EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Spain did not breach the Convention in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave

In today's **Grand Chamber** judgment[1] in the case of **N.D. and N.T. v. Spain** (applications nos. 8675/15 and 8697/15) the European Court of Human Rights held:

unanimously, that there had been **no violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion)** to the European Convention on Human Rights, and

unanimously, that there had been **no violation of Article 13 (right to an effective remedy) of the Convention taken in conjunction with Article 4 of Protocol No. 4.**

The case concerned the immediate return to Morocco of two nationals of Mali and Côte d'Ivoire who on 13 August 2014 attempted to enter Spanish territory in an unauthorised manner by climbing the fences surrounding the Spanish enclave of Melilla on the North African coast.

The Court considered that the applicants had in fact placed themselves in an unlawful situation when they had deliberately attempted to enter Spain on 13 August 2014 by crossing the Melilla border protection structures as part of a large group and at an unauthorised location, taking advantage of the group's large numbers and using force. They had thus chosen not to use the legal procedures which existed in order to enter Spanish territory lawfully. Consequently, the Court considered that the lack of individual removal decisions could be attributed to the fact that the applicants – assuming that they had wished to assert rights under the Convention – had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct.

In so far as it had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct, the Court could not hold the respondent State responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal.

Principal facts

The applicants, N.D. and N.T., are nationals of Mali and Côte d'Ivoire who were born in 1986 and 1985 respectively. The first applicant stated that he had left Mali on account of the armed conflict there in 2012. After travelling through Mauritania and Algeria he arrived in Morocco in March 2013 and apparently stayed in the migrants' camp on Mount Gurugu, close to the border with Melilla. The second applicant arrived in Morocco at the end of 2012 and also stayed in the migrants' camp.

The autonomous city of Melilla is a Spanish enclave of 12 sq. km on the North African coast which is surrounded by Moroccan territory. The Spanish authorities have built a barrier along the 13 km border which since 2014 has comprised three parallel fences. Four border crossing points are located along the triple fence. Between these points *Guardia Civil* officials patrol the land border and the coast in order to prevent illegal entry. Groups of foreign nationals from, among other places, sub-Saharan Africa make frequent attempts to breach the fences.

In the early morning of 13 August 2014 an initial attempt at entry took place. According to the Government, the Moroccan police prevented around 500 migrants from scaling the outer fence, but

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

around a hundred migrants nevertheless succeeded. Some 75 migrants managed to reach the top of the inner fence but only a few came down the other side and landed on Spanish soil, where they were met by members of the *Guardia Civil*. The others remained sitting on top of the inner fence. *Guardia Civil* officials helped them to climb down, before escorting them back to Moroccan territory on the other side of the border through the gates between the fences.

N.D. and N.T. reportedly managed to reach the top of the inner fence and remained there for several hours. At around 3 p.m. and 2 p.m. respectively they climbed down from the fence with the help of Spanish law-enforcement officials who provided them with ladders. As soon as they reached the ground they were apprehended by *Guardia Civil* officials who reportedly handcuffed them, took them back to Morocco and handed them over to the Moroccan authorities. The applicants allegedly did not undergo any identification procedure and had no opportunity to explain their personal circumstances to the officials or to be assisted by lawyers or interpreters. They were reportedly transferred to Nador police station, a few kilometres south of Melilla. There they allegedly requested, and were refused, medical assistance before being taken to Fez, some 300 km away, and being left to fend for themselves.

Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 4 (prohibition of collective expulsion) to the European Convention on Human Rights, the applicants maintained that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance. They complained of a systematic policy of removing migrants without prior identification, which, in their view, had been devoid of legal basis at the relevant time. Relying on Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4, they complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco.

The applications were lodged with the European Court of Human Rights on 12 February 2015. In its Chamber judgment of 3 October 2017 the Court held, unanimously, that there had been a violation of Article 4 of Protocol No. 4 and a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4.

On 14 December 2017 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention, and on 29 January 2018 the panel of the Grand Chamber accepted that request. A hearing was held on 26 September 2018.

The Belgian, French and Italian Governments, which had been given leave to intervene in the written procedure, submitted third-party observations. Observations were also received from the Commissioner for Human Rights of the Council of Europe, the Office of the United Nations High Commissioner for Refugees (UNHCR), the Spanish Commission for Assistance to Refugees and, acting collectively, the Centre for Advice on Individual Rights in Europe, Amnesty International, the European Council on Refugees and Exiles and the International Commission of Jurists, joined by the Dutch Council for Refugees. The written observations submitted by the United Nations High Commissioner for Human Rights in the Chamber proceedings were also included in the file. Ms Dunja Mijatović, Commissioner for Human Rights of the Council of Europe since 1 April 2018, spoke at the hearing, in accordance with Article 36 § 3 of the Convention. UNHCR also took part in the hearing.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Linos-Alexandre **Sicilianos** (Greece), *President*,
Angelika **Nußberger** (Germany),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
Ganna **Yudkivska** (Ukraine),

André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Faris **Vehabović** (Bosnia and Herzegovina),
Mārtiņš **Mits** (Latvia),
Armen **Harutyunyan** (Armenia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pauliine **Koskelo** (Finland),
Marko **Bošnjak** (Slovenia),
Tim **Eicke** (the United Kingdom),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
María **Elósegui** (Spain),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 4 of Protocol No. 4

The Court noted that the applicants had been members of a group comprising numerous individuals who had attempted to enter Spanish territory by crossing a land border in an unauthorised manner, taking advantage of their large numbers and in the context of an operation that had been planned in advance. The applicants' complaints under Article 3 had been declared inadmissible by the Chamber. The applicants had not been identified and no written procedure had been undertaken to examine their individual circumstances. Their return to Morocco had therefore been a *de facto* individual but immediate handover, carried out by Spanish border guards.

With regard to Contracting States like Spain whose borders coincided with external borders of the Schengen area, the effectiveness of Convention rights required that those States make available genuine and effective access to means of legal entry, in particular border procedures for those who arrived at the border. Those means should allow all persons who faced persecution to submit an application for protection, based in particular on Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment), under conditions which ensured that the application was processed in a manner consistent with the international norms, including those of the Court. Where arrangements existed securing the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention did not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, States could refuse entry to their territory to aliens, including potential asylum-seekers, who had failed without cogent reasons to comply with those requirements and had sought to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force.

The Court noted that Spanish law had afforded the applicants several possible means of seeking admission to the national territory. They could have applied for a visa or for international protection, in particular at the border crossing point, but also at Spain's diplomatic and consular representations in their respective countries of origin or transit or else in Morocco.

On 1 September 2014 the Spanish authorities had set up an office for registering asylum claims, open around the clock, at the Beni Enzar international border crossing point. Even prior to that date a legal avenue to that effect had been established under section 21 of Law 12/2009. The Government stated that twenty-one asylum applications had been lodged between 1 January and 31 August 2014 in Melilla, including six applications lodged at the Beni Enzar border crossing point, with the asylum-seekers then being escorted to the Melilla police station in order to make a formal

application. The individuals in question had come from Algeria, Burkina Faso, Cameroon, Congo, Côte d'Ivoire and Somalia.

The Court therefore saw no reason to doubt that even prior to the setting-up of the special international protection office at Beni Enzar on 1 September 2014 there had been a legal obligation to accept asylum applications at that border crossing point, and also an actual possibility to submit such applications. The mere fact – not disputed by the Government – that only very few asylum requests had been submitted at Beni Enzar prior to 1 September 2014 did not allow the conclusion that the respondent State had not provided genuine and effective access to that border crossing point.

In the written procedure before the Grand Chamber the applicants did not allege that they had ever tried to enter Spanish territory by legal means. Only at the Grand Chamber hearing did they state that they had attempted to approach Beni Enzar but had been "chased by Moroccan officers". Quite apart from the doubts surrounding this allegation owing to the fact that it had been made at a very late stage of the procedure, the Court noted that at no point had the applicants claimed that the obstacles encountered were the responsibility of the Spanish authorities.

Hence, the Court was not persuaded that, at the material time, the applicants had had the required cogent reasons for not using the Beni Enzar border crossing point with a view to submitting reasons against their expulsion in a proper and lawful manner.

Article 4 of Protocol No. 4 did not entail a general duty for a Contracting State to bring persons who were under the jurisdiction of another State within its own jurisdiction. Even assuming that difficulties had existed in physically approaching the Beni Enzar border crossing point on the Moroccan side, no responsibility of the respondent Government for this situation had been established. That finding sufficed for the Court to conclude that there had been no violation of Article 4 of Protocol No. 4 in the present case.

Examining the possibilities referred to by the Spanish Government for accessing Spanish embassies and consulates where an application for international protection could be submitted, the Court observed that the Spanish consulate in Nador was only 13.5 km from Beni Enzar and hence from the location of the storming of the fences on 13 August 2014. The applicants, who stated that they had stayed in the Gurugu camp for two years (in N.D.'s case) and for one year and nine months (in N.T.'s case), could easily have travelled there had they wished to apply for international protection. They did not give any explanation to the Court as to why they had not done so, nor did they allege that they had been prevented from making use of that possibility. Lastly, the applicants did not dispute the genuine and effective possibility of applying for a visa at other Spanish embassies, either in their countries of origin or in one of the countries they had travelled through since 2012. In N.D.'s case, a special treaty between Spain and Mali had even afforded a possibility of obtaining a special working visa.

The Court considered that the applicants had in fact placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They had not made use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders. Consequently, the Court considered that the lack of individual removal decisions could be attributed to the fact that the applicants had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct.

Accordingly, there had been no violation of Article 4 of Protocol No. 4.

Article 13 taken in conjunction with Article 4 of Protocol No. 4

The Court noted that Spanish law had provided a possibility of appeal against removal orders at the border, but that the applicants themselves had also been required to abide by the rules for submitting such an appeal against their removal.

In so far as the Court had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct in placing themselves in an unlawful situation by crossing the Melilla border protection structures on 13 August 2014 as part of a large group and at an unauthorised location, it could not hold the respondent State responsible for the absence of a legal remedy in Melilla enabling them to challenge that removal.

In so far as the applicants' complaint regarding the risks they were liable to face in the destination country, Morocco, had been dismissed at the outset of the procedure when the Article 3 complaint had been declared inadmissible, the lack of such a remedy did not in itself constitute a violation of Article 13.

Accordingly, there had been no violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

Separate opinions

Judge Pejchal expressed a concurring opinion. Judge Koskelo expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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