

5.1.1. Lack of a representative may invalidate the proceedings

Both the ECtHR and the CRC Committee have long regarded the prompt appointment of a guardian as integral to the presumption of minority and an essential safeguard during age assessment procedures. Since *Darboe and Camara v Italy* (21 July 2022, paras 16-21, 142-144), the ECtHR has consistently examined compliance with the right to a representative under Article 8 of the Convention. In this landmark judgment, the court found that the failure to promptly appoint a guardian or representative prevented the applicant from duly submitting an asylum request. The Gambian national, who disclosed his minority and intent to seek international protection shortly after arrival, was neither treated as a minor nor assigned a representative in a timely manner, which prevented him from effectively requesting international protection between his arrival in Italy and the appointment of a guardian more than 6 months later. The court found that the absence of this basic procedural safeguard amounted to a violation of the State's positive obligation under Article 8 of the ECHR to secure the right to respect for private life.

This line of case law was shortly after reaffirmed in the ECtHR's judgments in *Diakitè v Italy* (14 September 2023, paras 21-26) and *T.K. v Greece* (18 January 2024, paras 4 and 24), in which the ECtHR reiterated that, under both the Convention and EU law, the appointment of a guardian, access to legal assistance and informed participation in the age assessment process constitute essential procedural safeguards.

Likewise, the UN CRC Committee has long held that the prompt appointment of a representative during age assessment procedures constitutes an essential safeguard for the best interests of the child and their right to be heard under Articles 3 and 12 of the CRC. Throughout its jurisprudence, the committee has reiterated that all persons claiming to be minors must be provided with a representative "as soon as possible on their arrival and free of charge". It has further held that failure to do so may result in "substantial injustice", given that, in practice, the outcome of age assessments determines access to child protection and other rights guaranteed under the CRC (see for instance *A.L. v Spain*, 31 May 2019, para 12(8); *A.D. v Spain*, 4 February 2020, para 10(14); *M.B. v Spain*, 28 September 2020, para 9(12); *C.O.C. v Spain*, 29 January 2021, para 8(12); *R.Y.S. v Spain*, 4 February 2021, para 8(9)).

One such right is the right to seek international protection as a minor under Article 22 of the CRC. As the ECtHR later did in *Darboe and Camara v Italy*, the CRC Committee in *R.K. v Spain* (18 September 2019, paras 2(5) and 9(11)) examined a situation in which the absence of a representative prevented a Guinean applicant fleeing religious persecution from effectively

applying for asylum as a minor. The applicant had been classified as an adult without undergoing an age assessment procedure and was placed in detention pending deportation. When he attempted to request international protection as a minor while in detention, the procedure could not continue because a guardian had not been appointed, thereby exposing him to a risk of *refoulement*. Although he was eventually allowed to lodge the application, he continued to be registered as an adult despite possessing a birth certificate attesting to his minority. The committee recalled that children involved in asylum, administrative or judicial proceedings must be provided not only with a guardian but also with legal representation. It concluded that the failure to appoint a guardian enabling the applicant to seek international protection as a minor deprived him of the special protection afforded to unaccompanied asylum-seeking children and exposed him to a risk of irreparable harm, amounting to a violation of Articles 20(1) and 22 of the CRC.

Beyond violations of rights under international human rights instruments, the failure to appoint a representative in a timely manner may also lead to the annulment of proceedings in which this safeguard was absent, including a decision on international protection or child custody. This issue has primarily arisen before national courts, which are generally responsible for reviewing compliance with procedural requirements. For example, in July 2020 the Swiss Federal Administrative Court (FAC) ruled that the failure to appoint a guardian for an Ethiopian applicant claiming to be a minor invalidated both his hearing before the Swiss State Secretariat for Migration and the subsequent decision denying him international protection. Although the applicant had initially been treated as an adult following a bone examination, he later produced documents attesting to his minority. FAC noted that, while he was no longer a minor at the time of the judgment and therefore no longer required a guardian, he had been a minor when lodging the asylum application and had not benefited from the necessary procedural safeguards. The case was therefore remanded for a re-examination.

Also in a 2020 case, the Slovenian Administrative Court upheld the decision to deny refugee status and instead grant subsidiary protection to an Afghan applicant who claimed to be a minor but had been reclassified as an adult without a proper age assessment. The court based the decision on grounds that he had been appointed a representative and provided with adequate procedural safeguards from the outset and throughout the procedure.

The failure to appoint a representative may also compromise the legality of decisions concerning child custody, as illustrated by decisions of the German Higher Administrative Court of Baden-Württemberg dated 9 April 2024 and 11 June 2024. In both cases, the court granted interim relief, finding that the absence of a qualified and independent representative constituted a serious procedural defect “likely to lead to the illegality” of the contested decisions, namely the termination of custody and child welfare measures by the Youth Welfare Office (*Jugendamt*). As the reasoning in these cases also concerned the independence and qualifications required of representatives, they are examined below.

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