



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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English only

**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

**Applications No. 8675/15 and No. 8697/15
N.D. v. Spain and N.T. v. Spain**

Introduction

1. On 11 September 2015, the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') informed the European Court of Human Rights (hereinafter: 'the Court') of his decision to intervene as a third party in the Court's proceedings, in accordance with Article 36, paragraph 3 of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations concerning the cases of *N.D. v. Spain* and *N.T. v. Spain*. These cases relate to the return of the two applicants from the Spanish city of Melilla to Morocco.
2. According to his mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.¹
3. The protection of the human rights of migrants, including asylum-seekers and refugees, is a priority theme of the Commissioner's work in all Council of Europe member states. The Commissioner has repeatedly stressed the importance of guaranteeing the individual right to seek and enjoy asylum and has addressed a number of relevant recommendations to member states in this field.
4. This intervention is based on the Commissioner's visit to Melilla and Madrid from 13 to 16 January 2015, during which the Commissioner met with a number of state authorities and with representatives of civil society and international organisations, as well as on his continuous country monitoring.
5. Section I of the present written submission refers to the Commissioner's work in all member states of the Council of Europe to ensure adherence to the prohibition of collective expulsions; Section II provides some background information and the Commissioner's observations on the situation in Melilla and Ceuta as concerns access to the territory and international protection ; Section III deals with some major human rights issues concerning returns from Melilla to Morocco, access to the asylum procedure in Melilla, and access to effective domestic remedies. It is followed by the Commissioner's conclusions.

I. Ensuring respect of the prohibition of collective expulsions: an important component of the Commissioner's work

6. On many occasions, the Commissioner has strongly condemned practices of summary returns of migrants (also referred to as push-backs) by law enforcement and border control officials of some Council of Europe member states.
7. The Commissioner recalls that collective expulsions of migrants are unequivocally prohibited under Article 4 of Protocol 4 to the European Convention on Human Rights. Summary returns make it impossible for the authorities to assess the protection needs of migrants and for migrants to enjoy their human rights and fundamental freedoms, in particular the right to seek and enjoy asylum, and to be protected against torture, other forms of ill treatment and violations of their right to life. In practice, summary returns also often deprive migrants of the right to an effective remedy to challenge the legality of their expulsion or allegations of ill-treatment.

¹ [Resolution \(99\)50](#) on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

8. In the course of several country visits, the Commissioner had to reiterate that collective expulsions constitute serious human rights violations. The Commissioner visited Italy in 2012, after the landmark *Hirsi Jamaa v. Italy* judgment of the Court concerning the collective expulsion to Libya of migrants intercepted at sea. He welcomed the declarations by the Italian authorities that push-backs would no longer be pursued and called on the Italian authorities to ensure that all migrants, including those intercepted at sea, have full access to the asylum procedure and that adequate procedural safeguards are respected whenever a removal decision is taken. To that effect, he also recommended that border control agents receive systematic training and be aware of the necessity of identifying asylum seekers and referring them to asylum authorities, before applying any removal measure.²
9. In 2013, the Commissioner undertook a thematic visit to Turkey, Bulgaria and Germany, to raise awareness about the situation of Syrian refugees fleeing the conflict in their country and about the need for member states to respond more generously and effectively to the growing needs for international protection. Referring to reported cases of Syrians being “pushed back” from the borders of certain European countries they were trying to reach, he reiterated his call on member states to immediately cease any expulsions of Syrians at their borders and other practices contrary to the principle of *non-refoulement*.³
10. In a letter addressed in January 2014 to the Greek authorities, the Commissioner expressed serious concerns at large numbers of reported collective expulsions of migrants at sea by members of the coast guard and of the border police. He called on the Greek authorities to carry out effective investigations into all recorded incidents and take all necessary measures in order to end such practices and prevent their recurrence.⁴
11. In January 2015, following proposed amendments to Spain’s Aliens Act aimed at facilitating push-backs of migrants arriving in the Spanish cities of Ceuta and Melilla, the Commissioner carried out a visit to Melilla and Madrid. As further detailed below, the Commissioner urged the Spanish authorities to reconsider these amendments and ensure that any future legislation fully abides by Spain’s international obligations, which include ensuring full access to an effective asylum procedure, providing protection against *refoulement* and refraining from collective expulsions. Having received consistent information on push-backs, in some cases accompanied by excessive use of force, carried out by the Spanish border police (*Guardia Civil*), the Commissioner indicated that push-backs must stop and should be replaced by a practice which reconciles border control and human rights.⁵
12. During his visit to Bulgaria in February 2015, the Commissioner also received consistent reports of push-backs of migrants, in some cases accompanied by excessive use of force, carried out by the Bulgarian law enforcement authorities at the Bulgarian-Turkish border. He urged the Bulgarian authorities to ensure strict compliance with the prohibition of *refoulement* and collective expulsions and to fully respect in practice the right of every person to seek and enjoy asylum, irrespective of the way they reach Bulgarian territory. The Commissioner also insisted on the need for full and effective investigations into these allegations and for a procedural framework to ensure that Bulgarian police at the border with Turkey have clear

² [Report](#) following the visit of the Commissioner for Human Rights to Italy from 3 to 6 June 2012, doc CommDH(2012)26 of 18 September 2012 (see in particular §§ 135-139).

³ Human Rights Comment : [Syrian refugees](#), a neglected human rights crisis in Europe, 20.12.2013.

⁴ [Letter](#) from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to Mr Nikolaos Dendias, Minister of Public Order and Citizen Protection and Mr Miltiadis Varvitsiotis, Minister of Shipping and the Aegean, on collective expulsions, 14 January 2014.

⁵ Spain: Legislation and practice on immigration and asylum must adhere to human rights standards, [press release](#) issued at the end of the Commissioner’s visit to Spain (Melilla and Madrid) from 13-16 January 2015.

instructions on how to handle migration flows in compliance with international human rights and refugee protection standards.⁶

13. In the current context of growing numbers of refugees attempting to reach Europe to flee wars and persecution, the Commissioner has repeatedly reminded the authorities of the member states of the Council of Europe of their obligation to manage migration flows in a manner which fully abides by international human rights and refugee protection standards.

II. Background information and the Commissioner's observations on the situation in Melilla and Ceuta as concerns access to Spanish territory and international protection

14. Figures on asylum applications in Spain as a whole indicate that in 2014, 5 952 such applications were filed in Spain, about 28% of which concerned Syrians. The second country of origin of asylum-seekers was Ukraine, followed by Mali. The rate of recognition of international protection was 40.48%.⁷ Although these figures indicate an increase of more than 30% compared with asylum applications filed in Spain in 2013, they represent around 1% of the total number of asylum claims made in the European Union in 2014.
15. The increase in the number of Syrian asylum-seekers reaching Spain through the border between Morocco and Spain was, at the end of 2014, particularly significant. In Melilla, 543 asylum claims were made in 2014, a sharp increase from 2013, when 41 claims were filed. 515 of these claims were made by Syrian nationals (among which 404 claims at the Beni Enzar border check-point, mostly after September 2014 as further explained below). As for 2015, the Commissioner understands that until the time of writing this submission, 4 700 asylum claims have been made in Melilla, almost exclusively by Syrian nationals. He notes that UNHCR has underlined that since 2013, a growing number of the migrants arriving in Melilla were likely to have protection needs as they came from war-torn countries.⁸
16. During his January 2015 visit to Melilla, the Commissioner was also informed that in 2014, out of a total of 5 500 asylum-seekers and irregular immigrants who entered Melilla, about 2 000 (40%) did so by climbing the fence.
17. The territories of the autonomous cities of Ceuta and Melilla, which are located on the African continent, are part of the Schengen area. However, exemptions from Schengen regulations apply to these territories. Access to the cities does not grant automatic access to the Spanish mainland. The authorities justify this exemption to the right to free movement with the need to protect the Schengen area from an uncontrolled influx of migrants which could transit through Ceuta and Melilla because of the particular geographical location of the two cities.
18. While the processing of claims for international protection in Spain may last between three and six months according to Law 12/2009 regulating the right to asylum and subsidiary protection,⁹ asylum claims filed in Ceuta and Melilla used to take substantially longer and migrants having made a claim in one of the two cities could not be transferred to the mainland before a decision on their asylum claim had been rendered. At the end of 2014, following the welcomed opening of an asylum office at Melilla's main border check point of Beni Enzar, this

⁶ [Report](#) following the visit of the Commissioner for Human Rights to Bulgaria from 9 to 11 February 2015, doc CommDH(2015)12, 22 June 2015.

⁷ Source : Ministry of the Interior of Spain, [Asilo en cifras](#), 2014.

⁸ UNHCR concerned over attempts to legalize automatic returns from Spanish enclaves, Briefing Notes, 28 October 2014.

⁹ Except for claims made at the border or in aliens detention centres where an accelerated procedure is in place.

situation changed significantly, but only with regard to persons claiming asylum at these facilities, ie. mostly Syrian nationals, who are now swiftly transferred to the mainland before a decision on their asylum claim has been made. Those who did not enter Melilla through the border check-point can file an asylum claim at the Temporary Residence Centre for Migrants (CETI) where all migrants and asylum-seekers are accommodated.

19. While in Melilla, the Commissioner visited the 11-kilometre-long and six-metre-high triple-fence surrounding Melilla. The fence is covered with anti-climbing mesh, and equipped with CCTV and movement sensors. The Commissioner also visited the international border check-point with Morocco of Beni Enzar, where the Spanish authorities operate an office to register asylum claims since November 2014, as mentioned above. The Commissioner also visited the CETI. He met with representatives of the *Guardia Civil*, which is in charge of border control, the national police, which is tasked with registering asylum claims, and the local authorities. He also met with representatives of UNHCR, which has a field presence in Melilla since July 2014, and civil society organisations and had discussions with a number of asylum-seekers and migrants.
20. Among the most important human rights concerns that were highlighted during the visit are the following: repeated instances of collective expulsions of migrants having climbed the fence; the impossibility for those migrants to be identified and have their needs adequately assessed and the impossibility to claim asylum due to summary expulsions; the apparent lack of access to the official border check-point for certain categories of migrants, mostly Sub-Saharan Africans; allegations of disproportionate use of force and ill-treatment of migrants by the *Guardia Civil*; lack of remedies against expulsions and allegations of ill-treatment during expulsions; inadequate living conditions in the CETI in Melilla; long delays in the determination of asylum claims in Melilla for some asylum-seekers; and lack of transparency regarding the policy of transfers to the mainland. Most of these concerns were reflected in the press release issued by the Commissioner at the end of the visit.¹⁰

Relevant legal framework regulating access to Ceuta and Melilla

21. Organic Law 4/2000 on rights and freedoms of foreigners in Spain and their integration (“the Aliens’ Act”) includes both a possibility to deny entry at the border and to reject foreigners attempting to enter the country in an irregular manner, including persons intercepted at and near the border (“devolution procedure”). In accordance with the law, the relevant procedures require proper identification and registration of the persons intercepted, respect for procedural guarantees, including access to a lawyer and interpreter, and access to legal remedies.
22. Spain also signed a readmission agreement with Morocco in 1992, in force since 2012, which foresees a full readmission procedure with proper identification of the persons concerned and their circumstances. However, only a very limited number of readmissions have taken place since 2012.
23. In October 2014, the Spanish government announced that it would propose amendments to the Aliens’ Act in order to provide better legal protection to actions of law enforcement officials in charge of controlling the border in the two cities (the *Guardia Civil*). In December 2014, the Commissioner urged the Spanish authorities to ensure that any future legislation fully abides by Spain’s international obligations, which include ensuring full access to an effective asylum procedure, providing protection against refoulement and refraining from collective expulsions. Moreover, he stressed that such a legislative step would inevitably erode fundamental human rights protections and could constitute a dangerous

¹⁰ See footnote 5 above.

encouragement for other European countries faced with an increasing arrival of migrants and asylum-seekers.¹¹

24. In March 2015, following the adoption by the Spanish Parliament of an amendment to the Aliens' Act establishing a special regime for Ceuta and Melilla,¹² the Commissioner expressed concerns that this amendment fell short of providing clear guarantees against *refoulement* and collective expulsions, and of establishing adequate safeguards for the right of every person to seek and enjoy asylum, irrespective of the way they reach Spanish territory. He called on the Spanish authorities to reconsider the amendment. In the meantime, he urged the authorities to apply it in strict compliance with existing domestic legal provisions which, as mentioned above, provide unambiguous safeguards against push-backs, and to adopt a procedural framework to ensure that Spanish border police in Ceuta and Melilla have clear instructions on how to handle migration flows in compliance with international human rights and refugee protection standards.

III. Major issues concerning the respect by Spain of the prohibition of collective expulsions and of the principle of non-*refoulement* in Melilla and access to effective domestic remedies

Practices regarding returns of migrants and their protection against collective expulsions and *refoulement*

25. During his visit to Melilla, the Commissioner received consistent information about regular summary returns of migrants to Morocco. Such operations have reportedly taken place in Melilla in the course of group attempts by migrants to climb the fence, with episodes in June, August and October 2014 having gained particular exposure due to widely disseminated video footage made by NGOs. In February 2014, the Minister of Interior admitted that isolated cases of handovers of irregular migrants had taken place.¹³
26. The Commissioner was informed by refugee lawyers and civil society organisations that the persons concerned had no effective possibility of claiming asylum as they were immediately returned to Morocco through the fence and handed over to Moroccan law enforcement officials.
27. The authorities have argued that persons intercepted on or near the fence cannot be considered as having entered Spain's territory and are therefore not covered by the provisions of the Aliens' Act. They maintain that migrants have to have gone past the fence and the *Guardia Civil* units posted in the vicinity of the fence (or on beaches in the case of interceptions at sea) to be considered as having entered Spain. In this connection, the Commissioner notes the statement of Spain's Ombudsperson that the fence, including the space between the three layers of the fence, is located on Spanish territory.¹⁴
28. The Commissioner was also provided with extensive accounts that summary expulsions have at times been accompanied by excessive use of force and serious ill-treatment of migrants, carried out by the Spanish *Guardia Civil* and even, allegedly, by Moroccan law

¹¹ Commissioner for Human Rights, [Spain cannot legalise what is illegal](#), Huffington Post Spain, 10 December 2014.

¹² Tenth additional provision to Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreigners in Spain and their social integration. Special regime for Ceuta and Melilla.

¹³ El País in English, [Interior Minister admits to "isolated" cases of illegal migrant handovers](#), 5 February 2014.

¹⁴ See *inter alia* Spain's Ombudsperson, "[La Defensora concluye en el Senado el trámite parlamentario del informe anual](#)", 9 April 2014.

enforcement officials who were on several occasions let into Spanish territory during push-back operations.¹⁵ He has in particular been informed about the case of a migrant who, in October 2014, was summarily returned to Morocco following a fall from the fence and ill-treatment by members of the *Guardia Civil*, without having been provided with medical assistance. Video footage of the incident was brought to the attention of the Commissioner. Highlighting that border control and human rights are not irreconcilable, the Commissioner urged the authorities to fully and effectively investigate and sanction any allegation of excessive use of force by law enforcement officials.

Practices regarding identification measures and access to the asylum procedure

29. As the Commissioner could see during his visit to the asylum office at Beni Enzar, asylum-seekers who apply at this facility are identified by the national police, which proceeds to the registration of asylum claims. While welcoming this development which made it possible for a growing number of Syrians to have safe access to international protection in Spain, the Commissioner underlined the need for additional human and material support to be provided to the asylum office, including adequate numbers of trained police officers, lawyers and interpreters.
30. However, the Commissioner is concerned that in practice only asylum-seekers from Syria can access the asylum office through the Moroccan border. He was informed that other migrants, notably those of Sub-Saharan origin, are unable to access the border check-point on the Moroccan side and are therefore left with the option of climbing over the fence (or finding other irregular ways of crossing the border check-point or entering Melilla by sea).
31. According to all information provided to the Commissioner, no identification procedures are implemented regarding migrants who are apprehended while climbing the fence. They are not identified, have no access to interpreters and lawyers and are not able to file an asylum claim. They have no access to the asylum office at the border check-point, even though the above-mentioned amendment to the Aliens' Act of March 2015 establishes that "applications for international protection will be formalised in the premises established to this end in the border check-points". To the knowledge of the Commissioner, no person intercepted on or near the fence has until now been transferred to the asylum offices in order to be able to make an asylum claim.
32. The Commissioner has underlined that migrants climbing the fence may also have valid protection claims and that they should not be obliged to take serious risks, including climbing over the six metre high triple fence, to be able to have access to the asylum procedure. He does not share the view expressed by the authorities that the very low number of asylum claims made by Sub-Saharan Africans means that they have no valid protection needs. The Commissioner called on the Spanish authorities to strengthen the asylum system in Melilla to allow all persons in need of protection, irrespective of where they come from, to access the territory safely and to submit asylum claims.
33. The Commissioner, like Spain's Ombudsperson and UNHCR, has insisted on the urgent need for the *Guardia Civil* to be provided with clear and mandatory instructions on how to act in compliance with international and domestic standards when intercepting migrants at the borders of Ceuta and Melilla.¹⁶ Instructions should explicitly prohibit summary and collective expulsions and *refoulement*. They should highlight procedural guarantees that have to be

¹⁵ Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Report](#) on the visit to Spain carried out from 14 to 18 July 2014, doc CPT/Inf(2015)19.

¹⁶ See Spain's Ombudsperson, [Recomendaciones](#) sobre la Ley de Seguridad Ciudadana, 30 June 2015 and UNHCR, [Enmienda a la Ley de Extranjería vincula gestión fronteriza y respeto de obligaciones internacionales](#), 17 March 2015.

respected, including the right to be identified, to have one's international protection needs assessed, and to have access to an interpreter, a lawyer and medical assistance as appropriate. To the knowledge of the Commissioner, no such operational protocol has yet been adopted for the *Guardia Civil* in Melilla.

Access to effective domestic remedies

34. The Commissioner notes that Art 13 requires access to an effective remedy in respect of violations of the Convention of which migrants could allege to be victims. The notion of an effective remedy under Article 13 implies a scope of review by a domestic court able to address the key elements of whether there has been a violation of the Convention and to grant appropriate relief.
35. However, according to all information available to the Commissioner, the practice of immediate expulsions to Morocco deprives migrants of any possibility to challenge the legality of the expulsion decision, or to complain about ill-treatment possibly inflicted during the expulsion, before a competent authority. No written, individualised and reasoned decision is provided to the persons subject to expulsion through the fence. Furthermore, there are credible reports according to which those returned to Morocco are often transferred to other regions of the country by the Moroccan authorities, to prevent repeated attempts to enter Spain. The Commissioner understands that non-governmental organisations intending to follow up on the situation of migrants summarily returned to Morocco have often lost track of them, a circumstance which reduces the possibilities of bringing complaints of human rights violations before the Spanish courts.

Conclusions

36. In conclusion, the Commissioner considers that:
 - all the information available points to the existence of an established practice whereby migrants who attempt to enter Melilla in groups by climbing the fence surrounding the city are summarily returned by Spain's border guards to Morocco. Such returns, which affect Sub-Saharan Africans in particular, take place outside of any formal procedure and without identification of the persons concerned or assessment of their individual situation. This practice, to which the legal amendments adopted in Spain in March 2015 aim at providing legal underpinning, prevents the persons concerned from effectively exercising their right to seek international protection.
 - migrants who have thus been summarily removed from Melilla have no access to an effective remedy which would enable them to challenge their removal or to seek redress for any ill-treatment they may have been subjected to during such operations.
37. While fully supporting the efforts recently carried out by the Spanish authorities to improve the asylum system, particularly in Ceuta and Melilla, the Commissioner has urged them to engage in the necessary legislative and administrative changes, in full compliance with international and European human rights standards, in order to safeguard the right of all migrants to seek and receive asylum in Spain and to be protected from collective expulsions.