there are no doubts about their age.¹⁰² Feltz asserts that, taking into account margins of error, if doubts linger after the results are known it should be presumed that the individual concerned is a minor.¹⁰³ It is clear that benefit of the doubt should persist until all appeals have been exhausted. A decision to deny a child international protection should not be based only on a child's refusal to undergo an age-assessment test.¹⁰⁴

The burden of proof and benefit of doubt principles have also been seen in the CRC Committee's views, notably in its jurisprudence on age assessment. For example, in *A.L. v. Spain*,¹⁰⁵ it held that the burden of proof does not rest solely on the author of the communication since the author and the state party do not always have equal access to the evidence. Often it is the state party that has access to the relevant information. On the issue of benefit of the doubt, the CRC Committee reiterated that in the event of uncertainty regarding a child's age, the child should be given the benefit of the doubt to protect their best interests. Indeed, it further clarified that if doubt persists after an age-assessment procedure, the author should still be given the benefit of the doubt (*A.L. v Spain*).¹⁰⁶ The CRC Committee's position that the burden of proof does not rest solely on the individual has been seen in subsequent cases such as *M.B. v Spain*,¹⁰⁷ *H.B. v Spain*,¹⁰⁸ and in *M.B.S. v Spain*.¹⁰⁹

6.1 Summary and conclusion

The CRC Committee's position on the burden of proof and benefit of the doubt is clear and has been applied consistently in its jurisprudence insofar as communications are concerned. Regarding the benefit of the doubt principle, adopted in GC CMW 4/CRC/23, the Committee has provided that if age assessment becomes necessary, children should be given the benefit of the doubt while the process is ongoing.¹¹⁰ This ensures that irreversible harm is prevented, and that the person involved is always treated as a child. As Dorber and Klaassen have noted,¹¹¹ perhaps the Committee could speak of the 'presumption of minority' rather than the 'benefit of doubt', as the presumption of minority stems from the best interests principle. The burden of proof principle also

¹⁰¹Ibid.

¹⁰²John Dorber and Mark Klaassen, (n34).

¹⁰³Vivien Feltz, 'Age assessment for unaccompanied minors: When European countries deny children their childhood' (*Mdmeuroblog*, 28 August 2015) < <https://mdmeuroblog.files.wordpress.com/2014/01/age-determination-def.pdf> > accessed 10 October 2024.

¹⁰⁴EU Directives (n14) see also Ursula Kilkelly and others, *Promoting child-friendly approaches in the area of migration – Standards, guidance and current practices* (Strasbourg: Council of Europe 2019).

¹⁰⁵(n58), para 11.2.

¹⁰⁶Ibid, para 8.2.

¹⁰⁷(n68) para 9.2.

¹⁰⁸CRC/C/83/D/25/2017, para 9.2.

¹⁰⁹CRC/C/85/D/26/2017, para 9.2.

¹¹⁰See *A.L. v Spain*, *M.B. v Spain*, *M.B.S. v Spain*, and *H.B. v Spain*.

¹¹¹(n34).

recognizes that an adult examiner should have a greater burden of proof if the claimant is a child. This is also in line with the best interests principle, in that it safeguards the unaccompanied migrant child's right to protection.

7. Remedial developments in the CRC Committee jurisprudence regarding age determination

The remedies in the Committee's early jurisprudence on age determination were limited in scope and application. Despite the finding of rights violations in *N.B.F v Spain*, there was no remedy for the individual—that is, for N.B.F. himself. The remedy consisted only of an obligation to prevent similar violations in future. This systemic remedy was also vague, requiring that the state ensure that 'all procedures for determining age of possible unaccompanied children are carried out in a manner consistent with the Convention' and that all children facing age determination processes should be 'assigned a qualified legal or other representative free of charge'.¹¹²

The remedies in subsequent cases were more expansive. In *M.T. v Spain*,¹¹³ *R.K. v Spain*,¹¹⁴ and many others, both individual remedies and more elaborated systemic remedies were provided. The individual remedies occasionally include compensation, and several provide for 'effective reparation', including 'the opportunity to regularize their administrative status'.

The systemic recommendations include an expanded version of the requirement that the procedures for determining age be carried out in conformity with the Convention – elaborating (i) that documents submitted are to be taken into account and accepted if they are issued or validated by a state or embassy, (ii) that young persons should be provided with a 'qualified legal representative' (clarified in the case of *C.O.C. v Spain* (CRC/C/86/D/63/2018), and more recently *S.E.M.A. v France*),¹¹⁵ and (iii) that initial assessments are carried out not only in accordance with the CRC but also General Comments 6 (2005) and 23 (2017). The remedies also include a requirement that age determination be carried out swiftly, and that there should be measures of protection for young persons claiming to be minors from the moment that they enter the territory and throughout the procedure, treating them as children and recognizing their rights under the Convention.

One remedy common to many of the age-determination cases is the requirement for the state party to develop an effective and accessible redress mechanism that allows young unaccompanied migrants claiming to be under the age of 18 to apply for a review of any decrees in cases where their age determination was not accompanied by the necessary safeguards to ensure the best interests of the child and the right to be heard.

Another remedy requires training on the CRC and the relevant General Comments for authorities and officials who deal with migration status determinations; in the case of *R.Y.S v Spain*,¹¹⁶ a specific addition was made that gender awareness needed to be added to the training. In the *R.Y.S* case, the Committee expanded on its standard remedy developed over time and included particular remedies, such as declaring that

¹¹²(45) para 13.

¹¹³(n64).

¹¹⁴(n65).

¹¹⁵(n78).

¹¹⁶(n72).

genital examination as a method of age determination must never be performed and requiring that unaccompanied minors who are seeking asylum and claim to have been victims of violence receive certified psychosocial counselling to facilitate their rehabilitation. It is in the paragraph on training immigration officers and other officials that the Committee included the wording ‘integration of a gender perspective where migrant girls are concerned’.¹¹⁷

It is a requirement that the Committee’s Views be published and disseminated widely. The Committee also undertakes ‘follow-up’ procedures after the remedies have been passed, and the reports on these are public documents. The state party is required to report on the progress made towards carrying out the remedies within 180 days of the Views being issued, and the Committee keeps the follow-up actions open until determining whether it is satisfied or not. With regard to the age-determination cases, the Committee has grouped together several cases which are being followed up (*M.B.S. v Spain* (CRC/C/ 85/D/26/2017); *M.B. v Spain* (CRC/C/85/D/28/2017); *B.G. v Spain* CRC/C/85/D/38/ 2017); *S.M.A. v Spain* (CRC/C/85/D/40/2018) *C.O.C. v Spain* (CRC/C/86/D/63/2018); and *R.Y.S v Spain* (CRC/C/86/D/76/2019). A detailed examination of the state’s compliance efforts is beyond the scope of this article, but the positive highlights from the follow-up report¹¹⁸ include the fact that in April 2020 an inter-ministerial working group was established in Spain to determine a new age-assessment procedure in line with remedies. The new Organic Law 8 /2021 includes an absolute ban on nudity and genital examinations, as well as other invasive medical tests. Several training sessions of relevant bodies and authorities are reported to have taken place, and the state party claims that the Views have all been published. Compliance with individual remedies appears to be weaker: no compensation has been paid to any of the complainants.

8. Conclusion

This article has examined the jurisprudence of the CRC Committee, including both its General Comments and a significant body of decisions under OPIC. This conclusion summarizes the contribution that, in our view, this jurisprudence contributes to the guidance offered to states parties.

The jurisprudence of the CRC Committee from its General Comments 22 and 23 sets valuable guidance for age determination. This includes age-assessment methods that are safe, child- and gender-sensitive, and which preserve the dignity of children.¹¹⁹ Children should be given the benefit of the doubt and accorded child-related benefits and protections. States must refrain from age-determination methods which are invasive and traumatic.¹²⁰ Procedural safeguards must be in place, such as assistance and legal representation by qualified and competent professionals, and there must be a right to review and appeal.¹²¹

¹¹⁷Ibid, para 9(d).

¹¹⁸Committee on the Rights of the Child, ‘Follow-up progress report on individual communications’ CRC/C/90/R.1.26 2022 <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/2022-11-17/CRC-C-90-R.1_UV.pdf>accessed 10 October 2024.

¹¹⁹GC CMW 4/CRC/23 (n11) para 4.

¹²⁰Ibid.

¹²¹CRC/C/GC/6, (n10) para, 20.

Before any age-assessment test is carried out, the child and their representative must be informed of the procedure, the risks involved, and the consequences of the result or of a refusal to proceed.¹²² This must be communicated in a language and manner which the child or their representative can understand.¹²³

Much of the guidance from the General Comments has been reiterated and provided with specific detail in the Views of the CRC Committee adopted under the Optional Protocol on a Communications Procedure. This article has explored the many cases that found violations of a wide range of children's rights, including the right to have their best interests protected, the right to healthcare, the right to identity, the right to protection as an unaccompanied child, the right to be heard, the right to protection against unlawful or arbitrary interference with one's privacy, and the right to special protection for children deprived of their family environment. This has helped make states parties more aware of their obligations and of specific rights infringements that inappropriate age-determination processes may cause. Of particular relevance was the jurisprudence on children being given the benefit of the doubt, which some argue would have provided more durable protection if it had been framed as a presumption of minority. A further aspect highlighted was the findings of the Committee regarding the fact that children should not have to bear the burden of proof—documents should be accepted if they are issued or validated by a state party of an embassy.¹²⁴ Also, receiver states bear a responsibility to assist with ensuring that the process of age determination is done in a just, fair, and lawful manner.

Debates regarding 'benefit of the doubt' or 'presumption of minority' mostly concern semantics, as the effect of either approach, if properly applied, would result in young people being treated as children until proof to contrary is available.¹²⁵ The CRC Committee has used 'benefit of the doubt' consistently over time, and this is probably more acceptable to states parties that may have committed to applying the CRC's GC 6.

A positive shift has occurred in the type of remedies the CRC Committee prescribes in age-assessment cases. Recent communications have shown remedies that are more elaborate, expansive, and individualized. Individualized remedies include compensation for non-pecuniary damages, such as mental anguish, pain, and suffering. An important remedy is effective reparation, which includes the opportunity for the child to regularize their administrative status; this tackles the root of the problem that the child has faced and gives them a chance to benefit even if they are no longer children at that the time the decision is made. In line with Article 12 of the CRC, the CRC Committee has recommended that children who face age assessment must be appointed qualified legal representation, to allow for effective child participation. The CRC Committee has also recommended that initial assessments be done by considering the rights in the CRC, as well as CRC/C/GC/6 and GC CMW 4/CRC/23. This recommendation recognizes the need for the rights in the CRC to be interpreted together with the unaccompanied, separated, and migrant child's rights in age-assessment cases. The CRC Committee's remedies also provide much-needed guidance and clarity to states parties on accepting documents, such as birth certificates, to prove the age of a child migrant: documents

¹²²EU Directives (n14).

¹²³*Ibid.*

¹²⁴*S.E.M.A. v France* (n78).

¹²⁵John Dorber and Mark Klaassen (n34).

submitted are to be taken into account and accepted if they are issued or validated by a state or embassy.

The CRC Committee prescribes remedies by considering three factors: first, the rights of the child victim; second, state-party responsibilities; and third, the need to provide interpretive guidance on the CRC and its relevant General Comments in order to work toward ensuring that the rights of migrant children are adequately protected and promoted.

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