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

Information Note on the Court's case-law 237

February 2020

N.D. and N.T. v. Spain [GC] - 8675/15 and 8697/15

Judgment 13.2.2020 [GC]

Article 4 of Protocol No. 4

Prohibition of collective expulsion of aliens

Immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross it in an unauthorised manner and *en masse*: *no violation*

Facts – In August 2014 a group of several hundred migrants from sub-Saharan Africa, including the applicants, attempted to enter Spain by scaling the fences surrounding the city of Melilla, a Spanish enclave on the North African coast. As soon as they had crossed the fences they were apprehended by members of the *Guardia Civil*, who allegedly handcuffed them and took them back to the other side of the border. The applicants reportedly did not undergo any identification procedure and had no opportunity to explain their personal circumstances. They subsequently managed to enter Spain without authorisation and orders were issued for their expulsion. Their administrative appeals were dismissed, as was the asylum application lodged by one of them.

In a judgment of 3 October 2017 (see Information Note 211) a Chamber of the Court held unanimously that there had been a violation of Article 4 of Protocol No. 4 on account of the lack of individualised examination of the situation of each of the applicants, and a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

On 29 January 2018 the case was referred to the Grand Chamber at the Government's request.

Law – Article 4 of Protocol No. 4

(a) *Applicability* – The Court was called upon for the first time to address the issue of the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*. As the Government maintained that the applicants' case concerned a refusal of admission to Spanish territory rather than an expulsion, the Court had to ascertain whether the concept of "expulsion" also covered the non-admission of aliens at the border of a Contracting State or – in respect of States belonging to the Schengen area – at an external border of that area, as the case might be.

The Court had not previously ruled on the distinction between the non-admission and expulsion of aliens, and in particular of migrants or asylum-seekers, who were within the jurisdiction of a State that was forcibly removing them from its territory. For persons in danger of ill-treatment in the country of destination, the risk was the same in both cases, namely that of being victims of such treatment. Examination of the international and

European Union law materials supported the Court's view that the protection of the Convention, which was to be interpreted autonomously, could not be dependent on formal considerations. The opposite approach would entail serious risks of arbitrariness, in so far as persons entitled to protection under the Convention could be deprived of such protection, for instance on the grounds that, not having crossed the State's border lawfully, they could not make a valid claim for protection under the Convention. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions could not go so far as to render ineffective the protection afforded by the Convention, and in particular by Article 3, which embraced the prohibition of *refoulement* within the meaning of the Geneva Convention relating to the Status of Refugees.

These reasons had led the Court to interpret the term "expulsion" in the generic meaning in current use ("to drive away from a place"), as referring to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she had spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border. As a result, Article 3 of the Convention and Article 4 of Protocol No. 4 had been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under those provisions. In the Court's view these considerations, which formed the basis for its recent judgments in *Hirsi Jamaa and Others*, *Sharifi and Others* and *Khlaifia and Others*, concerning applicants who had attempted to enter a State's territory by sea, had lost none of their relevance. There was therefore no reason to adopt a different interpretation of the term "expulsion" with regard to forcible removals from a State's territory in the context of an attempt to cross a national border by land.

In the instant case the applicants had been removed from Spanish territory and forcibly returned to Morocco, against their will and in handcuffs, by members of the *Guardia Civil*. There had therefore been an "expulsion" within the meaning of Article 4 of Protocol No. 4.

(b) *Merits* – While Article 4 of Protocol No. 4 required the State authorities to ensure that each of the aliens concerned had a genuine and effective possibility of submitting arguments against his or her expulsion, the applicant's own conduct was a relevant factor in assessing the protection to be afforded under that provision. According to the Court's well-established case-law, there was no violation of Article 4 of Protocol No. 4 if the lack of an individual removal decision was the consequence of the applicant's own conduct. In particular, a lack of active cooperation with the procedure for conducting an individual examination of the applicants' circumstances had prompted the Court to find that the Government could not be held responsible for the fact that no such examination was carried out. In the Court's view, the same principle must also apply to situations in which the conduct of persons who crossed a land border in an unauthorised manner, deliberately took advantage of their large numbers and used force, was such as to create a clearly disruptive situation which was difficult to control and endangered public safety.

In this context, however, the Court would attach considerable importance to whether, in the circumstances of the particular case, the respondent State had provided genuine and effective access to means of legal entry, in particular border procedures. Where the respondent State had provided such access but an applicant had not made use of it, the Court had to consider, in the context of the case at hand and without prejudice to the application of Articles 2 and 3 of the Convention, whether there had been cogent reasons preventing the person concerned from doing so, based on objective facts for which the respondent State was responsible.

The means of legal entry had to allow all persons who faced persecution to submit an application for protection, based in particular on Article 3, under conditions which ensured that the application was processed in a manner consistent with the international norms. In the context of the present case, the implementation of the Schengen Borders Code presupposed the existence of a sufficient number of border crossing points. In the absence of appropriate arrangements, States might refuse entry to their territory; this was liable to render ineffective all the Convention provisions designed to protect individuals who faced a genuine risk of persecution.

However, where such arrangements existed and secured 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, they could refuse entry to their territory to aliens, including potential asylum-seekers, who had failed, without cogent reasons, to comply with those requirements by seeking to cross the border at a different location, especially, as had happened in this case, by taking advantage of their large numbers and using force in the context of an operation that had been planned in advance.

Spanish law had afforded the applicants several possible means of seeking admission to the national territory. It was established that on 1 September 2014, shortly after the events in the present case, the Spanish authorities had set up an office for registering asylum claims at the Beni Enzar international border crossing point. Furthermore, even prior to the setting-up of that office, there had not only been a legal obligation to accept asylum applications at that border crossing point but also an actual possibility to submit such applications.

The applicants had failed to make use of that possibility with a view to submitting reasons against their expulsion in a proper and lawful manner. Only the absence of cogent reasons based on objective facts for which the respondent State was responsible and preventing the use of that legal avenue could lead to this being regarded as the consequence of the applicants' own conduct, justifying the fact that the Spanish border guards did not identify them individually. The Court was not persuaded that the applicants had had cogent reasons for not using the Beni Enzar border crossing point. In the present case, even assuming that difficulties had existed in physically approaching the crossing point on the Moroccan side, no responsibility of the respondent Government for that situation had been established. This finding was sufficient for the Court to conclude that there had been no violation of Article 4 of Protocol No. 4 in the present case.

The Court noted the Government's argument to the effect that, in addition to being afforded genuine and effective access to Spanish territory at the Beni Enzar border crossing point, the applicants could have applied either for a visa or for international protection at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco. Specifically, if the applicants had wished to seek such protection they could easily have travelled to the Spanish consulate in Nador, which was close to the place where the storming of the border fences had taken place. They had not offered any explanation to the Court as to why they had not done so. In particular, they did not even allege that they had been prevented from making use of those possibilities. In any event, the applicants' representatives had been unable to indicate the slightest concrete factual or legal ground which, under international or national law, would have precluded the applicants' removal had they been registered individually. Moreover, the applicants' complaints under Article 3 had been declared inadmissible by the Chamber.

Consequently, in accordance with its settled case-law, the Court considered that the lack of individual removal decisions could be attributed to the fact that the applicants, if they

indeed wished to assert rights under the Convention, had not made use of the official entry procedures existing for that purpose, and had thus been a consequence of their own conduct.

However, the Court specified that this finding did not call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders – either their own borders or the external borders of the Schengen area, as the case might be – in a manner which complied with the Convention guarantees, and in particular with the obligation of *non-refoulement*.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been no violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4, on the grounds that the lack of an individualised removal procedure had been a consequence of the applicants' own conduct and that the applicants' complaint regarding the risks they were liable to face in the destination country had been dismissed at the outset of the procedure.

(See *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, Information Note 149; *Sharifi and Others v. Italy and Greece*, 16643/09, 21 October 2014, Information Note 178; *Khlaifia and Others v. Italy* [GC], 16483/12, 15 December 2016, Information Note 202; see also *M.A. v. Cyprus*, 41872/10, 23 July 2013, Information Note 165; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), 18670/03, 16 June 2005, Information Note 76; and *Dritsas and Others v. Italy* (dec.), 2344/02, 1 February 2011)
